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EFET request to ACER for initial high level guidance on certain aspects of REMIT implementation

Introduction

The new EU Regulation for Energy Market Integrity and Transparency (REMIT) is expected to 'go-live' in December 2011 (20 days after it is published in the EU Official Journal). REMIT sets out rules and requirements in relation to insider trading and market abuse, defines what constitutes inside information and imposes disclosure obligations for this information. It also imposes transaction and order reporting obligations on firms and requires that all market participants participate in a registration scheme with its national regulatory authority. The purpose of this letter and the annexed paper is to outline the immediate Day 1 challenges faced by industry and regulators and where possible to try to offer practical and implementable solutions for Day 1 compliance. With this in mind comments are not included on the longer term transaction and order reporting requirements of REMIT, the registration process or the definition of market manipulation.

EFET supports the introduction of REMIT and actively contributed to its legislative development. Its successful implementation will help ensure integrity and transparency across EU wholesale power and gas markets.

It is important that all relevant firms can take practicable steps to implement REMIT. However the uncertainty for businesses (both asset and non-asset based trading companies) inherent under REMIT in the absence of regulatory guidance may hinder effective REMIT implementation, in particular with respect to disclosure of inside information, and may lead to the development of inefficient compliance systems and processes.

We believe initial high level guidance from ACER is needed to ensure efficient and appropriate REMIT implementation. ACER guidance will also be crucial in ensuring an

orderly implementation of REMIT and should help facilitate a common EU approach to implementation issues by national regulatory authorities.

EFET strongly supports the need for initial high level guidance from ACER before REMIT enters into force, especially in the following areas:

- the definition of inside information what is considered precise and likely to be significant, and, on significance, what is an appropriate approach for disclosure of inside information in a power or gas context;
- progressive implementation towards 'near real time' disclosure of inside information; and
- appropriate publication routes for inside information.

Further detail on each of these areas is set out in the paper attached as Annex 1 to this letter. If you have any questions on this letter or the annexed paper, please do not hesitate to contact Karl-Peter Horstmann (karl-peter.horstmann@rwe.com), Cemil Altin (cemil.altin@edftrading.com) or Barry Shackleton (barry.j.shackleton@exxonmobil.com).

EFET looks forward to the workshop on 28 November and further discussion towards development of ACER's initial high level guidance.

Yours sincerely,

On behalf of the European Federation of Energy Traders (EFET)



Jan van Aken

EFET Secretary General

Annex 1

Issues for ACER Initial High Level Guidance on REMIT Implementation

Disclosure of inside information

Information to be disclosed under Regulations (EC) No 714/2009 and (EC) 715/2009

At this stage one of the key transparency building blocks that will underpin REMIT's application to power markets – the proposed ERGEG Guidelines on Fundamental Data Transparency in Electricity (the Electricity Transparency Guidelines) – have yet to be agreed through the EU comitology process. This means any new transparency requirements in power may not enter into force before end of 2013 which will be well after REMIT enters into force (as expected) in December 2011. In addition, there are no additional transparency requirements for gas production under the Third Energy Package.

This means that there is at best considerable uncertainty as to the disclosure obligations for fundamental data going forward in power generation and gas production. This impacts the ability of market participants to put in place arrangements for disclosing inside information under REMIT and threatens convergence towards a consistent, and coordinated, level of disclosure. This also potentially creates significant inefficiency as the arrangements and processes for publishing inside information should effectively be the same for obligations to disclose information under both the Third Energy Package and for REMIT.

EFET recognises that REMIT requires public disclosure of precise information which, if it were made public, would be likely to significantly affect the prices of relevant wholesale energy products before a market participant trades using such information, except under certain circumstances as outlined in Articles 3(4)(a) and (b). This effectively means that market participants will need to disclose information much closer to 'real time' in order not to face delays in their trading activities or have in place effective information barriers. Moving towards near real time disclosure of inside information across the EU is a significant challenge for many firms involving changes in processes, IT systems, and certain contractual arrangements may also need to be reviewed, consulted upon and updated accordingly to accommodate new inside information publication obligations.

The proposed Electricity Transparency Guidelines suggest that electricity market participants should disclose changes in planned availability and unplanned outages within 1 hour of their occurrence. EFET believes that compliance against these aspects of the proposed Electricity Transparency Guidelines (when they becoming legally binding) are helpful and offer a point of reference or benchmark for firms in achieving compliance

against REMIT (in terms of the requirement for effective and timely disclosure of inside information).

In the absence of disclosure obligations for gas production under the Third Energy Package similar considerations should be taken into account in relation to determining effective and timely disclosure of inside information under REMIT, recognizing potential temporal differences between the markets.

The existing requirements under Regulation (EC) No 715/2009, the Guidelines of Good Practice for Storage System Operators (GGPSSO), and the Guidelines of Good Practice on Third Party Access for LNG System Operators (GGPLNG) similarly offer assistance and a starting point, in conjunction with Article 2(1)(b) of REMIT, in the absence of other guidance, in interpreting in a gas context what is required in practice by the obligation to publish inside information in an effective and timely manner under REMIT.

