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**EFET 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”**

## **Recommendation and questions**

### **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.***

### **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.***

### **Question 1**

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

EFET suggests to include a disclaimer indicating that the ‘definitions’ as given are only for the purpose of clarifying the remainder of the text of this consultation, and in no way reflect generally accepted legal standards or definitions. Many of the *definitions are too vague, overlapping and potentially conflicting. EFET recommends that ACER clarify the proposed definitions*

EFET suggestions on the definitions and requests for clarifications are:

- the definition of ‘**Agreement**’ proposed does not seem to identify different subjects; we propose with the following amendments:
  - “*Agreement*” means a set of rules that defines the obligations concerning the exchange of a wholesale energy product between two entities (e.g. Master Trading Agreement like GTMA, ISDA, EFET, or Exchange Participation Agreement governing transactions, or bilateral agreements);
- The definitions of **Transaction**, **Contract**, **Execution** and **Trade** seem partially overlapping, hence we suggest the following:
  - “*Transaction, Contract or Trade*” is an agreement on a particular wholesale energy product between at least two counterparties, possibly including the specification of a delivery point, a mechanism to price the value of such wholesale energy product and a statement on the quantity to be supplied irrespective of the settlement type, with the intention of a financial obligation being transferred from one counterparty to another;
  - “*Trade Execution*” means acting to complete the process of buying or selling one or more wholesale energy product(s);
- The definition of ‘**Standard Contract**’ refers to a ‘standard agreement’, without any definition of that notion. Suggestions to use ‘contract admitted to trading at an organised market place and subject to a standard framework energy trading agreement, or with respect to provision of balancing and reserve services to TSOs’ as definition for ‘**Standard Contract**’.
- As the definition of ‘**Non-standard Contract**’ refers to the definition of ‘**Standard Contract**’, this needs clarification as well.
- 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. Hence we propose the following:
  - “*Tradable Instrument*” means a contract for which an organised market place (including balancing market) has specified a description of limited characteristics so as to make the basic terms of the contract easily identifiable.
- in order to define the term ‘**Order to Trade**’ in consistency with the proposals of the consultation and to exclude bespoke orders from the definition, we suggest the following amendment: “*Order to Trade*” means a firm, electronic and written indication expressed by a counterparty to buy or sell a Tradeable Instrument (including auctions, continuous trading) on an organised market place. An alternative would be to use the MiFiD “order” definition as expanded by the European Commission (cfr CESR 07-320) for ‘**Order to Trade**’ as well of ‘**order type**’ in the annexes. A separate class of transaction should be introduced namely: ‘Execution Only’ which could encompass own account trading, RFQs (Request For Quote) i.e. Market Making, house hedging etc. This would assist the Agency in the monitoring of the market and the nature of trading. We note that Annex 1 already covers this in “trading capacity” and therefore fields 22, 23, and 25b may need to be amended as there is an element of duplication. Further efforts are required to more clearly distinguish between ‘Orders to Trade’ and ‘Bids and Offers’
- The definition of ‘**Supply**’ is worded as... “**Supply**” means the sale, including

resale, of electricity or natural gas, including LNG, where delivery is in the Union;” ... as written this would appear capable of including LNG cargoes for delivery to EU (or is LNG not natural gas for this purposes of this definition?). LNG is not specifically mentioned in the definition of wholesale energy products under Article 2(4) of REMIT and cargoes do not form part of the wholesale supply picture – that is fulfilled by the requirements to report “Regulated Information” relating to the capacity and use of LNG facilities. We should seek clarity that LNG cargoes are not intended to be caught. See also below.

- With regard to the definition of ‘**Transportation**’ (which includes transmission and distribution), EFET considers this ‘transportation’ concept as covering to many distinct activities, since it incorporates the LNG facility services and storages. Such overly large scope of activities falling under ‘transportation’ could interfere with the ultimate definition/clarification of ‘market participant’, as some gas and/or LNG-related businesses may or may not qualify as ‘market participant’. Suggestion to segregate transportation, storage, the provision of (LNG) terminal/storage services into separate definitions. Note however that such disentanglement may impact upon the sections and section headers in Annex III.
- the definition of ‘**Market Participant Subject to Reporting Obligations**’ seems to differ from the definition of ‘market participant’ in Reg. 1227/2011. “Market Participant” is defined under REMIT as “any person, including transmission system operators, who enters into transactions, including the placing of orders to trade in one or more wholesale energy markets. “Wholesale Energy Market” is defined as any market within the Union on which wholesale energy products are traded. Whilst we believe that a better specification is appropriate, we ask for further clarity, in particular concerning supply firms. Indeed from the definition proposed it is not clear whether firms buying energy commodities in the wholesale market in order to supply final customers, either through standardised or non-standardised contracts, should be subject to the reporting obligation. We appreciate a clarification in this sense. Suggestion to shorten the definition label to ‘Market Participant’ in case the qualification ‘subject to reporting obligations’ in the definition label offers no discriminative connotation with market participants that do not have reporting obligations. Clarification is required on whether intra-group transactions are in scope (they seem not to be excluded from REMIT and seem to be included in EMIR)

