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European Commission initiative: Wholesale energy markets – improving EU protection against market manipulation

EPEX SPOT – Public & Regulatory Affairs
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EPEX SPOT position paper on the REMIT package – Feedback to Proposals

EPEX SPOT has been a supporter of a centrally coordinated European market surveillance system since its early inception and continue to deeply value REMIT's contribution to the transparency and integrity of European wholesale markets in electricity and gas. Given the lessons learnt from more than ten years of implementation, the evolution of the REMIT ecosystem and the energy markets themselves, we would welcome a targeted update of the Regulation on wholesale energy market integrity and transparency.

REMIT is a complex legislative framework which has been refined over the years through comprehensive and continuously updated ACER guidance. It has relied heavily on close cooperation with stakeholders and has grown into a highly specialised ecosystem. This complex system covers both spot markets, which are primarily used for the physical delivery of gas and power and the balancing of the grid, as well as certain financial instruments (i.e., gas and power derivatives), which are used by market participants to protect themselves against price fluctuations. While the Commission proposal in part aims to build on these improvements, we would like to call attention to several amendments which are inconsistent, reach far beyond the intended scope of REMIT or create unnecessary hurdles to trading on European wholesale energy markets.

1. Ensure clear definitions with no duplication of responsibilities

Recital 14 and Articles 2, 8, 13. EPEX SPOT is deeply concerned by the inconsistencies and potential overlap in the definitions of 'Market Participant', 'Organised Market Place' (OMP) and 'Persons Professionally Arranging or Executing Transactions' (PPAET). As PPAET are included in both the market participant definition as well as the OMP definition, OMPs could be considered as Market Participants. This would confer a number of responsibilities upon OMPs which would be highly inconsistent. The inclusion of the undefined term "shared order book providers" worsens the situation even further. In SDAC and SIDC there are no "shared order book providers" but only a set of NEMOs submitting their anonymised, aggregated orderbooks to the MCO-function systems. Besides the potential tripling of the data volume to be reported to ACER due to the new definitions, there might be significant competition risks if these entities will get access to non-anonymised data of competing OMPs.

We therefore strongly urge to ensure the definitions accurately reflect the responsibilities of each actor, stick to the original definition of Persons Professionally Arranging Transactions (PPATs) and to remove the term "shared order book providers" from the OMP definition.

As the new example for Inside Information is concerned (Article 2.1 (e)), we ask the Commission to recall that the definition of Inside Information is made of four cumulative criteria: Precise, not public, likely to significantly affect prices, and related to a wholesale energy product. Currently, paragraph (e) is drafted in a way that is not taking all criteria into account and therefore could be misleading. All four criteria should therefore be listed, otherwise the information cannot be defined as Inside Information.
Please be advised that the definition of MAR Article 7 (d), which supposedly served as a blueprint for the present amendment of REMIT, properly lists all four criteria. We believe it is important to be accurate in this case and add the fourth criteria.

2. Avoid double or triple reporting obligations

Article 8. Article 8.1a would directly lead to a duplication of data reporting as both market participants as well as OMPs would be obliged to report orders. This new Article would require OMPs to make order book data available to the Agency (or even provide access to it, on request), while market participants have the same obligation currently outlined in Article 8.1. Making order book data available to ACER essentially allows ACER to access data they have already received. Besides duplicating reporting requirements towards ACER, we believe there are further drawbacks of requiring order book data from OMPs. For example, it is unclear how this could be applied to OMPs outside of the EU and may result in ACER receiving an incomplete view of the market if market participants themselves were to no longer be responsible for reporting trade data. Furthermore, this article adds another layer of complexity without improving market surveillance in any measurable way. As a consequence, we strongly recommend removing the obligation for OMPs to report shared order book data.
As Article 8.5 is concerned, the proposal aims to extend the reporting obligation of market participants to national regulatory authorities besides ACER. We conclude that such an extension clearly infringes the general concept of REMIT ordering a reporting obligation to ACER, who is then in charge to disseminate information among national authorities. We see no reason to abandon this general rule on the present case.

