

**EFET response to ACER Public Consultation
on definition of inside information
(PC_2019_R_05)**

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EFET welcomes the possibility to participate in this consultation regarding the definition and assessment of inside information. We would like to raise a few points on which we are of the opinion that clarification and further guidance could be beneficial to all market participants and could help to level the playing field. Most importantly, we would like to emphasise the need for unified thresholds regarding inside information, in order to effectively reduce risks associated with the assessment of information by market participants. EFET would also welcome further standardisation regarding Inside Information Platforms. Generally, we are of the opinion that the growing integration of European energy markets should be reflected more coherently in the application of inside information provisions under REMIT.

Question 1: What are your experiences so far regarding the assessment of inside information that you have possessed? Which criteria do you apply for the assessment for the disclosure of inside information?

Please describe your assessment of whether an information is to be considered an inside information.

The assessment generally follows the criteria set out within REMIT and the ACER guidance. Even though in most cases the assessment of whether a piece of information is inside information or not is rather clear, there are grey areas. Generally, EFET is of the opinion that the definition of inside information in REMIT, which takes into account the specifics of the energy market, as opposed to financial markets, should be maintained.

Please describe the process step by step including the tools used and the participants involved.

Market participants usually provide internal guidance to their employees dealing with possible inside information. This guidance can include trainings, guidelines and FAQs, which enable employees to qualify most incoming information as inside information or not.

Market participants usually employ a compliance function as a second level of control, which oversees and monitors publication and is able to provide further guidance during the assessment of more complicated cases, or when there are reasons for doubts.

Market participants use Chinese walls in order to prevent the horizontal flow of information between business units and to ensure that information flows only vertically to the compliance/monitoring function.

The approach described above is generic, as market participants' specific requirements vary due to differences in the size and nature of their business.

a. Has the unavailable capacity concerned by an outage of production unit been a criterion in your assessment of REMIT information?

Market participants use data regarding unavailable capacity caused by outages when assessing information. While it can be helpful to take this information into account, it is burdensome for market participants to correctly quantify the influence of an unavailability on the entire market. As a result, some market participants have introduced internal thresholds as a guide to the size of a price-significant outage. Conversely, other market participants err on the side of caution and tend to over-report by publishing all outages for fear of breaching the prohibition on insider trading. This, however, puts in question the very point of a publication regime and leads to lack of consistency. Therefore, it would be more meaningful to establish fixed thresholds for the entire market in order to enable market participants to assess information more quickly and uniformly. More specifically, if thresholds are set and a UMM is published, then the entire market would work on the same premise, i.e., that the UMM concerns an event with regard to a certain MW or MWh or mcm amount. This would facilitate the faster absorption of the information and, consequently, a more efficient trading environment.

b. If so, which amounts do you consider to be relevant and would apply as a threshold? Do those amounts vary depending on the relevant market situation?

EFET would consider it beneficial to establish a single fixed threshold for the entire power market. This would – as mentioned above – greatly reduce the burden of work, as well as the risk on each market participant. Information has to be assessed as quickly as possible to ensure swift reaction to outages in order to avoid losses for a company facing an outage. Those who are best equipped to assess the impact of information on market prices are traders. At the same time, traders are precisely the employees who must not be contacted for fear that they could be “contaminated” with inside information. Thus, there is a mismatch between the skill set required to carry out the assessment and the employees who must be “quarantined” from relevant information. As a result, for most companies, it is challenging to make a reliable assessment on a 24/7 basis. A threshold of 100MW for power could eliminate this risk and enable market participants to act swiftly. This would also increase the legal security for the publishing entity in general and the persons responsible for publication in particular.

Furthermore, the introduction of XBID and the continuing integration of power markets across Europe give further credence to the argument that the application of a single threshold across the European power market is feasible and rational.

We note that lower thresholds would lead to a much larger volume of publications, essentially making it more difficult for smaller market participants with less IT capabilities to capture events of actual significance. To illustrate, a large market participant with a significant IT budget is able to invest in aggregation technology which can capture UMMs from various platforms and consolidate them into a continuous production “tape,” thus allowing the market participant to trade on current information. On the contrary, a small market participant who does not have any IT spend, is often faced with a flood of UMMs (triggered by low thresholds or automated publication by the plant), which are often stale. This market participant has to analyse and internalise the information manually and is thus at an automatic disadvantage.