According to the consultation the definition of this term is as follows:

*“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;*

We oppose strongly to ACER's suggestion to include producers supplying their production to their in-house trading unit or energy trading company in the definition of the above term. This could lead to the interpretation, that reporting of intra-group transactions is expected, which EFET believes is not appropriate. EFET supports the exclusion of intra-group transactions and contracts from the standardised reporting requirements to ACER. Intra-group transactions are not executed on the market and therefore are not capable of leading to potential insider trading or market manipulation – they form no part in the price formation process. Firms will keep records of intra-group transactions and these can be available to NRAs on request or in the event of any investigation. In addition, any resulting market transaction resulting from an intra-group transaction will of course be reported to ACER. EFET also points out that while ESMA is reviewing whether the reporting of intra-group transactions is necessary under EMIR, it should be noted that the purpose of REMIT and EMIR are very different: EMIR seeks to put in place arrangements in order to reduce the level of credit and systemic risks in derivative markets whereas REMIT focuses on transparency and prohibition of market abuse in physical power and gas markets. As such, even if ESMA decides that intra-group transactions should be reported under EMIR there should be no presumption that similar arrangements should be put in place under REMIT as it would significantly increase the reporting burden for no additional justification.

In our opinion, if ACER believes that intragroup transactions should be reported, given the very significant burden this will create on firms, it should provide detailed justification (or examples) as to why this information is necessary and can be justified by the purpose and objectives of REMIT.

Thus we propose following text:

*“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 entities, which are integrated companies with a production and a trading branch, 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 ‘**Derivative**’ or ‘**Derivative Contract**’ makes explicit reference to financial instruments as defined under MiFID Directive 2004/39/EC. As a MiFID review is ongoing, it is possible that the future definition of financial instrument undergoes changes and these changes could be substantial.

Suggestion to include reference to possible adjustments in the definition of financial instrument as a result of the outcome of MiFIR/D, with a view to avoid future inconsistency.

- We believe that the definition of '**Energy Commodity** or **Energy Commodity Contract**' is out of scope of REMIT and it is preferable to replicate the definition of 'wholesale energy contract' included in REMIT.
- The definition of "**Spot Market**" should be referred to energy/gas and electricity markets only. Other commodities are not in scope of data collection under REMIT. The definition of 'Spot Market' should be consistent with the definition of 'spot commodity contract' in MAR and also with the final MiFID provisions.
- The term '**Organised Market Place**' should be better specified, also on the basis of the terms used in financial regulations. The definition of 'Organised Market Place' makes reference to MTF, but this concept of an MTF is not itself defined, nor is reference to MiFID given where this concept is in fact defined, and is actually still subject to ongoing discussions.  
Suggestion to include the MiFID-relevant reference in the definition (with consideration for a possible adjustment under the new MiFIR/D).
- Finally further definitions should be introduced, in particular we suggest: **Confirmation, Settlement, scheduling, nomination.**
- LNG is explicitly referred to in Section 2.1 under the proposed definition of '**Transportation**', both in the context of transportation stricto-sensu, and as LNG storage and facility services. Also in the definition of '**Market Participant Subject to Reporting Obligations**', reference is made to LNG in the context of LNG facility operators. However, in the Annex II and Annex III that contain detail of, respectively, the transaction records and the list of contracts to be reported, no further reference is made to LNG. This may lead to confusion. See also our answers to Question 4 and Question 5.  
Suggestion to clarify what specifically must be reported for LNG transactions, either by explicitly listing it or by making explicit reference to LNG when referring to natural gas ("natural gas, including LNG"), where appropriate.
- EFET sees no benefit in reporting confirmations as part of lifecycle events.