Article 13b. The proposal extends the competence of ACER to request information from any person (i.e., including MPs, RRMs, OMPs, etc.) without clear limitation to avoid the pending threat of double reporting. We urgently require a safeguard to avoid such situations. We should therefore add a condition (f) to ensure and illustrate that the requested information could not be obtained by any other means and does not result in double reporting of data.

3. The introduction of new barriers for RRMs will add complexity without improving the market's transparency and integrity

Article 9a. Generally speaking, EPEX SPOT notes that a regulatory basis for RRMs is already in existence. We miss a reasonable explanation why the Commission considers the current setting not sufficient and how the proposed changes would address the identified shortcomings. Without this clear explanation, the overall assessment has to be negative as the proposal imposes additional rules, work and efforts without any visible benefit. We would welcome a more extensive discussion on this point.

Besides this general comment challenging the new Article 9a as a whole, we would like to present the following more specific concerns.

First, we find that the suggested new requirements for the authorisation and supervision of the Registered Reporting Mechanisms (RRMs) effectively act as a location policy given that third country based RRMs are not provided with any alternative means to become recognised and provide reporting services to EU customers. Hence, we suggest introducing third country access arrangements based on existing third country frameworks as in EMIR and the Benchmark Regulation (BMR) to ensure that EU customers are able to continue to benefit from using reporting services provided by third country RRMs.

Second, we are concerned about the proposed introduction of regular RRM activity reports that are disproportionate and will add significant cost. As a matter of fact, when initially registering with ACER, the RRM

already needs to submit complete documentation describing its activities. The RRM is further obliged to report any changes to ACER. Moreover, the Agency has the power to request additional information from a RRM at any time. Against this background, we see the introduction of regular RRM activity reports as an unjustified administrative burden. If adopted, these will have to be reflected in the cost of RRM services and consequently in the reporting fees. Further, is it unclear what information would be required in such reports and for what purpose which could hamper comparability between the reports and spawn an immense amount of data with no aim or ability to practically analyse and make use of it.

Moreover, EPEX SPOT recommends removing the need for regular reports and recommend that authorities file requests for information on a case-by-case basis, as needed, to ensure the information generated is directly applicable.

Further, the proposed text puts a requirement on RRMs to check the messages for errors caused by market participants. Such a requirement goes beyond the role of an RRM as a reporting mechanism, as there exists a large variety of contracts where their details depend on the specific setup of the market participant. We strongly ask to remove the requirement for RRMs to check for errors caused by market participants and maintain that market participants are responsible for their own errors.

Finally, the applications for the authorisation of RRMs will require significant analysis and preparatory work, whilst the more detailed requirements for RRMs would be established through level 2 legislation. To facilitate an orderly process for the authorisation and recognition of RRMs, we recommend grandfathering in currently registered RRMs for a one-year period, whilst establishing clear timelines for the application process.

4. PPAETs do not have the resources to monitor the disclosure of Inside Information

Article 15. Article 15 would add a new obligation for PPAETs to monitor the disclosure of Inside Information as defined in Article 4. Such obligation is not in line with the existing obligation to monitor orders/transactions. Inside information is not at all connected with transaction data and, moreover, some PPAETs do not have access to Inside Information Platforms (IIPs) to monitor such data. While some OMPs also operate an IIP, this is generally not the case for PRAETs, and this obligation may trigger substantial costs for obtaining automated access to all possible IIPs for every PPAET. Further, OMPs would need to establish the necessary infrastructure to monitor Inside Information. As the same monitoring is already done by NRAs, we believe it will lead to an unnecessary duplication of efforts for little benefit.