To sum up, it is of great importance to market participants to find a unified threshold across European markets. In order to effectively eliminate the above-mentioned risks for market participants, a clear threshold under which publication is not required should be established. This threshold, however, should not be too small in order to exclude very small market participants (see also below, 6.b) and avoid flooding the market with irrelevant information, which, in turn, could also be misleading.

The approach of finding a unified threshold should also apply to gas markets for the same reason - to reduce the risks and burdens arising from an assessment of information vis-à-vis the market situation. EFET would like to propose a value of 5 - 10 mcm/ day.

As the current ACER REMIT Guidance suggests, it may be legally challenging under the current REMIT framework to define a single threshold across the EU: "Regardless of whether indicative thresholds are applied by market participants, NRAs should ensure that market participants are aware that a planned or unplanned change in the capacity or output of any size at a facility for production, storage, consumption or transmission of natural gas or electricity may constitute inside information if it meets the criteria outlined in Article 2(1) of REMIT." The wide differences in market size, structures and liquidity of national gas and power markets, as well as volatile market conditions, may require the setting of different national threshold levels under this legal definition.

Therefore, an alternative to setting one single threshold might be that ACER publishes binding guidance for NRAs on a harmonised methodology how to define a publication threshold on a national level. At least this would ensure a level playing field with regard to the underlying criteria how to calculate a threshold. Where an NRA thinks a lower or higher threshold should be applied under this methodology, they should send their opinion to ACER and ACER should then check it and publish the different threshold for the specific region.

This approach towards single, harmonised disclosure thresholds can be achieved at different levels of the REMIT framework, e.g. through ACER guidance. However, it may be necessary to amend the definition of inside information under REMIT to provide for market participants the necessary legal certainty, so that they can rely on the defined thresholds.

c. Do you apply any further thresholds for other kinds of inside information?

Various market participants may employ different thresholds, either for internal purposes or due to the nature of their business activities. Only few national regulators have "blessed" certain thresholds, which market participants take into account for the respective jurisdictions. For example, the Danish gas market works with a threshold of 28 000 MWh/day, which is the threshold suggested and updated by the industry (from an earlier threshold of 14 000 MWh/day), and endorsed by the regulator.

Question 2: Which criteria do you apply for using inside information disclosed by other market participants for decisions to enter into a transaction relating to, or to issue an order to trade in a wholesale energy product?

Market participants take into account all available data on generation capacity and availability in order to steer their trading activities. Any data published on IIPs or other platforms for fundamental data will be taken into account by more sophisticated market participants. Once published on a platform, the information is public and therefore, it is no longer inside information and can be used freely like any other public fundamental data. For information not published on platforms, some market participants employ web crawlers to gather data published on companies' websites.

However, market participants find that the usability of disclosed information is very low due to poor data quality and the number of insignificant outages published. Market participants encounter double reporting across different platforms, missing information and lack of standardisation in general. This problem is aggravated by the (still) widespread use of websites for publication. In order to actively make use of disclosed information, it is in the interest of all market participants to enhance data quality, thus ensuring that markets can react appropriately and competitively to outages.

Question 3: Do you distinguish between inside information relating to the electricity and gas markets, or do you apply one general threshold which covers both electricity and gas markets?

Due to the different characteristics of the power and gas markets, different thresholds should be applied. Regarding the size of the thresholds, please refer to our answer to question 1b.

Question 4: Do you take into account and distinguish between geographical peculiarities or different markets or is your decision based on different amounts of capacity?

Instead of applying different thresholds in various geographical areas and markets, a unified threshold across Europe would greatly benefit the reliability of information, in addition to reducing risks for market participants. Please also refer to our answer to question 1b.

Question 5: Are the thresholds that already exist within the framework of the transparency regulation a factor you take into consideration in your assessment of inside information?

The 100MW threshold for power from the Transparency Regulation serves as a basis for the assessment of potential inside information for a majority of market participants. The rationale behind a threshold of this size can still be applied to the power market.

Question 6: Would you propose amendments to the existing legal framework regarding the disclosure of inside information?

a) Publication of inside information via a central platform (IIPs)

While EFET welcomes the publication of inside information on central platforms as opposed to individual websites, there are obstacles to be overcome in order to have a simpler and barrier-free approach to publication. The use of websites should be accepted only as backup to avoid getting locked in inside positions in case of technical failures. Therefore, EFET welcomes the updated ACER REMIT Guidance, which provides for such an approach (see section 7.2 of [ACER REMIT Guidance](#)).

