

## Position Paper

# **ACER Recommendations on records of wholesale energy market transactions of 21 June 2012 (PC-2012\_R\_10)**

Berlin, 1. August 2012

Interest Representative Register ID: 20457441380-38

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## 1 Introduction

BDEW welcomes the opportunity to discuss ACER's opinion on implementing records of wholesale energy market transactions, including orders to trade and the disclosure of inside information according to Article 4(1) of Regulation (EU) No 1227/2011 (REMIT) through platforms. BDEW would like to highlight, that in Germany alone, there are over 800 registered balancing responsible parties, 700 balancing responsible network operators in gas and 800 balancing responsible network operators in electricity. These roughly 2000 market participants will have to register, their details will have to be checked, their registration to be confirmed and their reported data to be processed subsequently. In addition, there will be entities as identified by Articles 8(4) and 8(5) that will have to sign up. Many of these market participants, BDEW estimates around 300, are active outside the German market as well.

## 2 Main Points

The right balance must be found between the needs for an effective monitoring and the functioning of energy wholesale markets. The positive developments in liquidity must be maintained. BDEW is, therefore, very much in favour of ACER's approach to focus on a cost-efficient and pro-market rather than simple anti-abuse implementation of REMIT which ACER stressed during the workshop in Ljubljana on July 19, 2012. The level of detail of transaction reporting and consequential IT-costs should neither result in a reduction of market liquidity, detain new participants to enter the market, nor increase energy costs.

In particular, for standardised transactions on organised exchanges and platforms, the recording process should be automatic, via the RRM. The reporting requirements must not add significant additional processes and costs to market participants. This means that the information requirements should be tailored to the information already being collected.

Although BDEW welcomes the approach to further refine the definitions, several are still ambiguous or at least lead to confusion about the applicability of a number of requirements (e.g. obligation to report) to undertakings active in the market. In general, BDEW considers the definitions to be useful and reasonable. All definitions referring to the energy wholesale market, irrespective of any particular regulation, should preferably be used synonymously.

BDEW, however, is not convinced that based on those definitions a consistent cross-market understanding can be reached for an – in ACER's view – accurate reporting.

BDEW stresses that the information ACER will collect is mostly highly sensitive. Therefore a high level of confidentiality has to be guaranteed regarding IT-systems and staff dealing with such information (i.e. non-standardised contracts).

Due to the complex nature of the whole process an adequate timeline for the implementation of reporting measures should be laid down.

### 3 Consultation Issues

#### 3.1 Draft recommendation as regards Art. 8 (1)

##### 3.1.1 Definitions

**Recommendation 1:**

*The implementing acts should include crucial definitions for the data collection under REMIT in order to avoid ambiguity for the market participants subject to reporting obligations. Definitions which could be specified in the implementing acts include the notions of "transaction", "agreement", "contract", "standardised contract", "non-standardised contract", "trade", "tradable instrument", "order to trade", "bid and offer", "execution", "supply", "transportation", "market participant subject to reporting obligations", "derivative", "energy commodity", "spot market" and "organised market place". In addition, definitions common in the EU financial market legislation should be applied and notions newly introduced for the purposes of the implementing acts should be defined.*

**General comment:**

BDEW agrees that it is advisable to use the implementing acts to provide definitions for data collection in order to avoid ambiguity for the market participants, who have to report information since REMIT itself does not define crucial terms for the collection of data according to its Article 8. In addition, ACER suggests applying definitions which are common in the EU financial market legislation. BDEW agrees that an integrated approach is preferable to avoid substantial differences in the reporting regime through different definitions which would lead to double reporting by firms and also confusing results at the authorities monitoring the markets. However, BDEW would also like to point out that REMIT is a tailor-made integrity and transparency regime which is supposed to capture the specific nature of energy markets.

**Question 1**

*Do you agree with the proposed definitions? If not, please indicate alternative proposals.*

**Market participant**

ACER proposes the following definition:

***"Market participant subject to reporting obligations"***

*includes energy trading companies pursuant to Article 2 No 35 of Directive 2009/72/EC and Article 2 No 1 of Directive 2009/73/EC, including producers supplying their production to their in-house trading unit or energy trading company, wholesale customers pursuant to Article 2 No 8 of Directive 2009/72/EC and Article 2 No 29 of Directive 2009/73/EC, final customers pursuant to Article 2 No 9 of Directive 2009/72/EC and Article 2 No 27 of Directive 2009/73/EC as a single economic entity with a consumption at individual plants under the control of a single economic entity that have a consumption capacity greater than 600 GWh per year in so far as consumption takes place on markets with interrelated wholesale prices and does not exert a joint influence on wholesale energy market prices due to their being located in different relevant geographical markets, transmission system operators pursuant to Article 2 No 4 of Directive 2009/72/EC and Directive 2009/73/EC, storage system operators pursuant to Article 2 No 10 of Directive 2009/73/EC, LNG facility operators pursuant to Article 2 No 12 of Directive 2009/73/EC and investment firms pursuant to Article 4(1) No 1 of Directive 2004/39/EC;*

The definition of "market participant" is of utmost importance for the market, since it defines who is obliged to publish inside information, register and report under REMIT. According to REMIT 'market participant' means any natural or legal person, who enters into transactions, in one or more wholesale energy markets, Article 2 No 7. ACER's definition is a good starting point, but further clarification is necessary.

The definition of the term "market participant" should take into account the objective of REMIT to create sufficient transparency of inside information and fundamental data for an orderly functioning price mechanism and safeguard the integrity of wholesale energy markets. Therefore, all essential market participants of the wholesale energy markets are subject to certain REMIT obligations, including TSOs, SSOs, Gas Production and LNG facility operators.

Liquid natural gas (LNG) and storage contracts relating to the use of these facilities and capacities do not rank among wholesale energy products. Therefore, LNG facility operators and SSOs should only be considered as market participants, if they enter into transactions in wholesale energy markets.

For the purpose of defining the market participants it is helpful to refer to already existing definitions in the EU energy law, namely the 3<sup>rd</sup> energy package.

The reference to "producers supplying their production to their in-house trading unit" seems to be driven by the desire to capture those producers as market participants under the disclosure regime for inside information. However, BDEW would like to point out that such in-

house-transactions do not qualify as wholesale energy products and thus should not be part of the reporting requirements.

Industrial consumers become market participants, when they participate directly in the wholesale energy markets, even if they otherwise do not meet the definition of Art. 2 (4) and (5) REMIT. Examples are established energy procurement or trading undertakings of these industrial customers and/ or if these companies directly sell electricity produced in their industrial power plants. This should be clarified in the definition.

### **Wholesale energy product**

The reference to 'producers supplying their production to their in-house trading unit' could mean that generation businesses would have to report on internal transactions.

REMIT does not explicitly provide a ruling on whether intra-group transactions fall within the scope of application of REMIT. From a legal point of view, there are strong arguments showing that transactions between related undertakings are in principle no wholesale energy products traded in a wholesale energy market. They have no impact on the wholesale energy market and particularly on the prices in this market and can therefore not affect it.

Therefore, producers supplying their production to their in-house trading unit or energy trading company should not be regarded as market participants. In particular if the producer is not a legal entity, it could not be regarded as market participant for the lack of two separate legal entities involved according to the wording of Article 2 No 6 REMIT.

The purpose of REMIT is to provide transparency also in order to avoid insider trading and market manipulation. The same however needs to apply to companies with a different legal structure having a separate energy trading company. They cannot be considered as participants on the wholesale energy market.

