

# EFET

## European Federation of Energy Traders

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## Guidance Notes

to the

### REMIT Reporting Agreement (Tripartite and Bilateral) (version 1.0 / 9 June 2015)

**I. Introduction:** The tripartite and bilateral forms of REMIT Reporting Agreement (version 1.0/9 June 2015), as published on the [EFET web page](#) on 10 June 2015 (together the “**REMIT Reporting Agreements**” and each a “**REMIT Reporting Agreement**”), were developed by a working group comprised of EFET Legal Committee member company representatives, Joint Energy Association Group (“**JEAG**”) member representatives, LEBA member representatives and EFET’s counsel (the “**Working Group**”).

Unlike EFET General Agreements, the REMIT Reporting Agreements do not follow the format of a standard pre-printed form that is not intended to be amended with an elective schedule to incorporate any amendments to that standard form. It is expected that parties to the REMIT Reporting Agreements will amend and tailor the main body of the agreements.

The REMIT Reporting Agreements were developed in response to the implementation of regulatory requirements imposed by Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (“**REMIT**”). The REMIT Reporting Agreements aim to facilitate compliance with certain REMIT-related requirements and obligations, in particular those set out in Commission Implementing Regulation (EU) No 1348/2014 (the “**Implementing Acts**”).

Unless otherwise expressly set forth in these Guidance Notes, capitalised terms used throughout these Guidance Notes shall have the meanings attributed to those terms in REMIT, the Implementing Acts and the REMIT Reporting Agreements.

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**PLEASE NOTE:** These Guidance Notes were prepared by EFET exercising all reasonable care and as a general guide only for the purposes of assisting users of the REMIT Reporting Agreements. EFET, the EFET members, representatives and counsel involved in the preparation of these Guidance Notes shall not be liable or otherwise responsible for their use and any damages or losses resulting out of their use and in whatever jurisdiction. It is the responsibility of each party wishing to use the REMIT Reporting Agreements to ensure that the terms and conditions set forth therein are legally binding, valid and enforceable and best serve to protect the user’s legal interest, and are suitably brought to the attention of a counterparty. Users of the REMIT Reporting Agreements and/or these Guidance Notes are urged to consult their own legal counsel.

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**II. Scope & Purpose:** In response to requirements imposed by EU legislators increasing market transparency and monitoring systemic risk to include trade data reporting requirements (the relevant parts of which are summarised below), each of the REMIT Reporting Agreements is designed to:

- (i) act as a basic document to facilitate REMIT trade data reporting in accordance with Article 8(1) of REMIT and the reporting obligations on transactions set out in Chapter II of the Implementing Acts with respect to Orders to Trade and Standard Contracts concluded through organised market places (“**OMPs**”) (please see further details in the relevant sections below); and
- (ii) to form the basis for commercial discussions between market participants, OMPs and registered reporting mechanisms (“**RRMs**”) to enter into contractual arrangements governing the reporting of Relevant Trade Data to ACER.

Pursuant to Article 8(1) of REMIT, market participants, or third parties acting on their behalf, shall provide ACER with a record of wholesale energy market transactions, including orders to trade.

Pursuant to Article 6(1) of the Implementing Acts, market participants as defined in Article 2(7) of REMIT are required to report wholesale energy products executed at OMPs (as defined in Article 2(4) of the Implementing Acts) including matched and unmatched orders to ACER through the OMP concerned, or through trade matching or trade reporting systems. Further, pursuant to Article 6(1) of the Implementing Acts, the OMP where the wholesale energy product was executed or the order was placed is required, upon request, to provide market participants with a reporting agreement.

Trade Data must be submitted to ACER using an RRM. All data submitted to ACER via its reporting system ARIS must be generated by reporting entities as valid data that complies with ACER’s technical requirements for data generation. Data that does not pass the validation process or the integrity of which cannot be confirmed will be marked as invalid or rejected. If data is rejected, a receipt will be generated and provided to the RRM which submitted the data with an error message describing the reason for the failure.