Aside from access to IIPs, further difficulties for PPAETs to monitor the disclosure of Inside Information arise from the fact that it is impossible to know if published Inside Information is connected to a transaction at a given PPAET in predominantly portfolio-based markets. Additionally, one market participant may trade at several PPAETs which exacerbates the uncertainty over who is responsible for monitoring and the complexity for PPAETs to monitor. Against this background, such an obligation would involve substantial monitoring efforts in terms of human resources and development resources for PPAETs for little gain as breaches to Article 4 are already monitored by NRAs.

As an example, late disclosure of information by a participant in the electricity market may constitute a breach of Article 4. The responsibility to detect it will lie on all PPAETs active in the given bidding zone in which a market participant may have traded (including financial exchanges, NEMOs, TSO(s), brokers) and the NRA. This will

generate a stream of Suspicious Transaction Reports (STRs) that will need to be processed and will require significant resources by the NRAs and ACER.

EPEX SPOT strongly urges co-legislators to remove the responsibility for PPAETs to monitor the disclosure of Inside Information as this would lead to multiple reporting streams which will generate a large amount of unnecessary data, raising both costs and complexity.

5. Other amendments

Articles 9. We propose to delete the reference to 'office', which is quite unclear as the term does not seem to be defined in any EU legislation.
If the interpretation of 'office' is meant to require having any form of legal entity/branch in the EU, that would have consequences on market participants (e.g., cost to establish a new entity/branch, tax, etc.) which may reduce their appetite to provide gas/power to the EU. Ultimately the proposed regime is likely to negatively impact competition, in particular by limiting access of smaller market participants to the EU market. It might also affect the final volume of energy, which can be delivered to the EU negatively.

Articles 12, 17. We understand that the possibilities and competences of ACER to publish collected data shall be extended and agree that a set of essential, basic data might be published.
However, we also note that the confidentiality of market data related to market places shall be reduced significantly. Market places, RRMs and IIPs shall no longer be entitled to claim that certain data is considered commercially sensitive or to make use of data-protection rights. Please note that market places, RRMs and IIPs also operate in a competitive setting; consequently, there are cases that certain information should not be made accessible to their competitors (e.g., market shares). Against that background, we do not agree to remove the reference to sensitive information for these players in its entirety.

As regards, Article 12.2, we request to delete that last sentence for the above stated reason. In addition, we would like to stress that the wording of this sentence is rather paradoxical. Stating that applicable laws shall not apply does not appear to be a meaningful approach anyway.

As regards Article 17, we propose re-inserting the reference to market places again.

6. Opportunities for further improvement

Beyond the tabled proposals, a number of low hanging fruits remain unaddressed which could significantly improve the ability of REMIT to function as a tool for market monitoring. One aspect that we believe needs urgent regulatory attention is reaching more clarity on the consistent and systematic monitoring of cross-zonal transmission capacity. Transmission capacities are paramount for price formation and even a minor capacity reduction in one Market Time Unit (MTU) can lead to a major price impact on the market. Withholding transmission capacity is explicitly mentioned in Recital (13) of REMIT and in subsequent ACER Guidance as a form of market manipulation. In practice, however, there is no clarity which entity is responsible for monitoring if the transmission capacity provided in every MTU corresponds to the actual available capacity and is not unduly limited. This means that there likely exist breaches of REMIT in the provision of transmission capacities, e.g., through illegitimate capacity withholding, left undetected and with a significant impact on price formation.

Providing actual available transmission capacity should be explicitly covered in REMIT and the monitoring of it should be clarified. We find that the 70% minimum target for transmission capacity made available for cross-zonal trade is not an appropriate indicator and proactive monitoring is urgently required. The experience of our members from conducting day-to-day market surveillance shows this is a real problem which has a large market impact and requires urgent legislative and regulatory attention. A clear definition that explicitly includes the responsible entity for transmission capacity monitoring should be included in the REMIT review, not only limited to a recital but in the main body of the legal text. Further technical details could be clarified in the REMIT Implementing Regulation and additional ACER Guidance. In the short term, further harmonisation among NRAs could partly improve this issue within the existing legal framework. However, ultimately ACER is best positioned to monitor available cross-zonal transmission capacity at European level.

