– Position Paper –

Europex supports a targeted update of REMIT but cautions against a hasty, inconsistent review with potentially damaging effects

Brussels, 28 April 2023| Europex and its members have been strong supporters 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 constant evolution of the REMIT ecosystem and the energy markets themselves, we welcome that a targeted update of REMIT is being considered.

REMIT and its accompanying implementing regulation form a complex legislative framework which has been refined over the years through comprehensive and continuously updated ACER guidance as well as a steadily growing number of REMIT cases. This evolution has relied heavily on close cooperation with stakeholders and has grown into a highly specialised ecosystem with a large variety of actors. The REMIT framework 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 this evolution, we would like to call attention to several amendments which are inconsistent, reach far beyond the initial scope of REMIT or create unnecessary barriers to trading on European wholesale energy markets.

1) Avoid counterproductive overlap with financial services regulation

We generally support the intention to align the definitions and obligations in REMIT with the definitions and obligations in MiFID II / MiFIR and MAR, where relevant and useful. This is crucial to avoid regulatory arbitrage and ensure consistency in data collection and monitoring of spot and derivatives markets. However, the amendments as tabled by the Commission create a highly undesirable overlap with EU financial regulation in three distinct areas: (1) market abuse frameworks, (2) third country access arrangements as well as (3) algorithmic trading and direct electronic access ("DEA") requirements.

Firstly, the proposed removal of the exemption in Article 1 of REMIT for energy wholesale products which are also financial instruments, would oblige National Regulatory Authorities (NRAs) and ACER to monitor financial instruments for market abuse. As financial instruments are already subject to a comprehensive market abuse framework under financial regulation (i.e. MAR and CSMAD) and supervised by National Competent Authorities (NCAs) under MiFID II / MiFIR,

this would result in overlapping and potentially conflicting prohibitions and obligations, with no clear view on which institution is ultimately responsible and which framework is applicable.

Additionally, the proposed Article 5(a) introduces the requirement for market participants to notify the NRAs and ACER when engaging in algorithmic trading and DEA in wholesale energy products, which includes both spot markets as well as financial instruments. Under MiFID II, market participants are already required to notify the NCAs when they engage in algorithmic trading and DEA in gas and power derivatives.

➔ **We strongly recommend that the existing exemption in Article 1 for financial instruments from REMIT's market abuse framework is maintained and extended to provisions related to the new algorithmic trading and DEA arrangements.**

Secondly, the suggested amendments to Article 9(1) of REMIT would require third country firms who trade REMIT products to "[…] declare an office in a Member State in which they are active and register with the national regulatory authority of that Member State". Financial instruments in the EU, including energy commodity derivatives reportable under REMIT, are already subject to a comprehensive third country framework under MiFID II. Under this ruleset, non-EU based market participants rely on an equivalence determination by the Commission for their jurisdiction or, absent this determination, national market access arrangements for trading financial instruments in the EU. Short term (spot) gas and power markets which are not covered by MiFID's third country framework do not require such market access arrangements as they are typically used by regional market participants to address physical demand and supply imbalances in energy. Moreover, market participants who trade REMIT products, including those based in non-EU jurisdictions, are already required to register with national authorities in a Member State under Article 9 of REMIT.

The proposed restrictions on third country market access may result in significantly reduced liquidity in the main European energy derivatives markets, as third country firms play a crucial role in the provision of liquidity. Reduced liquidity may negatively impact the functioning of European commodity markets as a whole and the ability to trade on wholesale markets to lock in future prices. When firms are unable to adequately hedge their exposure, it can have significant negative consequences for energy firms, making it more difficult for them to operate, invest and compete in the energy market.

➔ **We strongly urge the co-legislators to delete the proposed office requirement for third country firms.**

Finally, it should be noted that the suggested alignment of the definition of "inside information" in REMIT with the definition of "inside information" in MAR is incomplete and inconsistent. The new REMIT definition refers to information that is "required to be disclosed" while MAR refers to information that is "expected to be disclosed". This could lead to different assessments of potential inside information depending on which regulator (the NRA for REMIT and the NCA for MAR) is conducting these assessments.

➔ **We recommend aligning the inside information definition in REMIT with the inside information definition in MAR to be consistent and avoid legal and regulatory uncertainty.**

2) Ensure clear definitions with no duplication of responsibilities

Europex 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 PPAETs 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 unto OMPs which would be highly inconsistent. Further aggravating the problem is the inclusion of shared order book providers. 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. The details of orders/transactions on a market participant level are not available to "shared order book providers". 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 were to get access to non-anonymised data of competing OMPs.

➔ **We strongly recommend ensuring that the definitions accurately reflect the responsibilities of each actor and to at least remove shared order book providers from the OMP definition.**

Irrespective of the above, the proposed amendment in Article 8(1a) would directly lead to a duplication of data reporting as both market participants and OMPs would be obliged to report orders. This new article would require OMPs to make order book data available to the Agency (or provide access to it, on request), while market participants already have the same obligation under Article 8(1). Making order book data available to ACER essentially allows the Agency to (re)access data they have already received. Besides duplicating reporting requirements towards ACER, we believe there are further drawbacks to 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, the new article adds another layer of complexity without improving market surveillance in any measurable way. Finally, REMIT fees are linked to the amount of data reported. If duplicative reporting would be installed, this would result in a doubling of fees for market participants.