### **III. Drafting Assumptions and Policy Decisions**

The REMIT Reporting Agreements are drafted on the basis that the OMPs using them would be brokers as opposed to exchanges.

Both forms of REMIT Reporting Agreement are drafted on the assumption that an OMP will not be an RRM. This assumption is based on EFET’s engagement with LEBA member representatives of the Working Group, who have indicated that they do not currently intend to register themselves with ACER as RRMs. If an OMP was to be registered as an RRM, the REMIT Reporting Agreement would require amendment to be suitable to document this contractual arrangement.

It should be noted that the REMIT Reporting Agreements do not necessarily cover all of the types of trades, information flows and access requirements that market participants would ideally wish to include in their contractual reporting arrangements with OMPs and/ or RRMs. It is expected that market participants will need to cover additional reporting issues, at least in respect of trades

that are not executed on OMPs and non-standard contracts, in separate contractual arrangements with their RRM(s)). They will also need to cover reporting of trades that are subject to the backloading obligation and lifecycle events that do not take place through an OMP where the original trade was executed on the OMP. It will be a matter for commercial negotiation between the parties as to whether they are able to expand the scope of the REMIT Reporting Agreements to cover these trades and, if so, on what terms. The REMIT Reporting Agreements necessarily reflect a compromise position arrived at during Working Group negotiation between JEAG members and LEBA members.

They are intended to cover the minimum set of data that OMPs are clearly required to offer a data reporting agreement for under article 6(1) of the Implementing Acts, upon request by the market participant. They also cover lifecycle data where the lifecycle events are concluded through the OMPs. In these circumstances, the OMPs will have the required reportable data on their systems. The REMIT Reporting Agreements are intended to operate as a baseline set of terms upon which market participants and OMPs (and, in the case of the Tripartite, RRMs) can, if they wish, choose to build and use as a base for negotiations to include the level of tailoring required to reflect their commercially agreed position and the specificities of their technical and operational functionality.

In particular, the Tripartite is drafted to be RRM neutral, so it is expected that the terms will need to be supplemented to reflect the information flows between the parties and the specifics of how market participants can access data reported on their behalf to satisfy their verification obligations under Article 11(2) of the Implementing Acts.

### **III. Notes on Selected REMIT Reporting Agreement Provisions & Differences between the Tripartite and the Bilateral**

#### **Tripartite**

The Tripartite is drafted to cover a situation where the RRM agrees to be a party to the “data reporting agreement” that the OMP is required to offer to the market participant upon request in accordance with article 6(1) of the Implementing Acts.

It is drafted to be RRM neutral, so it could be used with any RRM selected by a market participant as a reporting channel to ACER. As a result, the provisions of Clause 2 (Reporting Services and RRM Services) covering the RRM Services may need to be amended to take into account the level of service and respective obligations of the OMP and the RRM based on the specific RRM offering and technical capabilities.

As a minimum, market participants will require RRMs to provide them with copies of, or access to, Relevant Trade Data, and any other data, sent by the RRM to ACER on the market participant’s behalf in order to enable the market participant to comply with its obligation under article 11(2) of the Implementing Acts to take reasonable steps to verify the completeness, accuracy and timeliness of the data which it submits through third parties. Parties could choose either to amend this Clause to insert more specific provisions in the Tripartite itself covering additional functionality/ access to be provided by the RRM (or the OMP) to enable the market participant to make checks to verify the completeness, accuracy and timely submission of Relevant Trade Data reported on its behalf in accordance with its obligations under Article 11(2) of the Implementing Acts, or could cover this in a separate set of terms with the relevant RRM.

In addition, it is expected that Clause 9 (Errors) may need to be amended to reflect the functionality of the RRM and the OMP’s systems and the information flows between them. This

Clause has been drafted not to cut across or preclude any separate terms covering such additional functionality/ access to be provided by RRM.