Currently, IIPs impose a number of technical restrictions, which make it very difficult to accurately reflect different events within the pre-defined possibilities of publication. Market participants often need to refer to ad hoc messages supplementing the urgent market message. Also, technical burdens regarding the submission of messages have to be reduced and unified among platforms. The same applies to data output. We would like to encourage a standardised possibility to export data into market participants' own systems in order to be able to efficiently integrate and compute published inside information. To this end, EFET members would like to encourage ACER to provide a general technical standard for IIPs. In addition, easier access, data usability and reliability would also enable market participants to change platforms, thus, promoting competition among platform providers. General technical standards should address issues like design of UMMs, including permitting ad hoc messages, creation of event IDs, uniform data fields and titles, as well as a uniform approach to event history.

Generally, it should be clarified that market participants fulfil their publication obligation by transmitting an (accurate) market message to the platform. If the message does not get published, for example due to technical reasons (outage of IIPs), it should be clear that the

market participant cannot be held responsible and that the market participant has complied with its publication obligation. To this end, the proof of submission to the platform should be deemed sufficient to discharge the market participant from the disclosure obligation. However, as in this case the information would stay inside information, the market participant would still have to comply with the prohibition of insider trading, unless it publishes the information over its own website. Looking forward, it should be considered to amend the REMIT text to ensure that market participants can legally rely on the fact that they have sent the information to the platform.

With regards to publication and subsequent use of the submitted information for trading purposes, market participants should be able to rely on an immediate publication of the information by the IIPs and, hence, IIPs should be obligated to publish the received information without any delay. EFET proposes that market participants should receive a confirmation by the IIP, clearly stating that the submitted information has been published on the platform, including the timestamps stating receipt and publication of the information.

EFET would also like to point out to ACER the costs associated with the use of IIPs. Generally, the cost structure favours large companies with a significant amount of generation units and imposes high costs to very small market participants who then tend not to publish at all or use website solutions. Access to IIPs should be facilitated for smaller market participants by adapting a different cost structure, as well as by setting a uniform threshold in order to make it clear who needs to publish inside information in the first place.

b) Small market participants and the obligation to disclose inside information

Applying a single 100 MW threshold to all power markets would be beneficial especially for smaller market participants, as it would remove their obligation to publish inside information on platforms. Smaller market participants struggle to ensure both the timeliness of publication of inside information and the correct assessment of information. A single threshold would automatically and effectively remove this obligation for those participants, making further legislative changes unnecessary. Any uniform threshold approach should take small market participants into consideration. Lowering a threshold too far would incur obligations on those market participants, which would be burdensome and difficult to fulfil, while not really benefitting the market as a whole.

c) Consumption units and the obligation to disclose inside information

Consumption units should be obliged to publish inside information like all other market participants. However, experience shows that many industrial consumption units do not publish any information on outages because of fears of divulging proprietary information to their competitors. This, in turn, puts EFET members delivering energy to the consumption units at risk of being locked in an inside position, which they cannot publish in a reliable manner as a third party. EFET would like to encourage ACER to enforce publication by consumption units in the same way as for all other market participants, which makes the setting of a meaningful threshold all the more important.

d) Obligation to disclose inside information by TSOs, DSOs, LSOs and SSOs.

Currently, not all TSOs publish network outages, redispatching or congestion management information within their sphere of responsibility in a reliable manner. This can lead to risks for market participants who can get locked in a position while waiting for the TSO's publication, or to double (or multiple if several market participants are affected by the grid problem) publication by the market participant eventually followed by the TSO. Double publication, however, bears the risk that the published information may diverge (especially with regards to end times of events), thus a risk for accusation of possible market manipulation, and may confuse the

market. EFET would like stronger compliance by TSOs to meet the industry's need for timely publication to guarantee continuity on markets. It should also be considered if DSOs on lower voltage levels should be included to the same extent when technically available power plants are cut off due to grid maintenance.

e) Guidance and examples on the use of exemption under Art. 4 (2) (exemption permitting the exceptional delay of publication of inside information)

EFET would appreciate guidance by ACER on this topic. At this point the use of the exemption carries a very high risk for the market participant making use of it and is thus barely, if ever, used by EFET members. It would be helpful to receive clarification on scenarios in which ACER deems the use of the exemption justified and on procedures and documentation that would be seen as good practice.