Further, it does not seem to be necessary to include data of intra-company or intra-group transfers since these actions do not have any effect on the general energy market.

As per recital (19) the reporting obligations should be kept to a minimum and not create unnecessary costs to market participants. Including such supply to an in-house trading unit or a separate energy trading company into any reporting obligations with no possible effect on energy wholesale market does not seem to have any benefit in respect of the purpose of REMIT and significantly increases the burden to market participants by imposing a requirement to report the generated energy at least twice.

From a practical point of view, should EMIR force firms to report their gas and power OTC derivatives including the intra-group transactions, this would certainly lead to a double reporting requirement for firms under REMIT and EMIR. In this context it needs to be taken into account that the majority of intra-group transactions are not captured in the trading companies' electronic systems. Some "internal" deals have a fax or email process to confirm trade volumes. This means that the reporting of intra-group transactions would even be a bigger step to implement by firms.

According to REMIT, contracts for the supply and distribution of natural gas or electricity for the use of final customers are not defined as wholesale energy products (Article 2 (4)). This exception does not apply to contracts for the supply and distribution of natural gas or electricity to final customers with a consumption capacity of more than 600 GWh per year related to electricity or natural gas (Article 2 (5)).

With regard to distribution contracts, there seems to be no apparent reason for reporting regardless of the threshold, since such contracts follow regulated terms and conditions (especially regulated tariffs) that are subject to close monitoring and by the NRAs.

Proposed text	Comment	Suggested text
<b>transaction and agreement</b>	the definitions of 'transaction' and 'agreement' proposed do not seem to identify different subjects, therefore we propose to use them as synonymous or to delete the term 'transaction'; we propose with the following amendments	Agreement or Transaction means a set of rights and obligations that defines the obligations concerning the exchange of a wholesale energy product <u>between two entities</u> (e.g. Master Trading Agreement like GTMA, ISDA, EFET, or Exchange Participation Agreement governing transactions, or bilateral agreements)
<b>order to trade and bid and offer</b>	Both definitions are defined in such a way that it is difficult to make a distinction. In reality "bid and offer" are no indications, but rather the placing of a precise proposal to an introduced order, therefore the definition of "bid and offer" has to be adapted.	"Order to trade" means a <u>firm and written</u> indication expressed by a counterparty to buy or sell a tradable instrument (including auctions, continuous trading) <u>on an organised market place</u> ;
<b>contract or trade</b>	The proposed text is not really helpful.  The first three definitions do not combine well: "a transaction is an agreement", "an agreement is a set of rules...", "a contract is an agreement..."	"Contract <u>or Trade</u> " is an agreement on purchase or sale of a particular wholesale energy product <u>between at least two counterparties</u> , possibly including the specification of a delivery point, a mechanism to price the value of such wholesale energy product and a statement on

	In addition, it is also not helpful to try and list things that might or might not be in a contract: “possibly including ...”	the quantity to be supplied irrespective of the settlement type, <u>with the intention of a financial obligation being transferred from one counterparty to another</u>
<b>trade execution</b>	The definitions of contract, execution and trade seem partially overlapping, hence we suggest the following	acting to complete <u>the process of buying or selling</u> one or more wholesale energy product(s)
<b>standardised contract</b>	It should be made clear that the TSO auction platform is for the provision of balancing and reserve products.  With regard to the definition of non-standardised contracts (Section 2.1 together with detailed description in 2.3) further clarification is welcome on the time of execution of long term transactions on a bilateral basis (non-standardised contracts).	a contract admitted to trading at an organised market place and subject of a standard framework energy trading agreement, or with respect to provision of balancing and reserve services to TSOs.
<b>tradable instrument</b>	The definition of ‘tradable instrument’ should be amended since (i) the definition of contract is more appropriate because it is already defined; (ii) the term ‘venue’ is not otherwise defined. We suggest to replace it with the term defined ‘organised market place’; (iii) the duplication of ‘contract’ in the final part of the definition should be deleted.	an <del>instrument contract</del> <u>contract</u> for which an <u>organised market place venue</u> (including balancing market <del>venues</del> ) has specified a description of limited characteristics <del>of a contract</del> so as to make the basic terms of the contract easily identifiable.
<b>energy commodity or energy commodity contract</b>	This definition of ACER is unclear and not necessary. For the purpose of the technical standards all necessary terms are defined in ACER’s	We suggest deleting the definition.

	<p>recommendations (whole sale energy market transaction, derivatives, contracts, orders to trade).</p>	
<p><b>transportation</b></p>	<p>Since ACER considers in detail mostly obligations for transmission system operators without naming them explicitly, it should be clarified whether distribution contracts are to be reported or whether transportation means transmission of electricity only. In general distribution contracts are not wholesale energy products. Thus transportation should be defined as transmission.</p> <p>The definition proposed by ACER widens the scope of this term to include all infrastructure facilities including underground gas storage and LNG terminals. This does not bring more clarification but rather changes a universally accepted understanding of what constitutes the different kinds of gas infrastructure that exist today. Thus we do not see any benefits in changing this definition</p> <p>Transportation contracts should also be limited to trades between two market participants, not primary capacity acquired from TSOs as primary capacity contracts follow regulated terms and conditions (especially regulated tariffs) that are subject to close monitoring and by</p>	<p><del>the transmission and distribution</del> of electricity as defined in Article 2 No 4 <del>and No 5</del> of Directive 2009/72/EC and the transmission <del>and distribution</del> of natural gas as defined in Article 2 No 3 <del>and No 5</del> of Directive 2009/73/EC, including transportation through an upstream pipeline network as defined in Article 2 No 2 of Directive 2009/73/EC, <del>the transportation of LNG through other means and storage and LNG facility services in the Union;</del></p>

	the NRAs.	
<p><b>planned and unplanned unavailability</b></p>	<p>According to Art. 4(1) and 8(5) market participants are obliged to publish (and report) planned and unplanned unavailability of facilities. TSO have already similar obligations of publication according to the Regulations 715/2009 and 714/2009.</p> <p>Concerning the unplanned unavailability it is important to underline that not every technical problem has an effect on the market. A technical unavailability in the system of a TSO has not necessarily effect on its transport capacity. In this case the TSO would not be obliged to interrupt its customers. Therefore, we recommend clarifying that only those un-availabilities have to be reported which lead to an interruption of firm capacities at the relevant points.</p>	<p><b>Planned unavailability:</b></p> <p>For transmission system operators planned unavailability has the meaning as set out in No 1.9 of Annex 1 of regulation 715/2009.</p> <p><b>Unplanned unavailability</b></p> <p>For transmission system operators an unplanned unavailability shall, in accordance with No. 3.3 1g of Annex 1 of regulation 715/2009, mean, that the unavailability of a facility in the system of a TSO is causal for the interruption of firm capacity on a relevant point (as defined in No. 3.2 1 of Annex 1 of regulation 715/2009).</p>

### 3.1.2 Reporting of transactions in standardised contracts

#### **Recommendation 2:**

*The records of transactions should distinguish between standardised and non-standardised contracts. They should include parties of the contract, contract type and details on the transaction according to Annexes II.1 and II.2. The unique identification of each market participant should be achieved either through the use of the "ACER code" for registration, through the use of one of the codes already existing and used for trading (EIC, BIC, GS1/GLN) or through the new international code currently under discussions (LEI), provided that the market participant has communicated at the time of registration (at least) one of these codes. Reporting of transactions in standardised contracts should include orders to trade in tradable instruments, which could be reported through organised market places. Both reporting of transactions in standardised and non-standardised contracts should include lifecycle information on the post-trade stage of a transaction, including confirmations, amendments, cancellations and information on the physical or financial settlement of the transaction. Information on the physical settlement of the transaction ("scheduling/nomination") could be reported by TSOs or third parties delegated by TSOs.*

#### **General Comment**

In general, BDEW welcomes the intention of ACER to cooperate with ESMA and to take care of a synchronisation of standards and requirements. However, ESMA already suggests in its consultation of reporting processes, formats and specifies requirements with a great level of detail. Hence, BDEW urges both authorities to intensify cooperation and establish common views on more points.