## **Question 2**

### ***What are your views regarding the details to be included in the records of transactions as foreseen in Annex II?***

General comments:

- irrespective of the standardised / non-standardised classification, all reporting of transaction data under REMIT should be proportional with, and restricted to the stated objective of REMIT i.e. allow monitoring of potential market abuse. In that context, we question the need for including a number of items such as - for example - those related to 'contract type' (e.g. items 15 through 19 in Annex II.1, and items 11 through 14 in Annex II.2).
- It is also potentially difficult to report the ultimate beneficiary of a transaction – this could be subject of further investigation by NRAs in the event a trade is identified as anomalous.

- Although we welcome the fact that a consistency check has already been made between the requirements of ACER for REMIT and the ones of ESMA for EMIR there is still additional work to do in this field. The comparison of the details foreseen in the two consultation papers of ACER and ESMA makes clear that the two authorities have to cooperate more closely on this subject, as the definitions of the ESMA details are in many cases slightly different from those proposed by ACER. Further ESMA asks for more details than ACER foresees. This could lead in the worst case to the necessity of double reporting, for example if a decision is made, that either ACER or ESMA is the leading data platform for all data but none of them can fulfil the tasks towards the other.
- Further ACER, contrary to ESMA, does not propose any formats for the details included in the ANNEX II. We strongly believe that these formats have to be coordinated between the two authorities, as well. Different formats would lead to different IT-requirements and thus possibly to different systems and/or additional effort and costs for implementation and operation.
- ANNEX II requires significant details to be defined on a harmonised way for all market participants. EFET has provided an Excel-File further detailed comments in this respect.
- Reporting all the steps of a transaction life risks increasing exponentially the amount of data ACER and NRAs have to deal with, given that changes can occur through the normal course of business before the transaction is finally settled. This life-cycle actually starts from the first order to trade to the final payment to or from the relevant counterparty. Various elements on the transaction can be altered over this period and if ACER requires the reporting of all changes, the only way to deliver this will be post settlement of the transaction. This will mean there can be no standard reporting timeframes as financial settlement periods vary for each transaction. In addition, trades can be altered post financial settlement, e.g. if trades are novated to a new counterpart and ACER needs to be clear that such amendments should also not be reported. EFET urges ACER to implement a 'one-shot' reporting requirement whereby companies report all of their standard transactions to the timescales envisaged and notify their relevant NRA of the number of trade amendments and novations every 6 months or so.
- Last but not least we would like to point out that the ANNEX II.1 is not adequate for the reporting of options, as it misses fields for the reporting of important data, such as strike price, execution date or schedule etc. Such data consider standard characteristics of an option product and are very important for any institution, which wants to understand the handling of these products and the way they influence the market or not. At this point we would like to mention again that the coordination between ACER and ESMA is of huge importance.
- With regard to the content of Annex II.1, transaction information items are mixed with orders information items. In case of orders to trade, items 23 and 25 are clearly needed from platform operators, but at the same time make it impossible to identify a 'other market participant' (item 4); in case the record

template does not contain 'logical checks' on information needed for transactions and on information needed for orders to trade, this will result in errors/omissions/contradictions.

Suggestion: segregate (standardized) transactions from orders to trade, and create another Annex II.1.a and as highlighted below reported directly by exchanges/platforms/3<sup>rd</sup> party service RRM.s.

- It is not clear to what extent LNG is included or not

***Do you agree that a distinction should be made between standardised and non-standardised contracts?***

We support the exclusion of non-standardised contracts from the standardised reporting obligation. In particular, it is not appropriate for companies to report the full contracts for these non-standard transactions which are generally of a long form nature. Of course, these contracts are kept on record and are available to NRAs on request and in the event of any investigation. If ACER decides that some contractual information must be reported on non-standardised transactions it is crucial that this remains limited to only basic prime economic terms that do not need to be updated. EFET's views on intra-group transactions are set out above.

***Do you agree with the proposal on the unique identifier for market participants?***

We support the introduction of a new global unique identifier for market participants (Legal Entity Identifier - LEI) as long as historical codes could be replaced by the new identifier over time. However, this transition must be managed carefully to ensure that the reporting arrangements are not undermined.

A key aspect of this will be the maintaining of public registers of codes. We agree with the proposal for a counterparty unique identifier but strongly advise that we use already existing industry used codes such as EIC for EFET net or LEI for DTCC reporting in the interim before any global code system is introduced.

In order to respond to the regulators' concern that different legal entities are created by the same group, we propose that all registered companies that fall under the same ultimate Group are also associated to a "Group identifier".