Additionally, we believe that more transparency regarding REMIT enforcement decisions is needed. Publishing detailed case descriptions (also) in English will improve monitoring by Persons Professionally Arranging Transactions (PPATs) and compliance by Market Participants.

Overall, we share the view that reopening REMIT could help futureproof the regulation and build on practical experiences since its adoption. However, **overhauling the fundamentals is not a productive step forward**. We urge the co-lawmakers to take the necessary time to fully understand the complexity of this file and seek the viewpoints of stakeholder who have worked closely with ACER to tailor REMIT into the tool it is today.

Proposed amendments

1. Recital 14: Ensure clear definitions	Persons professionally arranging ~~and executing~~ transactions have the obligation to report suspicious transactions in breach of the provisions on insider trading and market manipulation. To enhance the possibility of enforcement of such breaches, the persons professionally arranging transactions should also have the obligation to report suspicious orders and potential breaches of the obligation to publish inside information. ~~Direct electronic access providers and shared order-book providers should be considered as persons professionally arranging transactions.~~
1. Article 2: Ensure clear definitions	"(1) (e) information conveyed by a client or by other persons acting on the client's behalf and relating to the client's pending orders in wholesale energy products, which is of a precise nature, relating directly or indirectly, to one or more wholesale energy products and which, if it were made public, would be likely to significantly affect the prices of those wholesale energy products.";
1. Article 2: Ensure clear definitions	"(7) 'market participant' means any person, including transmission system operators and ~~persons professionally arranging or executing transactions when trading on their own account~~, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets;";
1. Article 2: Ensure clear definitions	"(8a) 'person professionally arranging ~~or executing transactions'~~ means a person professionally engaged in the reception and transmission of orders for, or in the execution of transactions in, wholesale energy products;";
1. Article 2: Ensure clear definitions	"(20) 'organised market place' ('OMP') means an energy exchange, an energy broker, an energy capacity platform or any other person professionally arranging ~~or executing transactions~~, ~~including shared order book providers but excluding purely bilateral trading where two natural persons enter into each trade on their own account.~~
1. Article 8: Ensure clear definitions	"(d) an organised market place, a trade-matching system or other person professionally arranging ~~or executing~~ transactions;"
1. Article 13: Ensure clear definitions	"1. […] Where appropriate, the national regulatory authorities may exercise their investigatory powers in collaboration with organised markets, trade-matching systems or other persons professionally arranging ~~or executing~~ transactions as referred to in point (d) of Article 8(4).";
1. Article 13: Ensure clear definitions	"5. The Agency may exercise its powers to ensure that the obligations set out in Article 15 are met where the persons are professionally arranging ~~or executing transactions~~ on wholesale energy products for delivery in at least three Member States.
2. Article 8: Avoid double or triple reporting obligations	~~"(1a) For the purpose of reporting records of transactions, including orders to trade, entered, concluded or executed at organised market places, those market places shall make available to the Agency data relating to the order book or, upon the Agency's request, give the Agency access to the order book so that it is able to monitor trading.";~~
2. Article 8: Avoid double or triple reporting obligations	"5. Market participants shall provide ACER ~~and national regulatory authorities~~ with information related to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities, and with inside information publicly disclosed in accordance with Article 4, for the purpose of monitoring trading in wholesale energy markets. The reporting obligations

