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**RE: German Draft Law concerning the Establishment of the Market
Transparency Agency – Infringement of REMIT**

Dear Mr. Lowe,

The European Federation of Energy Traders (EFET)¹ would like urgently to draw your attention to the draft law recently approved by the German government and sent to the German parliament, which provides for the establishment of a German Market Transparency Agency (Markttransparenzstelle). This national initiative overlooks EU legislation already addressing potential market abuse and market transparency in the power and gas sectors and calls into question the implementation of harmonised EU-wide market abuse and transparency standards. Given that no further national legislation is outstanding, the German initiative nonetheless de facto transposes a European regulation, which is binding in itself without transposition in all EU Member States, and thereby creates an additional regulatory framework.

¹ The European Federation of Energy Traders (EFET) promotes and facilitates European energy trading in open, transparent and liquid wholesale markets, unhindered by national borders or other undue obstacles. EFET currently represents more than 100 energy trading companies, active in over 27 European countries. For more information, please refer to: www.efet.org.

EFET has played a key role in advocating enhanced transparency in wholesale energy markets. We have been the original proponents of publication of detailed data about the use and availability of physical infrastructure in the power sector. More recently we supported the European Commission as it developed its Regulation on Energy Market Integrity and Transparency (REMIT). EFET welcomes the establishment of a comprehensive EU market integrity framework for wholesale energy markets, governing market participants located within and outside of the EU. Given the overall benefits of the market misconduct rules on EU level, EFET is deeply concerned about the plans of the German government to establish a separate reporting mechanism for transaction and fundamental data.

The Cabinet of Germany has resolved upon the establishment of the Market Transparency Agency (Markttransparenzstelle) on 2 May 2012. The draft law proposed by the Cabinet provides for a new agency, to be organised as a department of the Federal Cartel Office, empowered to conduct a “continuous monitoring” of wholesale gas and electricity trading. The draft law foresees a comprehensive list of transaction and fundamental data which the Market Transparency Agency has the discretion to request. All detailed measures are to be developed in an act by the Market Transparency Agency or a statutory instrument by the Federal Ministry of Economic Affairs.

To ensure that REMIT provisions on data collection are applied in a coordinated way across the EU, ACER is currently setting up a comprehensive data reporting framework under REMIT- a transactions register - envisaging the identical data coverage and granting access rights to NRAs. **EFET, therefore, perceives no practical or legal excuse for the German government to establish a separate German institution to specify and handle transaction-related and asset-related data of the power and gas market.**

In our view the German Ministry significantly underestimates the reporting complexity, timeframe and implementation costs the market participants would have to confront to meet the new reporting requirements under the proposed German law. Retrieving all information according to the definitions provided and implementing the necessary interfaces necessitates a complex and expensive project for all affected companies which are trading gas and/or electricity in Germany (in fact some provisions also indicate that activities of companies outside Germany could fall under these continuous reporting obligations). These costs are equally not justifiable for the purpose of any reporting system which might be contemplated in the interim until the REMIT reporting scheme goes live.

In addition to the main concerns outlined above, we have assembled a number of specific criticisms on legal grounds levelled at the German legislative proposal (see **Annex**).

The matter requires immediate response at EU level. The German Parliament will decide upon the draft law shortly. **We therefore call upon the European**

Commission to take urgent action and liaise with the German government in a prompt manner to ensure that the draft law is fully compatible with the European legislation.

We look forward to hearing from you soon. In the meantime, if you have any questions about the content of this letter please contact Jan Haizmann (Chairman of the EFET Legal Committee), Karl-Peter Horstmann (RWE Supply & Trading) or Cemil Altin (EDF Trading)² who are Chair and Vice-Chair respectively of the EFET Task Force Market Supervision.