The introduction of a complete new counterparty code for ACER reporting (to identify market participants) should be avoided and will cause substantial cost for hundreds of firms across the EU. In order to avoid a proliferation of equivalent but incompatible or incoherent alternative schemes which would otherwise undermine the aim of a homogeneous data set, it is highly recommended to use the most widely used existing codes for counterparty identification in the European energy industry which are already utilised within existing data exchange standards: the EIC code (Energy Identification Code) for legal entity and delivery location identification in energy commodities, until a (cross-sectoral) global Legal Entity Identifier (LEI) code system is introduced and translated into business processes. We, therefore, support Option B as outlined in the



consultation document, provided unique identifier generated by ACER is aligned to the anticipated regulatory usage of the LEI.

In preparation for the anticipated regulatory usage of the LEI, firms should use for the time being existing codes as a business-driven solution widely accepted in the marketplace and actively consider how the LEI can be mapped to existing identifiers used in multiple internal business and compliance applications across the industry. Market participants' implementation and communication efforts should ultimately be limited to just one unique code for all regulatory reporting regimes.

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.

Finally, we would like to point out that ESMA's considerations in the consultation paper "Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories, Date: 25 June 2012" on this subject are slightly different than ACER's. We suggest that ACER coordinates with ESMA on this subject, so that market participants avoid the need to use different codes to fulfil the reporting obligations of different regulation regimes.

### **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 II.1 will be sufficient to capture the specificities of orders, in particular as regards orders for auctions?***

EFET agrees to the proposed way forward to collect orders to trade from exchanges and/or brokers.

EFET sees no a priori reasons to treat 'auction orders' different from 'regular orders' to trade.

Further, we would like to clarify ACER's statement with regards to orders to trade:

*“However, valid orders to trade are captured and stored in the market participant’s energy trading and risk management software, where they are typically organised in trading books.”*

This statement does not reflect the reality. Market participants do not generally capture systematically and store all orders in their energy trading and risk management software systems. Orders are normally captured and stored either in the systems of the trading venues or in the log-files of trading platforms for each individual company. At last, we would like to point out – cfr supra - that the reporting of orders should be done through a different table than the one foreseen under ANNEX II.1. As such, That’s ANNEX II, 1 should be split into two different tables: one for orders and one for transactions. In this case ACER would still be able to follow the execution of an order and the resulting transaction(s) through the reported time stamps.

#### **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.***

It is important to understand the nature of non-standardised transactions. By their very nature they are not standard products and therefore it is not appropriate to subject them to reporting regime for standardised transactions.

Such transactions are bespoke structured transactions that for example may include complex optionality in relation to volumes, interruptions, pricing, time spreads etc. 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 possible to report these contracts through the standardised reporting regime.

Under the Third Energy Package all firms must keep records of all transactions (including non-standardised transactions) for a period of at least 5 years. Regulators always have the right to request records from firms. As such, EFET does not support a requirement to report non-standardised transactions directly to regulators. However, if regulators decide they need greater visibility on non-standardised transactions one option would be for firms to report the number of transactions (and their counterparts) and volumes once a year.

If ACER decides that some additional information on non-standard transactions then further thought is needed on what information should be reported given the complex nature of these transactions. It is not acceptable that firms should submit their full contracts for non-standard transactions. For example, what happens as when changes in price and quantities impact the option values in transactions – do these

need to be reported? As explained above these are generally long form contracts and are always available on request from NRAs. EFET firmly believes that a reasonable and balanced position on the reporting of information on non-standard transactions is outlined in our answer.

#### **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?***

EFET is not fully convinced that information concerning scheduling/nomination are necessary for market monitoring mainly because the aggregation level applied by TSOs does not allow to link this information to transactional data. However, if ACER wants to collect information in relation to scheduling and nomination it agrees that TSOs (or third parties delegated by TSOs) can indeed provide for efficient data collection in this area.

It should however be made clear that in case TSOs or their delegated parties are used as a collection channel, this absolves the other Market Participants from their own responsibility vis-à-vis ACER regarding this matter, on condition that Market Participants provide the TSOs with all necessary information that is in line with the rules governing such information feeding to fulfill scheduling/nomination activities, i.e. Market Participants cannot be held responsible for reporting delays or errors of any kind that result from TSO actions. Market Participants should furthermore have access to the data that was submitted by the TSOs, so that they can follow what has been reported in their name and respond to questions that are directly posed back at them

EFET concurs with the suggestion to include the required information in a separate Annex II.3. Furthermore it should be investigated whether the formats provided by TSOs are sufficiently standardised.

Additionally, it should be made clear that information on scheduling of LNG cargoes and vessels at LNG facilities is not intended to be captured here.