Annex II.1 contains some records that are captured already automatically by firms as part of the automated trading process with brokers and exchanges e.g. the counterparties, volumes tenor, price broker, time of transaction etc. However, there are several records in Annex II.1 that are not captured in the trade capture system, e.g. beneficiary, orders.

A number of the proposed details are not yet recorded in any system. Modifying systems in order to capture such details would incur extra costs. In addition, they would be operationally hard to capture. Therefore, a detailed review of each of the indicated information fields (Items) is necessary regarding the necessity for the purpose of market monitoring under REMIT. This is of paramount importance to prevent a loss in market liquidity, increased transaction costs, increased generation and retail risk costs and ultimately the unduly increase of the costs to the consumer.

In this context the harmonisation of information fields across all reporting formats under the different regulatory regimes (EMIR, MiFID, REMIT, U.S. Dodd-Frank Act) is key to avoid double reporting. If this means that some additional fields for the REMIT reporting have to be accepted, this could be considered to avoid an even more burdensome double reporting.

It is crucial that all information reported to ACER is treated as confidential. It should be ensured that no unauthorised third party has access to that information, especially concerning non-standardised contracts that show essential and sensitive information regarding a company's commercial and hedging strategies.

**Question 2**

*What are your views regarding the details to be included in the records of transactions as foreseen in Annex II? Do you agree that a distinction should be made between standardised and non-standardised contracts? Do you agree with the proposal on the unique identifier for market participants?*

**Answer:**

Regarding the details to be included in the records of transactions as foreseen in Annex II the main problems are with reporting of 'beneficiaries' and reporting 'orders':

**a) Ad beneficiaries:**

A single trade can have more than one beneficiary, as a single position might be made up of, for example, retail, generation and renewable volumes. Often the beneficiary is not known until full analysis is completed of the whole complex trading position. For example, the asset management function of an integrated energy company may take a trading decision for a station even if the station has not asked for it.

Therefore, a clear definition of beneficiaries is necessary so that any transactions can be allocated properly.

**b) Ad orders:**

We acknowledge that REMIT also mentions the reporting of orders. However, a cost-efficient solution should be implemented to avoid any drop in liquidity and increase of energy costs:

Reporting 'orders' would incur excessive costs to market participants. This would either result from having to report orders themselves, or because they would have to pay exchanges/ platforms to provide this service as it is assumed that this order information refers to any price put on an exchange or with a broker.

This is not captured today by the trading counterparties, but may be captured by the brokers and exchanges. Therefore, providing such data through the broker or exchange might be the most cost-efficient method, if this information is really needed. It would require significant changes to IT-systems to capture this level of detail for the counterparties, which would result in additional costs to the brokers or exchanges if they had to provide the data.

If brokers or exchanges are required to provide the information, it should be assumed that transaction costs would be levied on the counterparties to cover the costs. Whichever solution would be put in place, it would increase transaction costs and therefore ultimately increase costs to the consumers.

BDEW therefore proposes that only orders to trade collected by regulated platforms should be reported to ACER and only through these organised trading platforms. The regular reporting of any other orders, if it was at all needed, would increase considerably the cost for undertakings and consumers. In this context ACER's proposal at the bottom of page 9 seems acceptable: "...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".

**c) Detailed comments on the list in Annex II.1:**

It is not clear whether all the 39 fields shown for the standard contract are expected to be mandatory (the non-standardised contracts distinguish between mandatory and non mandatory). There are certainly some fields (32-35) which do not seem well suited to capacity trades but maybe an entry option such as "N/A" would be an option. Alternatively, ACER could make a distinction between capacity and commodity and publish separate appendices for each. It is not clear to which extent these fields should be filled with free-format text or based on a number of pre-defined options/ flags.

<b>Item 2</b>	It is not clear whether this refers to the RRM or the market participant
<b>Items 3, 5 and 8</b>	Are based on a condition (if...). Are they mandatory on the condition only?
<b>Item 9</b>	Possible overlap with item 2
<b>Item 10</b>	Possible overlap with item 1
<b>Item 12</b>	Reporting the beneficiary can be problematic.
<b>Item 15</b>	Redundant – all information is gathered via Items 17 and 18
<b>Items 17/18</b>	Possible overlap with item 14
<b>Item 22</b>	Possible overlap with item 14
<b>Item 23</b>	It is not clear what this means.
<b>Items 24</b>	Possible overlap with items 10 and 1
<b>Items 33/34</b>	Possible overlap with items 14 and 22 and Item 34 refers to 'swap' which is not defined

### **3.1.3 Reporting of transactions in non-standardised contracts**

BDEW agrees that there should be made a distinction between standardised and non-standardised contracts and appreciates that ACER proposes a different reporting format for non-standardised transactions. Non-standardised transactions are not a major proportion of the overall number of transactions although some structured transactions can involve larger volumes than standardised transactions.

Nevertheless, their number is still significant and BDEW would like to stress that all reporting of transaction data under REMIT should be proportional with, and be restricted to, the stated objective of REMIT i.e. allow monitoring of potential market abuse.

Non-standardised transactions are tailor-made by the parties involved and may include complex terms and conditions in relation to volumes, interruptions, pricing and time spreads. The nature of the parameters will differ across contracts. The contracts themselves will be 'long form' contracts outlining all of the commercial and other terms for the transaction. It would not be appropriate or possible to report these contracts through the standardised reporting regime for this reason.

Under the Third Energy Package undertakings must keep records of all transactions in supply contracts and derivatives with wholesale customers and TSOs (including non-standardised transactions) for a period of at least 5 years at the disposal of national authorities and the Commission, Article 40 and 44 Directive 2009/73/EC und 2009/72/EC.

BDEW does not support a requirement to report non-standardised transactions directly to regulators.

Non-standardised contracts do not contain information about the overall market and the market mechanism. We therefore do not see the need for a reporting of the contract itself to the agency and are of the opinion, that this is neither necessary for the purposes of REMIT nor covered by the Regulation. Hence, this would not agree with recital 19 which stipulates keeping costs for reporting obligations at a minimum and not to create unnecessary additional administrative burden.

Although BDEW considers a distinction between standardised and non-standardised contracts useful, we envisage problems implementing it:

1. It is uncertain whether the criteria of the respective definitions are sufficient or useful. A contract not concluded within an organised market may have a similar structure as a standardised contract. Furthermore, standardised contracts may include bilateral (non-standardised) elements. It appears to be useful to include price and quantity options to distinguish between standardised and non-standardised contracts.
2. Implementation costs to establish two different reporting processes (one for standardised and one for non-standardised contracts) should not exceed costs for implementing just one process which would harmonise both alternatives and place a greater responsibility on the (subsequent) classification of standardised and non-standardised contracts on ACER. A wide and flexible enough range of criteria that could be re-

ported for both categories consistently would make a distinction between standardised and non-standardised market participants dispensable.

