

Stellungnahme

Answer to ACER PUBLIC CONSULTATION ON THE DEFINITION OF INSIDE INFORMATION

Berlin, 17. September 2019

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?

BDEW welcomes the consultation on the definition of inside information under REMIT, and the fact that a sector-specific framework has been put in place for the wholesale energy market. Wholesale energy products and financial instruments and markets have intrinsically different characteristics, therefore it is of great importance that inside information under REMIT maintain the necessary specificities. We believe that the definition of inside information under REMIT takes the specifics of energy markets well into account and should be maintained. We propose changes to the REMIT Framework only if necessary to accommodate our proposals below.

We encourage at the same time the cooperation between energy market and financial market regulators to ensure a consistent approach to make market abuse case patterns under REMIT and MAR comparable. Article 16 REMIT on cooperation between energy regulators as well as Art. 25 MAR, respectively, on cooperation between financial market regulators and cooperation between ACER and ESMA could serve as an example.

We would also support the *ne bis in idem principle*, as to avoid that firms and persons would be punished twice for the same market abuse conduct. Therefore, a clarification in the REMIT and MAR legislation would be helpful.

Official thresholds for publication of inside information of 100 MW for power and 10 million cubic metres per day (10mcm/d) for gas production, timely discussed with the market participants, should be included in the REMIT legal framework (or in ACER Guidance document) both for the electricity and gas market.

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 guidances 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 regards to the underlying criteria how to calculate a threshold.

It is necessary to distinguish between inside information relating to the electricity and gas markets as the infrastructural element and the market dynamics of the two are mainly different.

BDEW suggests the following thresholds: For power markets 100 MW is considered the value from which on market participants consider information relating to changes in the availability of their power plants relevant to comply with the provisions of art. 4.1 REMIT. The 100 MW threshold is referred to in the ACER REMIT Guidance and derives from the transparency obligations under Regulation EU N ° 714/2009.

For natural gas production in absence of an official EU Guidance, a threshold of 10 million cubic metres per day (10mcm/d), is generally referred to as a general practice by market participants for publishing events related to unavailability of gas production.

We support changes to the REMIT Framework to achieve the setting of such threshold, incl. changes of the level 1 text of REMIT, if deemed necessary.

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

Yes, the unavailable capacity concerned by an outage of production unit has been a relevant criterion. The impact of relevant reductions of available power generation capacity with a considerable influence on the power prices in the different market segments is a criterion used by market participants.

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?

As mentioned in answer to Question 1 a single threshold of 100 MW for the power market and of 10 million cubic metres per day (10mcm/d) for gas production are considered to be relevant. At the same time such unified thresholds would increase clarity and certainty in the evaluation what is considered insider information (and what not) and at the same time would reduce complexity and burdensome publications procedures.

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

Processes are already put in place by market participants to ensure that inside information is identified and published according to the respective provisions.

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?

In general, market participants consider all kinds of data, which can have an influence on the power and gas prices (all fundamental data, incl. data published). That means that fundamental data is (automatically) collected from various information sources / platforms and services providers and then analysed and taken into account to define a firm's hedging and trading strategy and plans.

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?

BDEW agrees that it is necessary to distinguish between inside information relating to the electricity and gas markets as they differ fundamentally.

For power markets 100 MW is considered the value from which on market participants consider information relating to changes in the availability of their power plants relevant to comply with the provisions of art. 4.1 REMIT. The 100 MW threshold is referred to in the ACER REMIT Guidance and derives from the transparency obligations under Regulation EU N ° 714/2009.

For natural gas production in absence of an official EU Guidance, a threshold of 10 million cubic metres per day (10mcm/d), is generally referred to as a general practice by market participants for publishing events related to unavailability of gas production.

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?

n.a.

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?

Yes, for the power market the 100 MW threshold is referred to in the REMIT Guidance and derives from the transparency obligations under Regulation EU N ° 714/2009.

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

The REMIT framework should be maintained and further developed for gas and power markets as it has contributed towards an improvement in the integrity and transparency of wholesale energy markets. Market participants and regulators have set up their compliance systems and controls according to this framework.

Nevertheless, it is an established EU practice to review existing EU legislation after many years of application and to publicly consult market participants on it. Aim of such reviews is usually a “REFIT” of existing legislation: Further improvements of the existing framework to further simplify the rules and make them more efficient and proportionate (for example, adopted EMIR REFIT or upcoming MiFID II review)

Also, such a review process may identify areas where the REMIT framework needs to be developed further to address more fundamental problems with the application and design of the REMIT framework, as well as more recent market and political developments.

This review can take place on all levels of the REMIT framework and may lead to changes of the REMIT Regulation, the REMIT Implementing Regulation, adoption of new EU Commission legislation (e.g., Delegated Acts) and/or clarifications in ACER’s documents.

Hereunder we present first ideas for such a review of the REMIT Framework.

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

Inside information is currently published on specific platforms (e.g., EEX transparency platform) and/ or firms’ own websites. There are also currently different levels of transparency and data quality with regards to disclosure of inside information. Therefore, it is complex and burdensome for market participants to access and use information that is published according to Article 4 of REMIT.

The publication of inside information by market participants via Inside Information Platforms (“IIPs”) as indicated by ACER in its 4th Guidance Document, would guarantee in our view a major improvement, and ensure a harmonized, timely and efficient publication of inside information. Firms are responsible and liable only for sending their data to IIPs, but IIPs are responsible for publishing this data. IIPs should be registered with ACER subject to a defined set of conditions, e.g., compliance with standards in terms of availability and with ACER’s standards for publication of inside information (in particular data quality). IIPs should not impose technical burdens others from what is prescribed by ACER. Firms’ publication platforms can still serve as back-up solution, in

particular in case of outages of IIPs. The above-mentioned changes regarding the publication of inside information via IIPs can be achieved by a change of the guidance notes of ACER.

In conclusion, we strongly support the idea of making the disclosure of inside information mandatory and as a default on disclosure platforms, as indicated in the 4th Guidance document of ACER. Platforms should be wholly responsible and liable for:

- their systems' availability and reliability,
- the immediate publication of the information received from MPs,
- correspondence between the information received and published

The aforementioned features should be certified and supervised by ACER.

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

The qualification of insider information does not depend on the size of the market participant. The decisive factor is the capacity of the production- or consumption unit. We refer to the above: For production units the threshold of 100 MW power or 10 million cubic metres per day (10mcm/d) for gas seems to be appropriate.

c) Consumption units and the obligation to disclose inside information

Large industrial consumer should have the same obligations under REMIT like the producers as the power and gas prices are dependent of both supply and demand.

d) Obligation to disclose inside information by infrastructure operators.

The current definition of market participant does not include infrastructure operation. These entities who operate infrastructure can possess information that could also be inside information in relation to gas, power or transmission. However, currently there are no specific other obligations to disclose or publish. BDEW therefore suggests a clarification in the definition of market participants.

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

BDEW recommends, ACER to publish additional guidance and examples on the use of the exemption under Art. 4 (2) (exemption permitting the exceptional delay of publication of inside information) i.e., what scenarios would fall under either exemption and

examples/cases of good practice/poor practice. Market participants would like to understand when and how such exemptions could be used. Furthermore, ACER should publish aggregate, anonymised information about the use of these exemptions (together with the ones under Art. 3(4)) must be notified to ACER and the NRAs) in order to obtain more transparency on the usage of the above-mentioned provisions.

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