## **Recommendation and questions**

### **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.***

### **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?***

EFET supports the idea of using a fairly general descriptive-by-characteristics list of contracts to be reported, however some clarifications are needed as regards to the list in Annex III. EFET would prefer that ACER keeps updated on its website the resultant list of reportable contracts and allows Market Participants a reasonable amount of time (e.g. 6 months) to make the necessary systems/process adjustments or make arrangements for reporting to be delivered through a third party once a new contract becomes reportable to ACER.

Comments on Annex III  
Section A

- (1) Suggestion to replace this by a single timeframe descriptive, 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." and hereby use the CPML standard
- (2) Suggestion to replace this by a single timeframe descriptive, 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." and hereby use the CPML standard
- (3) Suggestion to replace this by a single timeframe descriptive, 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.” and hereby use the CPML standard
- (4) The definition ‘two-days-ahead’ seems rather uncommon. A definition of ‘working days’, more common in gas markets, is instead missing. Suggestion to replace this by a single timeframe descriptive, 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.” and hereby use the CPML standard
- (6) Further clarification needed. In particular, it is unclear if the definition in (6) applies to both standard and non-standard contracts. Moreover it is not clear what is the definition of ‘long term’ since there is no reference to a time period. EFET suggests specifying that this covers contracts lasting more than the periods mentioned in (1) to (5). Additionally, LNG long-term contracts (and physical cargoes lifted there under) should not be regarded as “natural gas” for the purposes of Annex III. In our view the requirements to report “Regulated Information” relating to the capacity and use of LNG facilities is sufficient to provide reliable supply information regarding LNG.
- (7) Further Clarification needed, more specifically but not limited to:
- It is unclear the reason why there is a general reference to ‘commodity contracts’. Such a definition may include all commodities and we do not believe this is the intention. We suggest therefore replacing it with ‘electricity and natural gas contract’, in consistency with the scope of REMIT (cfr the reference to “points (4) to (10) of section C Article 1” of Directive 2004/39/EC (MiFID).
  - there is an overlap with (6), unless (6) would cover non-standard 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.

We agree finally 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.

#### Section B

EFET we believes that the title should be amended with the following: Capacity contracts for the transportation of natural gas or electricity in the Union. Indeed transportation contracts are capacity and not commodity contracts.

EFET supports the proposal to develop product taxonomy, whilst recommending to use existing practices to the large extent possible (eg CPML). EFET favours the idea to establish a list of wholesale energy contracts to facilitate data collection under REMIT with a phased approach. This taxonomy should provide for a category ‘Other’ enable the capturing of not yet labelled/defined products. EFET wants to emphasize



as well that it is unlikely that market participants will be able to easily incorporate this into their ETRM systems and that, therefore, there should be no reporting obligations placed on market participants in this regard.

EFET believes that standard wholesale products only should be reported – therefore balancing market transactions should only be reportable where they are classified as standard wholesale products.

## **Recommendation and questions**

***The Agency welcomes the views of the stakeholders on the above-mentioned options and will make its recommendations in the light of the responses received during the public consultation.***

### **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.***

EFET reaffirms the need for a clarification of the definition of market participants subject to the reporting obligation.

EFET generally prefers option A, since markets may be manipulated by all market participants, regardless their size. A threshold may be introduced only for pragmatic reasons (i.e. reduce the disproportional burden of market participants for trades of very small amounts traded bilaterally) and it should not discriminate between market participants. However we believe that platform operators should report all trades without any de minimis thresholds. We note also that the possibility, as suggested in the text, to have small participants' reporting done by third parties such as exchanges, is not consistent with the last sentence of the section 3.1.2 stating that : "In any case, any de minimis threshold should only apply if the market participant does not trade at organized market places."

On a side note to option A, EFET has doubts in relation to Article 9.1. of REMIT that specifies the need to register as a Market Participant only if they enter into reportable transactions. In this Question 7, the possibility is introduced to exempt certain parties from reporting obligations, and therefore implicitly from registration obligations, due to a threshold application.

Registration will yield a unique identifier to anybody who is registered and this serves as a token for other Market Participants that at least some minimal checks by ACER and/or NRAs are performed on the registered party. Lacking registration for exempt actors in the market, how can a registered Market Participant establish that his counterpart is bona fide exempt, and is not a rogue market actor?