3. In BDEW's opinion, the typically complex content of non-standardised contracts can, in any case, not be displayed in an automatic reporting.

#### **3.1.4 Reporting of lifecycle information on the post-trade stage**

ACER proposes that both reporting of transactions in standardised and non-standardised contracts should include lifecycle information of a transaction, including confirmations, amendments, cancellations and, depending on the physical or financial settlement of the transaction, information on the contractual right for physical delivery which may include the use of optionality/ flexibility at the agreed point in time after execution ("scheduling/ nomination") or information whether the transaction was cleared or not cleared as post-trade information.

Lifecycle information such as amendments to a trade can occur for a number of reasons and there is a balance to be struck in terms of capturing all amendments in a reporting regime and the complexity and duplication of reporting requirements on firms. Reporting the whole transaction would mean that firms would be required to report any amendments which would blow up the reporting requirement and not add much additional value to regulatory authorities for their monitoring duties.

The level of trade amendments will also differ across markets depending for example on whether confirmations are dealt with electronically and on the level of development of the market. Over time the level of trade amendments should be expected to achieve a steady level. The definition of a trade amendment can also differ between undertakings.

#### **3.1.5 Unique identifier of market participants for reporting**

BDEW agrees with ACER's proposal for the reporting of transaction to use multiple existing identification schemes (GS 1, EIC and / or BDEW/DVGW Code number for market participants) during a relative short time period.

The introduction of a completely new counterparty code, while waiting for the introduction of the planned Legal Entity Identifier (LEI), would trigger two rounds of code implementation. The generation and introduction of new counterparty identifier by ACER necessarily raises processing costs of all participants in the beginning.

It is more efficient to introduce a new code only once and for all relevant sector regulations for transaction reporting, with which the energy market participants have to comply. Not only under REMIT, but also EMIR, MiFID II and U.S. Dodd-Frank will require a counterparty code and it would be helpful to introduce a single, world-wide counterparty code for all these regulations to avoid multiple implementations of several codes

For these reasons, BDEW does not support the introduction of a new code for a transitional period until a world-wide new code, e.g. the planned Legal Entity Identifier (LEI), is available as ESMA proposes in its consultation (ANNEX VI, Article 3). Thus, BDEW suggests that

ACER and ESMA coordinate closely on this subject, so that ACER's approach can be used by ESMA for the purposes of EMIR, as well.

However, using different existing identification codes like EIC for an interim basis, ACER will then need to maintain a mapping table. For example, a market participant may register with its EIC code and also use the counterparties' EIC code in their data submissions. If this market participant has however registered with a different code to the EIC code, it should be up to ACER to map the two. It cannot be a market participants' task to keep track of each counterparties' various codes.

**Question 3**

*Do you agree with the proposed way forward to collect orders to trade from organised market places, i.e. energy exchanges and broker platforms? Do you think that the proposed fields in Annex will be sufficient to capture the specificities of orders, in particular as regards orders for auctions?*

**Answer:**

Essentially, we agree with ACER 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".

ACER should cooperate closely with organised exchanges and platforms to ensure that the required fields match the information that is already collected. We cannot agree with the statement of ACER that orders to trade "are captured and stored in the market participant's energy trading and risk management software, where they are typically organised into trading books". As stated before there is no usual process of record-keeping for orders in the systems of market participants. This may be the case for brokers, regulated markets and similar platforms.

Also it should be verified whether all information needed is stored by organised market places, since only bids and offers that have been accepted are stored and used as input for trading books. We believe it is worthwhile to clarify this point in the final recommendations. If additional information is required from brokers or exchanges, then individual counterparties would have to set up systems to provide this information to the broker or exchange. This information is not stored today and would require significant investment in systems. In addition, operationally this would be hard to implement and probably result in reduced liquidity, as the trader would be required to enter more data for each order resulting in fewer orders being placed on the market. This will ultimately increase costs to consumers.

As far as overall responsibility rests with market participants, information channels and responsibilities between market participants and organised market places should be improved and clearly defined. In cases where ACER collects data concerning orders to trade directly from organised market places, the reporting obligation imposed on market participants should be deemed fulfilled for the market participants.

It has to be taken into account that for the fulfilment of the reporting obligations, the IT-systems of the parties have to be changed or adapted and that the traders have to write down explanations for their trades or placing of orders. Therefore, an adequate implementation period has to be introduced.

It should be sufficient to record orders, which are or have been visible to more persons than the potential buyer and potential seller.

See also our comments and proposal above under **Question 2**.

**Question 4**

*Do you agree with the proposed way forward concerning the collection of transactions in non-standardised contracts? Please indicate your view on the proposed records of transactions as foreseen in Annex II.2, in particular on the fields considered mandatory.*

**Answer:**

Although reporting non-standardised contracts is foreseen in REMIT, it will be burdensome and cannot be done automatically but requires massive manual work (see comments on **Question 2**).

BDEW agrees that for the purpose of collection of data about non-standardised transactions a different format is needed, because certain types of information typical for standardised transactions are not available for non-standardised contracts, in particular if they are OTC traded and/ or physically settled.

However, it is not yet clear whether non-standardised deals can be correctly/ sufficiently reported by the fields mentioned in Annex II.2. The fields are mainly taken from Annex II.1 for standardised transactions. Maybe it makes more sense to agree on some kind of usual standard terms (short form confirmation), i.e. primary economic terms, and provide further details via detailed pdf-files (long form confirmation) if necessary at ad-hoc request. As these details are highly sensitive the highest level of confidentiality has to be guaranteed. Due to the complex nature of these contracts an adequate timeline for the implementation of reporting measures for non-standardised contracts should be laid down.

We do not support the need to identify two separated sets of information to be submitted (one being the non-standardised contract in pdf). This would increase complexity in reporting. We believe the characteristics of non-standardised deals that cannot be identified should not be recorded and reported. Additionally, if all relevant information was already covered under items 1 to 28, the need to upload the pdf-file of the contract as indicated in item 29 is even more questionable.

In addition, we have the following comments on the list in **Annex II.2**:

Item 10	a long-term gas contract can integrate several different products e.g. sell and buy
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Item 11	a profile is not realistic for a long-term contract.
Items 12	a contract can include delivery in several market-zones.
Item 13	start and end of a contract can be very different from start and end of single nominations
Item 23	refers to 'swap', whereby the swap concept is not clearly defined in the document e.g. in the Definitions section 2.1
Item 24	to 'derivative'. As defined in Section 2.1, derivatives are financial instruments as defined under Regulation 2004/39/EC (MiFID). It would be more appropriate, and certainly less prone to duplication and overlap, if such financial instruments were excluded from the scope of REMIT reporting obligations, to the extent that they are also reported under MiFID/EMIR.
Items 25 and 26	Unclear, whether they apply to LNG as well

Finally, apart from providing details to report, we believe that ACER's recommendations to the Commission should also give some technical specifications on the practical implementation of reporting:

- Technical specifications on how to send reports and receive feedbacks (for instance, xml files via web service or txt files via ftp...)
- Message process flows (message statuses: sent, acknowledged, accepted, rejected...)