Yours sincerely,

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



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Annex: Legal assessment of German draft law concerning the Establishment of the Market Transparency Agency

The main provisions of the draft law regarding the reporting of transaction data and fundamental data can be summarised as follows:

- The draft law obligates traders, generators and trading platforms to submit data [Section 47e(1)].
- The obligation covers, amongst others, transaction data and fundamental data [Section 47e(2)].
- Data must be provided directly to the Market Transparency Agency, on a continuous basis. [Section 47e(3)]
- The reporting obligation “*shall be deemed to be fulfilled if the (responsible person) has reported the required or requested information, pursuant to Article 8 of Regulation 1227/2011 (EC) and if it is ensured that the Market Transparency Agency will have prompt access to the information*” [Section 47e(4.1)].
- All detailed measures are to be stipulated either in a statutory instrument from the Federal Ministry of Economic Affairs [Section 47f] or in an act by the Market Transparency Agency [Section 47g]
- The German Ministry of Economic Affairs shall define the reporting obligations in more detail “*taking into account the requirements of implementing acts according to Article 8(2) or (6) of of Regulation 1227/2011 (EC)*”. [Section 47f].

Implementation of the proposed German legislation would in the view of EFET violate the recently enacted REMIT:

- (1) **National policy objectives cannot justify a national German reporting mechanism for transaction data and fundamental data.** Article 7(2) provides that the national regulatory authorities may monitor the trading activity on the national level. To this end, national regulators may collect supplemental data³, but not the data already collected under REMIT. A key objective of REMIT is to put an end to multiple and diverging national reporting obligations by ensuring uniform criteria and a single EU reporting standard. Besides deviating from European provisions, intended to pave the way for greater transparency and clearer regulatory oversight, the German approach would duplicate the effort and thus massively increase

³ Recital 17 clarifies: “*The collection of data by the Agency is without prejudice to the right of national authorities to collect **additional data** for national purposes.*”

the cost of compliance for all affected parties. This does not seem an efficient approach.

(2) **The German draft law does not take into account the supremacy of Union law:** In order for the German legislation to be compliant with superior EU legislation, it is necessary to await detailed implementing acts to be issued by the European Commission under REMIT.

- Firstly, the mere implementation of duplicated national reporting regime constitutes an infringement of European legislation since **the European Regulation is meant to be the sole legal basis for the submission of transaction and fundamental data (inside information) throughout the EU.** Alternative or parallel national submission obligations are not in order, nor is a separate national implementation of REMIT foreseen as necessary.
- Secondly, **in practical terms participants on the German market will be subject to two different sets of reporting requirements for fundamental data and transaction data,** since the definitions would not be identical which creates risk of double reporting.

The draft law provides that the national reporting obligations under certain circumstances can be deemed fulfilled if a company has reported the same information to ACER (Section Section 47e(4.1)). In other words, should the Ministry of Economic Affairs or the Market Transparency Agency define the specification for transaction or fundamental data differently from ACER, the information required under the draft law would not be submitted to ACER, thereby leaving the German obligation unaffected.

It is worrying to note that the draft law does not prescribe the definitions in the proposed German law to be aligned with the REMIT definitions, Notwithstanding a caveat that the Ministry of Economic Affairs is expected to take “*into account*” the REMIT definitions stipulated by implementation acts” (Section 47f), the Market Transparency Agency has no responsibility whatsoever to consider the ACER definitions when detailing the reporting obligations under Section 47g. Section 47g(2), for instance, specifies that power plant and storages with a capacity of **more than 10 Megawatt** shall report fundamental data (regardless of the 100 Megawatt threshold defined by the ERGEG advice for fundamental data transparency).

- Thirdly, under the draft law market participants will only be spared from the obligation if it is **ensured** that the information provided to ACER **reaches the Market Transparency Agency.** However, under the REMIT regulation market participants are not responsible for the communication channels between ACER and the national authorities (a

process the market participant has absolutely no influence upon whatsoever). Given that REMIT only foresees data submission to ACER, any technical or organisational issues preventing submission of data to the national regulators must not affect the market participants' status.

In conclusion, the draft bill **infringes** the recently enacted EU REMIT Regulation. The content and process of data submission proposed under the German law must be **drastically reviewed and at a later stage, would need to be adjusted** to take account of EU implementing acts on transaction reporting. Any necessary national measures should therefore follow the REMIT schedule, rather than anticipate it.