EFET believes this is an argument in favor of option A (i.e. no thresholds), unless it is explicitly recognized that registration is a pre-condition to transact (as opposed to linking registration to reporting transactions)

**Question 8**

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

See Question 7



### ***Recommendation and questions***

#### ***Recommendation 4:***

***The Agency currently considers that records of transactions, including orders to trade, in standardised contracts should be reported through RRM's 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.***

### ***Recommendation and questions***

#### ***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.***

#### ***Question 9***

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

EFET agrees that, as explicitly allowed by REMIT, there should be a multi-channel approach to reporting of data to ACER. At the same time EFET recognizes that any entity reporting to ACER must be capable to doing so and be fully compliant with the reporting format and communication standards. EFET therefore generally support the concept of establishing RRM's and welcomes the clarification that individual market participants can chose to become RRM's for the purpose of reporting data to ACER rather than 'outsourcing' this to a third party RRM. However, it is crucial that ACER takes forward work now to clarify the process, timeframes, obligations and requirements for becoming an RRM. It is also crucial that ACER recognize an important distinction between RRM's that want to establish reporting services on behalf of 3<sup>rd</sup> parties and RRM's established by market participants for the sole purpose of reporting their own transactions (and possibly those of other Group entities) direct to

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

EFET would support the establishment of a public register on ACER's website of all third party service RRM so that firms choosing to outsource reporting can be assured that the relevant RRM has been approved by ACER.

It is also crucial that ACER gives further thought to the framework on data security and confidentiality aspects, responsibilities and liabilities, particularly relevant in case of possible failure in delivering the data by a third party service RRM or an exchange or broker. Firms should not be held liable for the failure of a third party service RRM/exchange/broker to report the required information to ACER.

We would like to point out that the operational requirements set to decide eligibility of a RRM under REMIT should be coordinated and harmonised with the operational requirements set by ESMA for the under EMIR obligatory trade repositories. ACER's opinion is that "ACER database will provide sufficient information to satisfy reporting under EMIR under a proposed direct link between the two databases". We welcome this approach, but we would like to refer to the differences between the details to be reported in the ANNEX II.1 of this consultation and the ANNEX I of ANNEX V of ESMA's consultation paper "Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories, Date: 25 June 2012". The details ESMA foresees are slightly different and more than the details foreseen by ACER (see attached excel-file).

#### **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?***

EFET strongly believes in maximum standardization of the process/format of data reporting, preferably based at maximum on CPML, to facilitate reporting. EFET recommends that standards are adopted by ACER, based on close consultation with market participants. The implementation planning of this standard should be phased and also based on consultation with market participants. The approach which applies 'classes of data' as a new concept however, needs to be more specified and defined.

#### **Question 11**

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

As explained above REMIT explicitly allows for market participants to report transactions directly to ACER. EFET recognises that ACER needs to be sure any entity reporting to it can deliver information using the required communication standards and protocols and as such a minimum set of tests/requirements should be fulfilled before a market participant can become an RRM. As explained it is crucial that these requirements are minimised and that a key distinction is drawn between RRM's that report on behalf of third parties and those that are established by market participants to report their own data (and possibly that of other Group entities).

### **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?***

EFET views on the reporting of non-standard transactions are outlined above.

The 'end-of-next-business-day' reporting deadline for standard contracts seems appropriate although it should be on a best endeavours basis with a final deadline of D+2.

This is on the provision that ACER defines 'execution' in a detailed manner (whereby the deadline is set to the end of month following the month of execution).

## ***Recommendation and questions***

### ***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.***

### ***Question 13***

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

EFET generally supports all endeavors to avoid double or overlapping reporting. The avoidance of double reporting must be a key driver in the design and implementation of the overall regulatory framework into which energy firms are scoped.

In this context it is e.g. not clear to EFET why the scheme on page 22 of the Consultation Document indicates that 'Trade Repositories' would have to report to ACER and also to ESMA, as there is a bi-directional data exchange arrow between ACER and ESMA. This appears inconsistent with the principle of avoiding duplicate data exchanges. Another missing definition is 'substantial part of the REMIT data requirements'.

Transaction reporting has the potential to become very complex and burdensome for non-financial companies. Alignment between trade data reporting obligations under REMIT and especially EMIR, but also Dodd-Frank Act and MiFID is of high importance. Non-financial firms have not been subject so far to detailed transaction reporting regimes (unlike financial firms), and implementation of the reporting obligations under EMIR and REMIT will involve significant development of the existing systems and possible implementation of new processes, IT architecture and agreements.