**Question 5**

*Please indicate your views on the proposed collection of scheduling/nomination information. Should there be a separate Annex II.3 for the collection of scheduling/nomination data through TSOs or third parties delegated by TSOs?*

**Answer:**

BDEW is not fully convinced that information concerning scheduling and nomination is necessary for market monitoring. However, as far as information on the physical settlement of the

transaction (i.e. information on scheduling/ nominations) should be reported directly by TSOs or should be reported by a third party on behalf of the TSOs. At least a clear indication on further details beyond already existing regulatory obligations should be specified. At the very minimum, cohesion with existing reporting obligations for TSOs and the existing systems for the fulfilment of such obligations should be preserved.

It should be made clear in the recommendations that in cases where TSOs or their delegated third parties are effectively used as a collection channel, this clears the other market participants from their own responsibility, vis-à-vis ACER regarding this matter, on the condition that market participants provide the TSOs with all necessary information. This should be in line with the rules governing such information feeding to fulfil scheduling/ nomination activities. Market participants cannot be held responsible for reporting delays or errors of any kind that result from third party actions, incl. exchanges, MTFs and TSOs that report on behalf of other market participants.

Regarding the two options (separate annex or not), we believe that, as far as electricity is concerned, most information is already covered in the FEDT where physical flows get reported. ACER should be careful not to duplicate this list or create inconsistencies. We believe that ACER should rather directly refer to the FEDT instead of creating a separate annex.

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

### 4.1 List of contracts and derivatives which are to be reported and appropriate de minimis thresholds, Article 8 (2) (a) of the Regulation

#### 4.1.1 List of contracts and derivatives to be reported

##### **Recommendation 3:**

*The Agency would propose to define the list of contracts to be reported pursuant to Article 8(2)(a) of the Regulation according to Annex III. At this stage, such list should not cover contracts in balancing markets, except markets in which balancing is mandatory for most market participants. Concerning derivatives, the list of financial instruments as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC as implemented in Articles 38 and 39 of Regulation (EC) No 1287/2006 should apply. In addition, the implementing acts could foresee that the Agency collects and publishes a set of information regarding all wholesale energy contracts admitted to trading at organised market places to increase transparency in wholesale energy markets and to facilitate data collection under REMIT, possibly in a phased approach.*

#### **General Comments**

For the purpose of the implementation, transportation is defined as transmission and distribution. Since ACER considers in detail only obligations for transmission system operators, BDEW proposes to clarify which distribution contracts (contracts with distribution system operators) are wholesale products and of those which have to be reported, if any.

Furthermore, it remains ambiguous which contracts are meant exactly when referring to contracts on balancing and for which cases the exemption is not applicable. Regarding contracts on balancing BDEW agrees that information on issues which are not comparable on national or regional level should not be collected.

**Question 6**

*What are your views on the above-mentioned list of contracts according to Article 8(2)(a) of the Regulation (Annex III)? Which further wholesale energy products should be covered? Do you agree that the list of contracts in Annex III should be kept rather general? Do you agree that the Agency should establish and maintain an updated list of wholesale energy contracts admitted to trading on organised market places similar to ESMA's MiFID database? What are your views on the idea of developing a product taxonomy and make the reporting obligation of standardised contracts dependent from the recording in the Agency's list of specified wholesale energy contracts?*

**Answer:**

BDEW agrees that the list of contracts to be reported in Annex III should be maintained rather generally, however some clarifications are needed. A clear, well-defined list of contracts which have to be reported can help market participants to fulfil their reporting obligation. And a conclusive and comprehensive list would be necessary to create legal certainty and clarity. It is however questionable, if such a list would be flexible and updated enough to accommodate market developments. In any case, a stakeholder consultation during the definition process seems necessary.

A clear well defined list could be achieved with a phased approach. ACER could periodically publish the resultant list of reportable contracts and allow market participants a reasonable amount of time (e.g. 6 months) to make the necessary systems/process adjustments.

We support the proposal to develop a clear product taxonomy (like the ISDA taxonomy for Dodd-Frank), whilst recommending using existing practices to the large extent possible:

**a) Detailed comments on Section A**

The definition (4) 'two-days-ahead' seems rather uncommon. A definition of 'working days', more common in gas markets, is instead missing.

Also the reference to several specific time windows (i.e. references to intraday, within-day, day-ahead, two-days-ahead, week-end and long-term) seems unduly complicated. This could be replaced by a single descriptive timeframe, e.g. "Contracts for the supply ... that relates to any tradable time-window, ranging from intraday (electricity) and within-day (natural gas) through longer timeframes."

Further, particularly but not necessarily restricted to Sections A (7) and B (2), it is unclear whether LNG is covered under the reportable contracts. See also comments to Question 1.

The definitions in (6) and (7) do not seem fully clear.

Definition (6) applies to both standardised and non-standardised contracts. Moreover the definition of 'long term' is unclear, since there is no reference to a time period. We suggest specifying that this covers contracts lasting more than the periods mentioned in (1) to (5).

Concerning (7):

- The general reference to ‘commodity contracts’ is incomprehensible. It includes all commodities which may not have been the intention. We suggest therefore replacing it with ‘electricity and natural gas contract’, in consistency with the scope of REMIT.
- There is an overlap with (6), unless (6) would cover non-standardised contracts only.
- There is an additional overlap between the initial part of the description and the contracts mentioned in (1) to (5); therefore we suggest excluding explicitly contracts with delivery period mentioned in (1) to (6).
- Finally in our understanding derivative instruments that are settled in cash are considered financial instruments under MiFID; therefore the reference to these types of contracts is redundant.

Finally, we agree that there is no need to require the reporting of derivatives as defined by MiFID, as these contracts are reported to trade repositories as foreseen by EMIR and ACER should have access the transactions in derivatives with underlying gas and electricity commodities.

#### **b) Detailed Comments on Section B**

BDEW believes that the title should be amended to “**Capacity**” contracts for the transportation of natural gas or electricity in the Union as transportation contracts are capacity and not commodity contracts.

For the sake of clarity, we would also suggest adding the exemption for contracts in balancing markets (p. 14) to the list of contracts.

The reporting of contracts relating to the transportation of natural gas in the Union should be limited to the transactions which are taking place at interconnection points and transactions which are taking place on the secondary market.

#### 4.1.2 De minimis thresholds for reporting

##### **Question 7**

*Which of the three options listed above would you consider being the most appropriate concerning the de minimis threshold for the reporting of wholesale energy transactions? In case you consider a de minimis threshold necessary, do you consider that a threshold of 2 MW as foreseen in Option B is an appropriate threshold for small producers? Please specify your reasons.*

##### **Answer:**

BDEW explicitly supports the general suggestion to consider a de minimis threshold for reporting as to keep reporting obligations at minimum level and not create unnecessary costs or administrative burdens for market participants. BDEW also agrees with ACER's statement that definitions of a de minimis threshold have to be balanced against the requirement to be able to identify the parties of the transaction according to Article 8 (1) of the Regulation.

Thus, BDEW favours Option A and proposes to specify the definitions further. A threshold may be introduced only for pragmatic reasons (i.e. reduce the burden of market participants for trades of very small amounts traded bilaterally).

The consultation text contains no de minimis thresholds for gas (and LNG). We advise to include also such (volumetric) thresholds, provided that they are sufficiently high, so as to be appropriate and serving the final purpose of REMIT.

For this purpose a clarification of the definitions of "wholesale energy product", and therefore of "market participants" (see answer to question 1), is needed and should not only aim at the exclusion renewable energy generation. Other operators active in both electricity and gas markets (e.g. storage operators under specific regulatory framework) should be allowed to use such an exemption, given that they have a limited impact on prices and other conditions in wholesale energy markets.