Definition of inside information

Information used by reasonable market participants

Paragraph (d) of the definition of inside information indicates that other information (that is precise and likely to significantly affect wholesale energy product prices) that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction should also be classified as inside information. This limb of the definition of inside information provides little clarity to market participants or regulators as to what information would, in practice be covered by it (given the need to judge what information another market participant may use), and EFET believes that the information used by reasonable market participants as the basis for decisions to enter into transactions is essentially already covered under paragraphs (a) to (c) of the definition of inside information. As such, this should define the scope of what is routinely disclosable as inside information (where it is price significant) under REMIT. This will help ensure that firms that own or operate physical assets can maintain an efficient and effective hedging and optimisation process which will not undermine market liquidity. EFET would welcome if ACER could give guidance also on paragraph (d) with the aim to facilitate greater legal certainty for firms.

Precise information

The nature of information can change over time so that, for example, an initially qualitative view that a facility could be subject to longer maintenance than originally anticipated could transform into a firm decision/change to the facility's availability forecast. The question is at which point the information becomes precise (and therefore potentially inside information if it is likely to significantly affect wholesale energy product prices). EFET does not believe that it is possible or desirable for ACER to issue guidance to determine the boundary between precise and imprecise data. Market participants and other entities subject to REMIT should (where such practices have yet to be established) develop an assessment of the information to be published in relation to planned and unplanned outages taking into account the best available information to them.

Own Plans and Trading strategies

REMIT also indicates (in Recital 12) that information regarding a market participant's own plans and strategies for trading should not be considered as inside information.

Recitals are intended to give context and direction in the interpretation of the main legal text (including potentially in a court of law). REMIT does not define what constitutes plans and strategies and, in order to provide some guidance to market participants and other entities subject to REMIT it may be useful for ACER to clarify that the following does not constitute inside information:

- hedging and optimisation strategies;

- origination or structured deals; and
- proprietary models and systems.

Conclusion on the definition of inside Information

The consequence of this interpretation of the definition of inside information under REMIT is that **the scope or perimeter of inside information** to be routinely disclosed should be precise information likely to significantly affect wholesale energy product prices relating to:

- the existing requirements for information disclosure within Regulation (EC) Nos 714/2009 and 715 /2009, GGPSSO and GGPLNG;
- the proposed requirements of ERGEG's Electricity Transparency Guidelines;
- changes to availability due to planned outages in aggregated or disaggregated form to the extent existing arrangements allow for this to be published without breach of contract or competition law;
- unplanned outages in aggregated or disaggregated form to the extent existing arrangements allow for this to be published without breach of contract or competition law; and
- existing installed capacities for power.

EFET sees no need for ACER to urge the establishment of 'Chinese Walls' within firms as all markets participants will have access to the same price significant inside information that should be disclosed under REMIT although it should recognise that some firms may chose this route.

Determining a threshold to help assess price significance under REMIT

The proposed Electricity Transparency Guidelines suggest, for the efficient functioning of wholesale electricity markets, that disclosure of changes in planned and unplanned availability of all generation units that equal or exceed 100MW – with a change of availability of at least 100MW lasting for at least 1 hour.

No similar threshold exists in a gas context and, in order to help ensure consistent implementation of REMIT, it would be helpful if ACER recognises the need for a disclosure threshold in gas production and provides guidance on the way it could be assessed to allow for a consistent application across the EU.¹

EFET believes a pragmatic and balanced approach be sought to facilitate compliance and clarity for market participants. For example a simple de minimis threshold below which facilities would not be subject to inside information disclosure would be useful as would some indication or guidance to market participants around what scale of event would be likely to significantly affect wholesale energy product prices. Whilst this need not be definitive guidance in the form of a single price significant threshold, we recognize that the diversity of market conditions may preclude even this. In that case some examples by way of guidance would at least allow gas market participants and other entities affected by REMIT to draw their own conclusions for internal compliance purposes using a common starting point on which to base those compliance assumptions.

¹ For example, an absolute threshold may not be suitable as the size of national gas markets varies significantly across the EU and as such it may be more appropriate to define the threshold on the basis of a percentage of end user demand.

Publication Routes for Inside Information

A number of potential publication routes can be envisaged for disclosure of inside information, which should all be deemed to be in compliance with REMIT requirements: individual TSO website (or website operated by ENTSO-E or ENTSO-G), an EU transparency platform or individual company websites, etc. Whichever route is chosen it is important that disclosure of inside information enhances the level of transparency across the EU and does not distort the dissemination of information. For example, access to inside information that has been disclosed should be non-discriminatory, available free of charge, in a user-friendly and quantifiable manner and, where appropriate, in a downloadable format that allows for quantitative analysis. The information should also be published in the official language(s) of the relevant Member State and in English. It is also crucial that any multiple user platforms put in place are very robust so that entities using them can have confidence that the chosen route for disclosure of inside information (and access to published information) will always be available.

Consideration should be given to situations where complex facility ownership arrangements exist. There is a strong case for taking a coordinated approach in these circumstances, perhaps through the facility operator publishing the relevant information in aggregated form on behalf of the owners, to avoid any risk of publication of inconsistent or misleading information and excessive compliance costs through an inefficient and uncoordinated approach to publication of inside information.

Clearly where this approach is taken entities should be allowed sufficient time, as part of steps for implementing REMIT, to put in place arrangements for disclosing inside information that meet ACER's objectives and that avoids the incurrence of stranded costs. ACER should therefore clarify if it has preferences for how inside information should be made public including the option for a firm to publish this information on its own webpage. It should also be possible for a firm to voluntarily publish additional fundamental data to that outlined above if that fits better their specific needs.