Given the complexity of the forthcoming obligations and in order to avoid any sort of duplication of reporting for companies subject to both EMIR, REMIT and possibly also MiFID, the relevant regulatory authorities must implement reporting requirements in the most coordinated way and allow an appropriate implementation period for non-financial companies. The content and format of reporting, as well as the reporting framework development and implementation timeframe must be coordinated with other relevant competent authorities and shall not lead to double reporting. In particular, we call upon ACER to work closely with ESMA, both in terms of a timetable for a consistent development and implementation of the reporting requirements and the format and content of these arrangements. This implies that market participants expect ESMA and ACER to reach specific agreements on the clear-cut definitions of common

trade repositories, common format and content of reporting, common ID for market participants.

We recommend that ACER hold joint workshops for this purpose with relevant experts from companies to help further develop the detailed reporting requirements under REMIT and EMIR. Consistency of format and codification schemes is essential if reporting complexity and costs are to be minimized and a single 'market dataset' (even distributed over multiple TRs) is to be established as a basis for consistent reporting across the various legislative packages (EMIR, REMIT and MiFID). Where possible existing open data exchange standards should be used as they comprise standardized, matching trade data already used within the industry to manage risk on a bilateral basis.

Once a comprehensive reporting regime is established under REMIT it should not be duplicated at a national level with additional transaction reporting obligations directly to NRAs

## **Recommendation and questions**

### **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).***

### **Question 14**

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

Agreed provided there is additional clarification on the organizational requirements and the remarks of Q11 are taken into consideration

EFET agrees with the proposed approach, including the broadly defined organizational requirements for RRM's, but refers to its answer under Question 9, 10 and 11 whereby, amongst other remarks, it was indicated that market participants should be offered the opportunity of an 'RRM light solution' if they want only report their own data (or that of other Group entities).

EFET would also support the establishment of a public register on ACER's website of all third party service RRM's so that firms choosing to outsource reporting can be assured that the relevant RRM has been approved by ACER.

It is also crucial that ACER gives further thought to the framework on responsibilities and liabilities which are particularly relevant in case of possible failure in delivering the data by a third party service RRM or an exchange or broker. Firms should not be held liable for the failure of a third party service RRM/exchange/broker to report the required information to ACER where these have been approved by ACER.

It is now crucial that ACER take forward as a matter of urgency defining the requirements for becoming a RRM – both direct reporting RRM's and third party service provider RRM's. This is important to allow market participants to take business decisions about how they want fulfill their reporting obligations under REMIT and for RRM's to be established.

**Question 15**

***In your view, how much time would it take to implement the above-mentioned organisational requirements for reporting channels?***

EFET estimates up to 18 months provided ACER publishes sufficiently detailed and finalized process, data and IT-related reporting specifications and the timing for when RRM's can be established. Implementation efforts should also be acknowledged for market participants (not only for RRM's).

## ***Recommendation and questions***

### ***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.***

### ***Question 16***

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

EFET does not generally support direct reporting of fundamental or published REMIT inside data where it is already published on a publically available website (centralised at a national or regional level). REMIT indicates that ACER and NRAs should make use of public sources of fundamental data (Article 8 Paragraph 5: “The reporting obligations on market participants shall be minimised by collecting the required information or parts thereof from existing sources where possible”). It is recognised that regulators need to have timely and effective access to fundamental data and inside information in order to monitor markets. EFET believes this can be achieved through reporting platforms that are centralised at the national level, and we encourage to allow TSOs for example to recover any efficient costs associated with providing national disclosure platforms for fundamental data.

There is also no single common standard/content at this stage for reporting fundamental data given its diverse nature. The development of a single standard would take significant time and expense and as such it would be more appropriate for ACER to gather information from existing regional platforms in order to avoid unnecessary costs and double reporting.

Direct reporting of inside information, on top of disclosure, will imply significant additional costs for market participants to develop information stream that already exists,).

In this context EFET wants to point out that lacking any publication initiative on a national or European scale, market participants have been under pressure to come up with an appropriate publishing forum for their inside information and the obvious response of using a (purposely built) corporate transparency website, in combination with using existing channels such as TSO websites, was the only available choice in order to meet the imposed deadline (December 28, 2011). Consequently, substantial efforts and money have been put into this solution. EFET notes that RIS, as referred to in section 4.2.1 are not yet operation on the energy scene, and their role at this time is purely hypothetical. The RIS mechanism therefore needs to be further defined and elaborated by ACER.

EFET believes therefore that centralised platforms for the publication of regulated information on gas and electricity markets are the most favoured outcome in the mid-



term. It should therefore be investigated whether the information stream relating to the publication of inside information cannot be automatically captured by ACER/NRAs from national and regional platforms so as to avoid unnecessary additional direct reporting by firms. This alternative way forward suggests that any RIS is used as an information aggregation platform only – extracting data from national transparency platforms (and individual company websites) and pulling this all into one place – where it can be accessed by ACER, NRAs and market participants. While this would not initially deliver standard messages for disclosing inside information it would provide a level playing field and allow NRAs and ACER an easily accessible platform where all disclosures of inside information and fundamental data are gathered together (i.e. an EU wide aggregating messaging board but not a direct publication route of inside information for firms).