National thresholds referring to the relevance on the market price can be taken into account considering European thresholds as indicated by in ACER's guidance on REMIT. Indications for the relevance on the market price could be for instance:

- Relation to relevant market in percent
- National thresholds for comparable obligations
- Where appropriate distinction between times of high and low demand of energy (e.g. summer and winter)
- Relation to threshold of 600 GWh per year in Article 2
- Relation to 100 MWh for power

However we believe that platform operators should report all trades without any de minimis thresholds. The burden of reporting can be mitigated as indicated by ACER in its consultation paper under Option A and many kinds of transaction can be reported through third parties (RRMs).

**Question 8**

*Are there alternative options that could complement or replace the three listed above?*

See above **Question 7**.

**4.2 Uniform rules on the reporting of information, Article 8(2)(b) of the Regulation**

**Recommendation 4:**

*The Agency currently considers that records of transactions, including orders to trade, in standardised contracts should be reported through RRM to the Agency. Any organisation (e.g. organised market places, trade repositories, TSOs, trade matching or trade reporting systems) or market participants themselves should be eligible to become a RRM under REMIT, subject to conformity with organisational requirements which should be set on a harmonised basis, possibly including the use of existing standardised trade and process data formats and protocols for each class of data. Whilst reporting of derivatives is already mandatory for trade repositories under EMIR, reporting through organised market places and TSOs or third parties on their behalf could be made mandatory as well, at least for some classes of data (e.g. orders to trade from organised market places and scheduling/nomination through TSOs or third parties on their behalf). Records of transactions in non-standardised contracts should be reported directly to the Agency.*

**General comment**

In any case it should be made clear that market participants on whose behalf data are reported have to have access to the data. Otherwise the market participant will not be able to answer any potential upcoming questions.

#### 4.3 Timing and form in which information is to be reported, Article 8 (2) (c) of the Regulation

**Recommendation 5:**

*Records of transactions, including orders to trade, in standardised contracts should be reported as quickly as possible, and no later than the working day following the execution, modification or termination of the transaction, or the placing of orders to trade. Records of transactions in non-standardised contracts should be reported within one month following the execution of the transaction. The records of transactions should be made in an electronic form.*

**General comment**

An appropriate balance must be reached in terms of ensuring regulators having access to the information they need to monitor markets and not placing undue burdens on undertakings. A requirement for best endeavours of D+1 reporting of transactions would strike such a balance with a maximum timeframe of D+2. This would allow undertakings to implement an end of day (batch) solution for reporting transactions to ACER. It is easier to control a D+1 / D+2 and technically less difficult than real time reporting. D+1 / D+2 reporting to ACER should be sufficient for market surveillance purposes particularly as both exchanges and OTC brokers are required under REMIT to have in place arrangements for monitoring market activity. These market monitoring functions will therefore become frontline 'regulators' of their own markets with access to real time transaction information.

**Question 9**

*Do you agree with the proposed approach of a mandatory reporting of transactions in standardised contracts through RRM's?*

**Answer:**

We support the concept of RRM's to collect and report information on standardised energy wholesale market transactions on behalf of market participants. This should reduce the costs of trading, support liquidity and ensure consistency. The information requirements should therefore be based on current practice among market participants, exchanges and other trading platforms.

As to the issue of making this mandatory, REMIT grants undertakings flexibility in terms of how they discharge their reporting obligations for wholesale energy transactions. The implementation of REMIT should not cut back on flexibility, since market participants are very different in terms of their size and structure and the level and geographic and product spread of their activity. For example, a small market participant who only trades on one or two exchanges may decide to delegate responsibility for reporting transactions to these RRM's.

Whereas a larger player, who trades across most EU power and gas markets (OTC, exchange and bilateral) may prefer to retain control over the reporting process. In such cases, delegating would require agreeing to terms and conditions with a large number of exchanges and brokers which would give rise to significant legal and operational risks (e.g. of non-delivery of reports).

The decision for becoming a RRM should be on a voluntary basis to the prospective RRM; i.e. also market participants should have the right to become a RRM.

ACER should define the framework of responsibilities of the parties involved. Granularity of submitted data, responsibilities for the correctness and completeness of reported data have to be clearly defined in advance, whereas the responsibilities should be in general with the data owner. In case the reporting party failed to deliver transactions to ACER in the required timeframe consequences should be defined, if undertakings choose to delegate responsibility for reporting transactions on their behalf and all the more if this approach was mandatory.

**Question 10**

*Do you believe the Commission through the implementing acts or the Agency when registering RRM should adopt one single standardised trade and process data format for different classes of data (pre-trade/execution/post-trade data) to facilitate reporting and to increase standardisation in the market? Should this issue be left to the Commission or to the Agency to define?*

**Answer:**

The provision of a single, harmonised IT-System and format for registration and reporting is preferable, so that all NRAs and ACER should share the same IT-System and format. Corporate groups with several, separate legal entities in different Member States should not be subject to different IT-Systems and formats.

Preferably ACER should rely on one existing open standard electronic transaction data format rather than expecting to source all data through common platforms.

In general, it appears useful if open standards for trade data exchange are mandated (possibly per asset class) and enhanced as necessary with regulatory specific data fields. It is highly recommended that the mandated standard is an existing standard already in use within the industry and/ or asset class to exchange and match trade data. This approach further resolves a number of data content standardisation issues (e.g. counterparty Energy Identification Codes, EIC – see below) using existing energy industry market practices on this.

In general, it is better to rely on a single identification code rather than data attributes, such as name and domicile, since such attributes can change over time. Such changes are better managed by amending the details related to the code identifying the organization which are held in a centrally managed code library.

A single identification code would:

- ⇒ ensure continuity over time in case the name of a counterparty or any other detail changes;
- ⇒ provide a central reference source ensuring that counterparty detail changes are propagated across the industry swiftly.

It is therefore recommended that:

- ⇒ a single codification scheme (possibly per asset class, for instance the EIC scheme in commodities) is mandated as part of the technical requirements to identify counterparties and intermediaries (such as brokers), and
- ⇒ the attributes are removed from the counterparty data requirement.

This will require both an agreed format and an agreed use of that format. It will also require an agreed product list across both exchange and OTC traded derivatives. ACER, ESMA and the implementation agent for Dodd-Frank (GTRfC) must define the rules for how this reporting will work in order to minimise the duplication of effort, reporting and relevant IT-implementation costs across the industry.

#### **Question 11**

*Do you agree that market participants should be eligible to become RRM's themselves if they fulfil the relevant organisational requirements?*

#### **Answer:**

Yes, BDEW supports the idea that market participants themselves should have the possibility to become RRM's. Efficient ways of data reporting are highly welcome. Nevertheless, the fulfilling of reporting obligations in the role of a RRM is combined with manifold responsibilities and additional work load. As outlined in question 9, a clear definition of responsibilities, compensation mechanism as well as tasks for RRM's has to be ensured. In general, taking over the role as a RRM should be on a voluntary basis and be up to the decision of the prospective RRM. Direct reporting to ACER should stay possible.

For the sake of a unified approach to the REMIT implementation, BDEW supports further determination of general requirements for all reporting channels (e.g. to ensure data security and confidentiality, to prevent and detect errors in advance etc.); details on technical standards especially on data protection would be also necessary.

These requirements must be non-discriminatory in order to make effectively available the option for market participants to report themselves. Such requirements should be subject to consultation as soon as possible, in order to allow market participants to evaluate carefully all the options available to comply with the reporting obligation.