## **Bilateral**

This is intended for use in circumstances where either:

- (i) the market participant's chosen RRM does not agree to sign up to the Tripartite and has its own separate form of services agreement separately setting out the contractual arrangements governing its relationship with the market participant; or
- (ii) the OMP does not agree with the market participant upon the RRM to be used or does not have the required connectivity with the market participant's chosen RRM to report through it to ACER.

In the case of (ii), there is a fallback provision in Clause 2(c) under which the OMP agrees to provide the market participant with the Relevant Trade Data in the required data format in sufficient time for the market participant to send the data to its RRM for the RRM to report within the Standard Contract Reporting Deadline. Market participants should, however, be aware that for technical reasons this may not be an option which all OMPs are able to offer and should not be relied upon until they have spoken to their OMPs. Market participants are in any event encouraged to engage with their chosen RRM and OMPs as soon as possible to ensure that the technical solution they prefer is available to them.

Where the Bilateral is used, the minimum service requirements expected of RRM (as set out in the Tripartite) will need to be covered in the market participant's separate form of service agreement with its chosen RRM.

## **Clause 1. Interpretation**

### **(a) (Definitions)**

Parties may wish to additionally provide that any terms not defined in the REMIT Reporting Agreement have the meanings set out in REMIT or the Implementing Acts, although REMIT and Implementing Act defined terms used in the approved forms of the Tripartite and the Bilateral have all been reproduced and cross-referenced in Clause 19 (Bilateral)/ Clause 20 (Tripartite) (Definitions).

### **(b) (Inconsistency)**

The REMIT Reporting Agreements were drafted to reflect detailed discussions within the Working Group relating to the intended prevalence in the event of inconsistencies between the REMIT Reporting Agreements and other documentation between the parties.

Subject to the exception discussed below, in the event of any inconsistency between the REMIT Reporting Agreement and general OMP (and, in the case of the Tripartite, RRM) terms of business the REMIT Reporting Agreement takes precedence but only in so far as those other general terms of business relate to the subject matter of the REMIT Reporting Agreement. The REMIT Reporting Agreement is not intended to override the provisions of general terms of business except in respect of its specific subject matter only.

It is also important to ensure that this Clause does not operate to cut across any additional functionality/ access to be provided by the RRM (or the OMP) to enable the Market Participant to make checks to verify the completeness, accuracy and timely submission of Relevant Trade Data

reported on its behalf under separate documentation. If separate documentation is used for this purpose, its priority over the terms of the REMIT Reporting Agreement in this respect should be reflected in that agreement.

## **Clause 2. Reporting Services and RRM Services**

### **(a) Appointment**

Under the Tripartite, the market participant and the OMP each appoints the RRM. This is intended to give both the market participant and the OMP the benefit of article 11(2) of the Implementing Acts by ensuring that, in addition to the market participant reporting through the OMP, both the market participant and the OMP are persons reporting through the RRM.

Article 11(2) of the Implementing Acts provides that persons required to report data under articles 6, 8 and 9 of the Implementing Acts shall have responsibility for the completeness, accuracy and timely submission of that data to ACER or an NRA, but where a person reports that data through a third party that *“person shall not be responsible for failures in the completeness, accuracy and timely submission of the data which are attributable to the third party. In those cases the third party shall be responsible for those failures [...]”*. It goes on to say that *“Persons [...] shall nevertheless take reasonable steps to verify the completeness, accuracy and timeliness of the data which they submit through third parties”*.

### **(b) Relevant Trade Data**

Where the market participant is subject to a reporting obligation under EMIR (or MiFIR, when this comes into effect) parties may wish to specifically carve trades reported under these regulatory reporting obligations out of scope of the REMIT Reporting Agreements.

### **Backloading**

The Tripartite and the Bilateral do not cover transactions that are subject to the backloading reporting requirement under Article 7(6) of the Implementing Acts. This is because there is no clear obligation under REMIT or the Implementing Acts upon OMPs to offer market participants reporting services in respect of these trades, even where they were executed on the OMP. Without input from market participants, OMPs would also not know which positions remain open on 7 October 2015. In light of this and in the interests of reaching an agreed baseline form of REMIT Reporting Agreement, the Working Group agreed that Relevant Trade Data would not include backloading.