With regard to the ‘Transparency Information’ as reported via 714/2009 and 715/2009, EFET would like to point out that there are very good reasons why this information is published on an aggregate basis, and such reasons 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 714/2009 and 715/2009 regulations; the ACER obligations, as written, will in fact 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 SOs.

### **Question 17**

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

EFET’s views on the reporting of regulated information direct to ACER are consistent with its views outlined above in question 16.

Regulated information is already published via TSO/SSO/LNG terminal forums (in aggregated form or not) and therefore is made available by market participants to TSOs/SSO/LNG Terminals in the context of 714/2009 and 715/2009. EFET is very concerned about multiple and substantially (but not totally) overlapping information streams to all these parties. The resulting overall operational burden, and the associated costs are heavy, and every reporting initiative adds one more layer to this.

As Art. 8.5 of the Regulation stipulates this information should preferably be collected from existing sources if possible, EFET believes that ACER should maximize its efforts to avoid asking market participants to initiate an additional information stream.

In conclusion, EFET believes that market participants themselves should only be the providers ‘of the last resort’ with regard to regulated data collection as referred to by Art. 8.5, and that all reasonable efforts must be made to avoid duplications and overlap in data-streams.

## **Recommendation and Questions**

***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.***

### **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?***

As explained above, EFET believes the eventual default arrangements for the collection of REMIT and other fundamental data should be through national (or regional) platforms. Some firms have chosen to disclose REMIT information on their own website, or through other channels, either because national or regional platforms do not exist or because they want certainty regarding control of the disclosure process. Careful consideration is needed as to how any RISs could be used to report information to ACER. As a first step, ACER needs to further define and elaborate on the RIS mechanism (cfr EFET's request concerning RRM). EFET believes, subject to its reservations on direct reporting of REMIT and fundamental data to ACER, an option for market participants to do so in case no RISs are available or a service is not available or withdrawn from the market.

Concerning the disclosure of inside information, if ACER final decision is that a platform approach is favored, compliance of the market participant with obligation of disclosing inside information should be guaranteed when it communicates it to the TSO/PX/other transparency platform. In other words, once communicated the inside information to the platform, it does not have to additionally publish on its website, nor to follow up and constantly check if the information has actually been published by the platform.

### **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.***

REMIT indicates that inside information needs to be disclosed if it is price significant. Price significance has to be determined by individual market participants (although ACER's guidance to NRAs on REMIT is a potential consideration in this respect). In



addition, obligations to publish fundamental data under the Third Energy Package or other relevant legal requirements could specify thresholds for information disclosure. EFET does not see a need for the establishment of additional thresholds.

## **Recommendation and Questions**

**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?**

Given the rather unclear process to report regulated information (using RISs or not, using existing platforms, 'directly' reporting into ACER), the timing impact on publication requirements is high. The priority for firms has to be the publication of inside information given the potential restrictions on traded activity. Where inside information is reported to a national or regional platform then as explained above an RIS could aggregate all such information and it make it available to ACER and NRAs and also to market participants to ensure a level field for transparency.

As explained above, in all cases ACER should collect both inside information and fundamental data from national or regional platforms where they exist – and company websites initially until such platforms are developed. EFET's strong view is that collation of such information can be readily delivered by a RIS on an automatic basis – rather than imposing additional direct reporting obligations on firms. This would meet the requirements of ACER to have all inside information and fundamental data ultimately in a single place.

If ACER needs to recognise that there will be some delays in the collation of such information even by a RIS aggregation platform – and these delays would be greater if ACET requires direct reporting by firms delays given the potential multiple steps in the reporting chain: 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.

The question is then what constitutes the limit of an acceptable delay for reporting.

If one accepts that published (inside) information is the most relevant in the context of price impact and that this information reaches the public and ACER in very little time (one hour at most, then at least technically, reporting such information should be feasible within (nearly) the same time-limit.

At the same time, given the lesser relevancy of non-published ('regulated') information with regard to price impact, EFET proposes. 2 working days.

EFET recommends that the appropriate frequency of reporting fundamental data should be established taking into consideration feasibility, practicality and historic reporting levels. We think that it should fit with current reporting procedures and systems as far as possible in order to keep costs at a reasonable level.