It is also crucial that ACER clarifies as soon as possible the process, timeframes, obligations and requirements for becoming an RRM. It is also crucial that ACER recognises an important distinction between RRM's that want to establish reporting services on behalf of 3rd parties and RRM's established by market participants for the sole purpose of reporting their own transactions (and possibly those of related group entities) directly to ACER. It is BDEW's

view that the requirements and obligations of non-third party RRMs should be minimised and only focused on the issue of establishing and confirming compliance with ACER's electronic communication protocols.

We would like to point out that a proper stakeholder involvement and appropriate timeframe for implementation is crucial for the success of the REMIT data reporting.

**Question 12**

*In your view, should a distinction be made between transactions in standardised and non-standardised contracts and reporting of the latter ones be done directly to the Agency on a monthly basis?*

**Answer:**

The requirement to report 'no later than the working day following the conclusion' is challenging. Transactions in standardised contracts should be required to be reported no earlier than end-of-next business day after the initial trade capture. We believe that this is the only solution technically feasible and economically appropriate.

Concerning transactions in non-standardised contracts please see question 2. If they are to be reported, it would be most appropriate to establish monthly reporting. However, it should be 'one month at the latest', so that transactions can be reported at the convenience of the market participant at any time during the month period.

Reporting of non-standardised transactions through RRMs (of any kind) appears to be overly complex and burdensome and responsibility of reporting such non-standardised transactions to ACER should lie with each market participant.

#### 4.4 Avoidance of double reporting obligations for derivatives, Article 8(3) of the Regulation

**Recommendation 6:**

*Trade repositories under EMIR should report records of transactions in derivatives collected and maintained under EMIR to the Agency. The Agency and ESMA will cooperate closely concerning the data collection of derivatives to be reported under REMIT, EMIR or MiFID. Where a substantial part of the REMIT data requirements is not met under EMIR or MiFID, RRM's should be required to report the complete data set directly to the Agency.*

**General comments**

A close cooperation of ACER and ESMA is essential to avoid superficial efforts and double reporting. Still, if data are delivered from one authority to the other this should be regulated clearly and with full transparency to the entity which generated the data.

We would also like to draw ACER's attention to the German draft law as of April 26 2012 on the establishment of a national market transparency agency<sup>1</sup>, which will also monitor the national electricity and gas wholesale markets. According to the draft law market participants in Germany will be obliged to report to the national agency unless it has access to ACER's Database. Therefore, market participants run the risk of double reporting obligations.

**Question 13**

*In view of developments in EU financial market legislation, would you agree with the proposed approach for the avoidance of double reporting?*

**Answer:**

The information required on derivatives to be reported under REMIT and EMIR should be harmonised, in particular with regard to OTC derivatives. We strongly support efforts to avoid double reporting and the details of the technical implementation of the proposed approach will be of great importance to achieve that objective.

However, we still see quite a big difference of data requirements between the various regulatory regimes, so it remains to be seen how much data can be transferred between ACER and ESMA. We support the cooperation already underway between ACER and ESMA. However, regarding the data format we see a challenge for both if they agree on only one single stan-

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<sup>1</sup> <http://www.bmwi.de/BMWi/Redaktion/PDF/G/gesetzentwurf-markttransparenzstellen-gesetz,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>

dard for the commodities market within REMIT (CpML) as EMIR most likely also accepts financial standards (such as FpML).

The approach to avoid double reporting should also ensure the coherence of the legal and regulatory framework on the EU level with measures taken on the level of the national legislator resp. the NRAs.

As mentioned above the German legislator has issued a draft law on the establishment of a national market surveillance agency. This draft specifies reporting obligations and stipulates that the competent authority can issue decisions specifying the type and content of the data to be reported to the market surveillance agency (compare Art 47d – 47g Draft Law against restraints on competition, pages 10-15).

Furthermore, the competent authority may issue decisions specifying the obligations resulting from Art. 4 (1), 9 (4) and (5) as well as 8 (1) and (5) of regulation 1227/2011 unless the European Commission has issued a contrary implementing act (Art 58a Draft German Energy Act, page 20). This leaves nevertheless room for the competent German authority to decide on additional reporting obligations on a national level.

Therefore, we consider that there is a risk of contradicting or at least non-harmonised reporting obligations on the EU and the national level and encourage ACER to closely follow the implementing acts on a national level in order to avoid double reporting obligations for the market participants and ensure the consistency of the regulatory and legal framework. Where possible, national authorities and ACER should cooperate and exchange reported data to mitigate the administrative burden of market participants.

#### **4.5 Reporting channels, Article 8(4) of the Regulation**

##### **Recommendation 7:**

*The implementing acts should require reporting channels to register with the Agency as RRM's on a mandatory or voluntary basis and define organisational requirements for RRM's (e.g. adequate policies and arrangements to report the information in a timely manner, effective administrative arrangements designed to prevent conflicts of interests with clients, operation and maintenance of sound security mechanisms to guarantee the security of the means of transfer of information, minimise the risk of data corruption and unauthorised access prevent information leakage, maintenance of adequate resources and back-up facilities, systems in place that can effectively check transaction reports for completeness, identify omissions and obvious errors and request re-transmission of any erroneous or missing reports).*

##### **General comment**

Again market participants should be able to report directly all reportable contracts in case they prefer and should not be obliged to become a RRM.

For any reporting channel (reporting through RRM or from market participants), it is important that clear processes and secure channels are identified. Organisational requirements to guarantee security, confidentiality, avoid unauthorized access to data and leakages to media are of the utmost importance. This is true for both RRM and ACER. For both, the best certification of system quality available should be adopted, as well as strict internal rules ensuring that confidentiality is guaranteed by any employee. For example, it should be forbidden for former ACER employees, who had contact with such confidential information to carry out professional activities linked to the energy business during a reasonable period of time.

**Question 14**

*Do you agree with the proposed approach concerning reporting channels?*

**Answer:**

Yes, BDEW agrees that these reporting channels should become RRM. We suggest also that third parties' RRM should be obliged to register. A voluntary registration offers no safeguards to market participants and implies a risk of two 'classes' of third parties' RRM. It is BDEW's view that the requirements and obligations on RRM acting on their own behalf should be minimised and only focused on the issue of establishing and confirming compliance with ACER's electronic communication protocols.

**Question 15**

*In your view, how much time would it take to implement the above-mentioned organisational*

**Answer:**

BDEW believes that further technical details are needed to specify the implementation period. We estimate that at least up to one year is needed by market participants to set up the organisational structure to become a RRM.

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

### 5.1 Information to be reported, Article 8(5) of the Regulation

*Recommendation 8:*

*Information to be reported according to Article 8(5) of the Regulation should include inside information and transparency information according to Regulations (EC) No 714/2009 and (EC) No 715/2009, including applicable guidelines and network codes. The information shall be provided as individual non anonymous data.*

#### General comment

#### **Also regarding the ACER Discussion Paper “Disclosure of inside information according to Article 4 (1) of Regulation (EU) No 1227/2011 through platforms”**

BDEW stresses once again that the basic principle regarding information that has to be reported pursuant to REMIT is to minimise obligations on market participants particularly by collecting the required information or parts thereof from existing sources where possible, Article 8 (6). Regarding publicly available information ACER and the national regulatory authorities should verify what information they already possess. Such information should not be subject to further reporting obligations. In this context, BDEW welcomes the opportunity to discuss the disclosure of inside information according to Article 4 (1) of Regulation (EU) No 1227/2011 (REMIT) through platforms and will also address this issue in a separate response.