➔ **We strongly recommend removing the obligation for OMPs to report "shared order book data".**

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

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.

➔ **We recommend introducing third country access arrangements based on existing third country frameworks in EMIR and the Benchmark Regulation (BMR) to ensure that EU customers can continue to benefit from using reporting services provided by third country RRMs.**

Furthermore, we do not see the need to introduce regular activity reports for all RRMs which create additional cost and effort but are of limited added value. As a matter of fact, when initially registering with ACER, the RRM needs to submit a complete set of documentation describing its activities. The same RRM is further obliged to report any changes of its activities to ACER. Moreover, the Agency has the power to request additional information from an 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 be reflected in the cost of RRM services and consequently in the reporting fees.

➔ **We suggest removing the obligation to provide 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.**

In addition, the proposed text introduces a requirement for RRMs to check the error messages caused by market participants. Such a requirement goes beyond the role of an RRM as a reporting mechanism, as there is a large variety of reported contracts and their details depend on the specific setup of the individual market participant.

➔ **We recommend removing the requirement for RRMs to check for errors caused by market participants and maintain that market participants are responsible for their own errors.**

Lastly, the tabled legislative proposal suggests that the applications for the authorisation of RRMs will require significant analysis and preparatory work, whilst the more detailed requirements for RRMs will be established through level 2 legislation. This also applies to the suggested re-registration of Inside Information Platform (IIPs).

➔ **To facilitate an orderly process for the authorisation and recognition of RRMs, we recommend grandfathering in currently registered RRMs and IIPs for a one-year period, whilst establishing clear timelines for the application process.**

4) PPA(E)Ts do not have the resources to monitor the disclosure of inside information

The suggested additions to Article 15 would add a new obligation for PPA(E)Ts 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 and transactions. Inside information is not at all connected with transaction data and, moreover, some PPA(E)Ts do not have access to Inside Information Platforms (IIPs) to monitor such data. Particularly given the wider definition proposed for PPA(E)T, this obligation would require anyone trading to monitor the disclosure of inside information. While some OMPs also operate an IIP, this is generally not the case, and this obligation may trigger substantial costs for obtaining automated access to all possible IIPs for every PPA(E)T. 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 with little or no added value.

Further difficulties for PPA(E)Ts 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 PPA(E)T in predominantly portfolio-based markets. Additionally, one market participant may trade at several PPA(E)Ts which exacerbates the uncertainty over who is responsible for monitoring as well as the complexity for PPA(E)Ts to monitor. Against this background, such an obligation would involve substantial monitoring efforts in terms of human and development resources for PPA(E)Ts at no added value as Article 4 breaches 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 PPA(E)Ts 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 to process and follow-up on.

➔ **We strongly urge to remove the responsibility for PPA(E)Ts 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) Inside Information Platforms must be able to recover operational costs

We strongly support the use of centralised IIPs for the disclosure of inside information. We further support that the information published online by Inside Information Platforms should be accessible through websites to all and free of charge. However, the development and operation of interfaces that allow for the download of information requires investments and hence cannot be provided free of charge. Taken altogether, the newly added requirements, proposed price regulation and fees for IIPs, can be detrimental to the business case of running an IIP which impacts competition and prevents new providers from entering the space.

➔ **While we strongly support the publication of inside information via centralised IIPs, IIP operators must be able to charge for the provided services to recover their costs and to ensure the space remains competitive. Proving a data interface for technical access to inside information shall be done on a reasonable commercial basis which is also an acknowledged principle in MiFIR.**

➔ **Furthermore, while REMIT requires a fair and competitive market, this is currently not valid for competition between IIP providers. We find that ENTSO-E, ENTSOG and individual TSOs operate IIPs free of charge, while they socialise their investment and maintenance costs through grid fees. Even more, they are exempted from paying fees for reporting fundamental data to ACER. If indeed the amount of reported data is driving ACER's cost – and OMPs were required to double the order reporting – there should be a level playing field between all IIP providers.**

6) Opportunities for further improvement: consistent cross-zonal transmission capacity monitoring & more transparency for the publication of REMIT cases

Beyond the tabled proposals, a number of low hanging fruit remain unaddressed which could significantly improve REMIT's market surveillance function. 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 on 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. To this end, a clear definition which 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. However, this demand for more transparency should not lead to a systematic release of data which would increase the required effort and provide the grounds for higher fees to cover those efforts. ACER's core function shall be the monitoring of the market.

7) Conclusion

Overall, we share the view that reopening REMIT could help future-proof the Regulation and build on practical experiences since its adoption. However, overhauling the fundamentals is not a productive step forward. We urge the co-legislators 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.

About

Europex is a not-for-profit association of European energy exchanges with 33 members. It represents the interests of exchange-based wholesale electricity, gas and environmental markets,

focuses on developments of the European regulatory framework for wholesale energy trading and provides a discussion platform at European level.

Contact

Europex – Association of European Energy Exchanges
Address: Rue Archimède 44, 1000 Brussels, Belgium
Phone: +32 2 512 34 10
Website: www.europex.org
Email: secretariat@europex.org
Twitter: @Europex_energy