	on market participants shall be minimised by collecting the required information or parts thereof from existing sources where possible.”;
2. Article 13b: Avoid double or triple reporting obligations	“1. At the Agency’s request any person shall provide to it the information necessary for the purpose of fulfilling the Agency’s obligations under this Regulation. In its request the Agency shall: (a) refer to this Article as the legal basis for the request; (b) state the purpose of the request; (c) specify what information is required, and following which data format; (d) set a time-limit, proportionate to the request, within which the information is to be provided; (e) inform the person that the reply to the request for information shall not be incorrect or misleading;~~.~~ (f) ensure and illustrate that the requested information could not be obtained by any other means and does not result in double reporting of data;”
3. Article 9a: Avoid new barriers for RRMs	**[challenging the entire Article 9a]**
3. Article 9a: Avoid new barriers for RRMs	~~“2. The Agency shall regularly review the compliance of RRMs with this Regulation. For this purpose, RRMs shall report on an annual basis about their activities to the Agency.”~~
3. Article 9a: Avoid new barriers for RRMs	“3. RRMs shall have adequate policies and arrangements in place to report the information required under Article 8 as quickly as possible, and no later than within the timing laid down in the implementing acts adopted pursuant to paragraph 5 of this Article. RRMs shall operate and maintain effective administrative arrangements designed to prevent conflicts of interest with its clients. In particular, an RRM that is also an OMP or market participant shall treat all information collected in a non-discriminatory way and shall operate and maintain appropriate arrangements to separate different business functions. RRMs shall have sound security mechanisms in place designed to guarantee the security and authentication of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage, maintaining the confidentiality of the data at all times. The RRM shall maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at according to the timing laid down in the implementing acts adopted pursuant to Article 8(2) and (6). ~~RRMs shall have systems in place that can effectively check transaction reports for completeness, identify omissions and obvious errors caused by the market participant, and where such error or omission occurs, to communicate details of the error or omission to the market participant and request re-transmission of any such erroneous reports.~~ RRMs shall have systems in place to enable the RRM to detect errors or omissions caused by the RRM itself and to enable the RRM to correct and transmit, or re-transmit as the case may be, correct and complete transaction reports to the Agency.”
3. Article 9a: Avoid new barriers for RRMs	~~“5. The Commission shall by means of implementing acts specify : (a) the means by which an RRM shall comply with the information obligation referred to in paragraph 1; and (b) the concrete organisational requirements for the implementation of paragraphs 2 and 3.~~

	~~Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 21(2).";~~
4. Article 15: PPAETs lack resources to monitor the disclosure of Inside Information	**Obligations of persons professionally arranging ~~or executing~~ transactions** Any person professionally arranging ~~or executing~~ transactions in wholesale energy products who reasonably suspects that an order to trade or a transaction, including any cancellation or modification thereof, might breach Article 3~~, 4~~ or 5 shall notify the Agency and the relevant national regulatory authority without further delay. Persons professionally arranging ~~or executing~~ transactions in wholesale energy products shall establish and maintain effective arrangements and procedures to: (a) identify breaches of Article 3~~, 4~~ or 5 ; (b) guarantee that their employees carrying out surveillance activities for the purpose of this Article are preserved from any conflict of interest and act in an independent manner.”;
5. Article 9: Registration of market participants	“1. Market participants entering into transactions which are required to be reported to ACER in accordance with Article 8(1) shall register with the national regulatory authority in the Member State in which they are established or resident. ~~Market participants resident or established in a third country shall declare an office , in a Member State in which they are active and register with the national regulatory authority of that Member State.~~”;
5. Article 12: Confidentiality	“2. Subject to Article 17, ACER may decide to make publicly available parts of the information which it possesses, provided that commercially sensitive information on individual market participants or individual transactions or individual market places are not disclosed and cannot be inferred. ~~ACER shall not be prevented from publishing information on organised market places, IIPs, RRMs according to applicable data protection laws.";~~
5. Article 17: Confidentiality	“3. Confidential information received by the persons referred to in paragraph 2 in the course of their duties may not be divulged to any other person or authority, except in summary or aggregate form such that an individual market participant or market place cannot be identified, without prejudice to cases covered by criminal law, the other provisions of this Regulation or other relevant Union legislation.”;

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