ACER has clearly expressed its view on page 20 of the TRUM that OMPs are not under any duty to offer reporting services in respect of these trades. While the TRUM is not expressed to be a binding legal interpretation of REMIT, it is likely to be persuasive and, although not technically impossible, it is difficult to foresee circumstances in which an OMP would be held in breach of REMIT where acting in reliance upon it.

Market participants may want to explore with their OMPs whether it will be possible for them to expand the scope of the REMIT Reporting Agreements to include other types of transactions (and, if so, on what basis they would be willing to do so), such as trades that are subject to the backloading obligation and lifecycle events that do not take place through an OMP where the original trade was executed on the OMP.

## Lifecycle Events

The REMIT Reporting Agreements do not cover the reporting of Lifecycle Data where the relevant Lifecycle Event is not concluded through the OMP. This is the case even where the original trade was concluded through the OMP. The wording clarifying that this Lifecycle Data is not covered by the current definition of Relevant Lifecycle Data in square brackets can be deleted if the parties additionally agree that Lifecycle Events that do not take place through the OMP in respect of Relevant Standard Contracts and Relevant Orders will be reported under the REMIT Reporting Agreements. Otherwise, market participants will need to make separate arrangements for reporting this Lifecycle Data along with Lifecycle Data for trades not concluded through the OMP through an RRM.

### (c) Generation of unique references

This Clause includes the option for the OMP to generate a unique reference for all Relevant Standard Contracts and Relevant Orders or Relevant Orders only (in circumstances where the market participant wants to generate its own unique references for Relevant Standard Contracts).

The obligation on the OMP to provide the market participant with the unique reference covers a situation where the transaction is executed or the order is placed through the OMP and subsequent Lifecycle Events occur outside the OMP and would need to be reported separately but nonetheless refer to the original trade reference details.

### (d) Notification requirements if RRM (or OMP in the Tripartite) reasonably expects it will not perform its obligations

This is to ensure no double-reporting but also gives the market participant (and the OMP in the case of the Tripartite) notice so it can notify its NRA or, if possible, make alternative reporting arrangements.

### (e) Use of Market Participant Registration Code

Some EFET members who do not report under other reporting regimes may not have LEIs. Providing for use of the REMIT Market Participant Registration Code promotes certainty. It is, however, dependent on these codes being available and the parties can agree to use other identifiers acceptable to ACER (as listed in Table 1 of the Annex to the Implementing Acts), if they prefer.

### (f) Obligation to have regard to evolving guidance from ACER as set out in the TRUM, the MoP and the RRM Requirements from time to time.

This allows for flexibility, especially as guidance may be revised over time as the reporting obligation progresses and technical issues and capabilities play out over the coming months.

## **Clause 3. OMP Obligations**

“Relevant Lifecycle Data” only includes Lifecycle Data where the lifecycle event is concluded through the OMP. In this case, the OMP would report it under Clause 2(b)(iii). It does not include other Lifecycle Data even where the original trade was concluded through the OMP, unless agreed otherwise between the parties.

The wording in square brackets can be deleted if the parties additionally agree that Lifecycle Events that do not take place through the OMP in respect of Relevant Standard Contracts and Relevant Orders will be reported under the REMIT Reporting Agreement.

#### **Clause 4. Market Participant Obligations**

The market participant agrees to deliver Static Data in sufficient time for the other party/ parties to comply with its/ their obligations and other data reasonably requested to enable them to comply. It also gives a representation that the data it delivers under Clauses 4(a) and (b) will, at the time of delivery, be true, accurate and complete in every material respect and that the OMP (and RRM in the case of the Tripartite) may rely on it, provided they take reasonable steps to verify that it has come from the market participant. The parties may want to specify that such reasonable steps would be satisfied by ensuring that any data was sent using the unique security password/ secure user access issued to the market participant.