#### **a) Actual regulatory situation:**

In terms of content ACER can already get three kinds of information, respectively, market participants have to deliver the following information:

1. Fundamental data under Article 8 (5) REMIT – they can ask for this to be reported directly to ACER under Article 8 (5) and it seems legitimate as they need that information to monitor market abuse
2. Transparency information pursuant to REMIT and the 3<sup>rd</sup> energy package:
  - a. Inside information to be published under Article 4(1) REMIT or inside information to be directly reported to ACER (see Article 3(4)(b), 4(2) )
  - b. Transparency information to be published under Regulations (EC) No 714/2009 and (EC) No 715/2009, including applicable guidelines and network codes

In this context, ACER’s statement (Recommendation 8) that **transparency information** and **inside information** must be reported to ACER is not adding new obligations considering the content of the data. Obviously, these terms need to be carefully defined.

**b) Solution for simple disclosure and reporting regime:**

The following principles seem to be the decisive guidelines to define the right reporting regime.

- Reporting obligations on market participants should be minimised by collecting the required information or parts thereof from existing sources where possible, Article 8 (6).
- The more ACER can use existing or future central information platforms to receive all of the above-mentioned information, the easier market participants can comply with their reporting obligations.
- The number of potential central platforms to which the information is to be delivered should be as low as possible to avoid that the same information has to be reported several times; and also minimise the risk that data security is compromised.

**c) This could lead to the following design:**

- (1) The market participants send their **inside information** to one of the central platforms (such as the EEX transparency site or the ENTSOG platform pursuant to Regulations (EC) No 715/2009 starting October 2013) which is provided and run by a third party. This could be a platform at national, regional or EU-level, such as for example an energy exchange. This platform would publish this information and where applicable send it to ACER at the same time. ACER and EC have recently indicated that they want to impose in the near future a more centralised publication of inside information in any case. ACER calls this insider information platform a Regulated Information Service (RIS). However, firms should be able to use existing information channels and keep the flexibility to publish their inside information over their internet site.
- (2) The **transparency information** should be collected by ACER through existing and future transparency platforms under Regulations (EC) No 714/2009 and (EC) No 715/2009, e.g. ENTSO-E.
- (3) This centralisation could be even further enhanced towards a combination of platforms under 1 and 2, i. e. a kind of EU-wide single insider and transparency information platform which collects the data and send it to ACER.
- (4) In any case, market participants should retain the flexibility to publish their information directly and report it directly to ACER. This is in particular necessary, if the central platform(s) fail(s) to operate correctly.

**Question 16**

*Do you agree with this approach of reporting inside and transparency information?*

**Answer**

We consider a distinction between fundamental data collection for market monitoring purposes and the publication of inside information in real time absolutely useful. If national or European platforms, acting as RIS, are not in place, the obligation to report inside information

to ACER in real time alongside its publication on the company website would impose excessive burdens to market participants. The relevant platforms and infrastructures for disclosing inside information (either at national or European level) should be set up without delay in order to avoid extra costs for market participants in setting up own channels for complying with REMIT obligations.

With regard to the 'Transparency Information' as reported via Regulations (EC) No 714/2009 and Regulations (EC) No 715/2009, we would like to point out that there are very good reasons why this information is published on an aggregate basis. They do not only relate to confidentiality but also to market relevancy, especially in the case of gas. While we are aware that the purpose of ACER's monitoring of possible market abuse by individual persons is different from the publication purpose by TSOs/SSOs under the Regulations (EC) No 714/2009 and Regulations (EC) No 715/2009 regulations, the ACER obligations, will duplicate the existing information streams of operators under these two regulation, unless ACER collects the 'raw data', as provided by the asset operators, directly from these system operators.

**Question 17**

*Please indicate your views on the proposed way forward on the collection of regulated information.*

**Answer:**

See general comment to **Recommendation 8**.

**5.2 Uniform rules on the reporting of information, Article 8 (6) (a) of the Regulation**

**Recommendation 9:**

*Inside information should be reported to the Agency through RIS, transparency information should be reported to the Agency through the existing sources for the publication of such regulated information. The implementing acts should require persons wanting to become a RIS to register with the Agency and define organisational requirements for RIS similar to those for RRM.*

**General comment**

All in all BDEW supports the RIS concept. Nevertheless, in the long run it should be modified. The easiest way for market participants to fulfil their publishing obligations and to keep ACER informed at the same time, would be centralised RIS.

**Question 18**

*Do you agree with the proposed approach for the reporting of regulated information? Please indicate your view on the proposed mandatory reporting of regulated information through RIS and transparency platforms. Should there remain at least one reporting channel for market participants to report directly to the Agency?*

**Answer:**

Although details would have to be elaborated, in our view, one way to allow timely disclosure and publication on a common platform is that inside information would be:

1. communicated by market participants and operators to TSO/ PX/ other transparency platforms
2. published by TSO/ PX/ other transparency platforms

BDEW would like to stress that the Agency does not have the right to create additional reporting obligations. The Agency has the right to define which transactions need to be reported (which is the purpose of this document). Any other information pursuant to Article 3 (4), 4 (2) and 8 (5) is defined by the transparency guideline. ACER's recommendation should not exceed those articles. To avoid the confusion, we suggest introducing a better definition of "regulated information".

If a RIS is in place, we favour the option for market participants to choose for their service in case they consider it to be efficient. BDEW favours the possibility for market participants of using RIS as a reporting channel, but do not support mandatory reporting through RIS. We believe there should always remain the alternative option of reporting directly to ACER.

**Question 19**

*The recommendation does not foresee any threshold for the reporting of regulated information. Please indicate whether, and if so why, you consider a reporting threshold for regulated information necessary.*

**Answer:**

Applicable thresholds concerning transparency information have been already identified through market practices in some cases. In particular this applies to the electricity market where data regarding production units of at least 100 MW are usually subject to disclosure of availability and production data. Using no thresholds would end in a continuous information flow of small units not driving the markets. We think that a similar approach needs to be established for gas.

Such existing thresholds for publication and reporting and new thresholds that will be established in the future by the relevant legislation concerning transparency (Regulation 715/2009 EC) and the publication of inside information have to be taken into account when implementing Art. 8 (5) REMIT (i.e. the same data should be subject to both regimes).

### 5.3 Timing and form in which information is to be reported, Article 8(6) (b) of the Regulation

**Recommendation 10:**

*The implementing acts should foresee that regulated information is reported to the Agency in an electronic form at the same time it is disclosed to the public.*

**Question 20**

*What is your view on the proposed timing and form of reporting?*

**Answer:**

BDEW agrees that electronic reporting is the appropriate method except under 'exceptional circumstances'.

On the timing, it appears that a multitude of delays is unavoidable in case multiple channels are used: if inside information is published by the market participant and it must also be reported (nearly) simultaneously, then this type of information will reach ACER without delay when reported directly by the publishing market participant. Information (inside or 'regulated'), that is not reported directly to ACER is likely to go through a lengthier chain of intermediate steps (RRMs or RISs) and will reach ACER later, almost regardless of the efficiency of such chain.

Real time reporting will be feasible only if RIS and trading platforms will be fully operational, whereas it could be excessively burdensome for market operators already publishing inside information on their own websites the simultaneous reporting of fundamental data to ACER.

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