#### **Clause 6. (Tripartite only) RRM Systems Representations**

The Tripartite includes a basic set of representations about the operation and functionality, etc. of the RRM's systems and does not repeat the RRM systems requirements that the RRM would need to comply with in order to obtain registration as an RRM under REMIT. Additional representations or undertakings as to the level of service and the operational specifics of that service could be covered in a separate agreement with the RRM or included as additional terms and conditions in the Tripartite (or an additional schedule to the Tripartite).

#### **Clause 6 (Bilateral)/ Clause 7 (Tripartite) Additional ACER Requests**

ACER may request additional information on an ad hoc basis pursuant to article 4(1) and article 7(3) of the Implementing Acts. It has indicated in a 'no action' letter that it does not intend to request information about certain types of trades (i.e. those under article 4(1) of the Implementing Acts, unless concluded at OMPs) until at least 31 December 2016. However, ACER noted in that letter that it is still open to NRAs to request this data before that date. Article 7(3) Orders to Trade (i.e. those placed with voice operated services which do not appear on an OMP's electronic trading screen) are not clearly covered by the ACER 'no action letter'.

Parties should note that Orders to Trade that are placed with voice operated services which appear on the OMP's electronic trading screen are subject to mandatory reporting and are covered by the REMIT Reporting Agreement as Relevant Orders.

#### **Clause 7 (Bilateral)/ Clause 8 (Tripartite) Responsibility for Data**

This Clause includes an acknowledgement by each of the parties that they will not be responsible for failures in the completeness, accuracy or timely submission of data attributable to another party. This is in line with article 11(2) of the Implementing Acts. In addition, the OMP (and, in the case of the Tripartite, the RRM) agrees that where it delegates the performance of some or all of its obligations under the REMIT Reporting Agreement, it remains contractually responsible for its performance of those obligations and is responsible for the failures of any person to whom it delegates that performance as if those failures were its own. The wording in this Clause tracks the wording in Article 11(2) of the Implementing Acts and it should be noted that Clause 11 (Bilateral)/ Clause 12 (Tripartite) contains a limitation of liability provision that reflects a compromise position reached in Working Group negotiations.

## **Clause 8 (Bilateral)/ Clause 9 (Tripartite) Errors**

This Clause is deliberately widely drafted in order to remain RRM neutral and it is expected that it will need either to be amended or supplemented by additional terms to reflect the functionality of the RRM and the OMP's systems and the information flows between them. This Clause should not operate to cut across any additional functionality/ access to be provided by the RRM (or the OMP) to enable the market participant to make checks to verify the completeness, accuracy and timely submission of Relevant Trade Data reported on its behalf.

In the Tripartite, this additional functionality/ access may either be covered by separate terms of business or a separate form of service agreement with the RRM or could be incorporated as an operational procedures and information flows Annex to the REMIT Reporting Agreement.

In the Bilateral, the access requirements in relation to the Relevant RRM's reporting of Relevant Trade Data would need to be covered in a separate agreement or set of terms covering the RRM Services or between the Relevant RRM and the market participant (the OMP may or may not be party to this separate agreement or the market participant and the OMP may each have separate agreements with the RRM).

The RRM may offer a verification service and this Clause in the Tripartite is not intended to prejudice any agreement with the market participant that it will do so. The wording of sub-clause 9(b)(ii) of the Tripartite should be amended accordingly to reflect what the parties agree and where the relevant specific terms are set out.

## **Clause 9 (Bilateral)/ Clause 10 (Tripartite) Use of Third Parties**

For the purposes of fulfilling the obligations imposed by Clause 2 on the OMP (and the RRM in the case of the Tripartite), it may appoint a Third Party Service provider by giving notice to the other party/ parties. This obliges the appointing party to use reasonable care in selecting and monitoring that Third Party Service Provider. Clause 11 (Bilateral)/ Clause 12 (Tripartite) (Liability) provides that the appointing party will remain liable for the failures of its appointee to the same extent as it would be liable for its own.

Depending on the type of Third Party Service Provider used, the parties may want to consider further language relating to the level of service provided by the Third Party Service Provider.

## **Clause 11 (Bilateral)/ Clause 12 (Tripartite) Liability**

This Clause reflects a compromise position reached in Working Group negotiations. Brokers do not have the benefit of an indemnity from market participants in respect of damage to third parties but their liability is limited to gross negligence, wilful default and fraud. If the OMP (or the RRM, in the case of the Tripartite) delegates any of its obligations it will remain liable for the failures of the person to whom it has delegated those functions to the same extent that it would be liable for its own.

## **Clause 12 (Bilateral)/ Clause 13 (Tripartite) Force Majeure**

The parties can provide for a long-stop date if they wish to do so. This was not thought necessary as the parties could use the termination mechanism if the Force Majeure event was ongoing.



**Clause 13 (Bilateral)/ Clause 14 (Tripartite)                      Confidentiality and Ownership of Data**

This sets out a broad list of circumstances pursuant to which a disclosure by a party is permitted and thus deemed waived by the other party. The list includes an expanding category of circumstances where disclosure is permitted pursuant to the REMIT Reporting Requirements; and permits disclosure made between the parties' head offices, branches or affiliates i.e. disclosures necessary for operational reasons.

The parties acknowledge the scope and extent of the disclosures that are permitted and provide the detail of the type of information which may be disclosed and to whom (such as trade repositories and regulators, despite the fact that certain information may become available to the public.

**Clause 15 (Bilateral)/ Clause 16 (Tripartite)                      Amendment and Termination**

The parties may wish to include wording to permit the OMP/ RRM to withdraw a rejected amendment within a set period to avoid termination of the REMIT Reporting Agreement.

**Clause 17 (Bilateral)/ Clause 18 (Tripartite)                      Notices**

All notices must be made in writing and the parties must specify the address to which notices should be delivered in Schedule 1. Notices may also be delivered by email, unless the parties have specified otherwise in Schedule 1.

**Clause 18 (Bilateral)/ Clause 19 (Tripartite)                      Governing law and Jurisdiction**

The REMIT Reporting Agreements are each expressed to be governed by English Law. Unlike many EFET documents, there is no choice of alternative governing law provided for. This is because the predominant relevant OMP community that is expected to use the Tripartite or the Bilateral is based in London and uses brokerage agreements and terms of business governed by English law.

This Clause provides two alternatives with respect to jurisdiction. Either the jurisdiction of the English courts is expressed to be non-exclusive (i.e., courts other than the English courts may hear the dispute provided that they have jurisdiction) or, in the limited circumstances where non-exclusive jurisdiction clauses are not recognised, English courts have exclusive jurisdiction. This aims to provide flexibility except in circumstances where including that flexibility may operate to make the clause invalid. Parties are free to choose alternative jurisdiction wording.

If the parties wish to specify an alternative governing law and dispute resolution provision, they should first check with local counsel to ensure that the REMIT Reporting Agreement is reviewed by local counsel for compliance, enforceability and effectiveness under the proposed governing law.

**Schedule 1.      Contact Information**

Contact details for the parties should be specified here. If a party does not wish particular types of notice (e.g. termination notices) to be given by email, this should be specified here.

## **Schedule 2. Static Data**

This sets out the information that the market participant must provide to the OMP to enable it to submit a Relevant Trade Data to an RRM for reporting to ACER. It represents the data fields that the OMP may not be able to complete using information generated by, or stored on, its own systems without input from the market participant. Guidance on the required data and the format in which it must be provided to ACER is set out in the TRUM and the MoP. The market participant and the OMP will need to commercially agree on the format in which the Static Data is to be provided by the market participant to the OMP.

## **Schedule 3. (Bilateral only). Relevant RRM**

The Relevant RRM's details (as chosen by the market participant) should be set out in this Schedule.