Berlin, 06 June 2023

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Position Paper

BDEW – Position Paper on REMIT II

Transparency Register-ID: 20457441380-38

The German Association of Energy and Water Industries (BDEW), Berlin, represents over 1,900 companies. The range of members stretches from local and communal through regional and up to national and international businesses. It represents around 90 percent of the electricity production, over 60 percent of local and district heating supply, 90 percent of natural gas, over 90 percent of energy grid as well as 80 percent of drinking water extraction as well as around a third of wastewater disposal in Germany.

BDEW is registered in the German lobby register for the representation of interests vis-à-vis the German Bundestag and the Federal Government, as well as in the EU transparency register for the representation of interests vis-à-vis the EU institutions. When representing interests, it follows the recognised Code of Conduct pursuant to the first sentence of Section 5(3), of the German Lobby Register Act, the Code of Conduct attached to the Register of Interest Representatives (europa.eu) as well as the internal BDEW Compliance Guidelines to ensure its activities are professional and transparent at all times. National register entry: R000888. European register entry: 20457441380-38

BDEW, the German Association of Energy and Water Industries with more than 1,900 members, firmly believes in the **importance of good regulation** as an indispensable foundation for the integrity of the European energy markets. A set of common rules gives guidance for fair competition on the market, and their enforcement a level-playing field for all market actors. In this regard, **BDEW** welcomes the publication of the draft Regulation on Wholesale Energy Market Integrity and Transparency (REMIT II). We fully support the objective of REMIT strengthening of the integrity and transparency on the energy wholesale markets. The further development of the REMIT framework is key to enhancing confidence in the integrity and transparency of EU wholesale energy markets, which especially in times of crisis is of paramount importance. However, we also attach a great importance to **useful, appropriate, and effective regulation.** Hence, we fear that the REMIT reform, if not properly designed in the context of existing legislation on wholesale energy and financial markets, may lead to results jeopardizing the intent of the actual reform.

In order to achieve the goal of further strengthening market integrity and confidence in market dynamics to efficiently allocate goods at lowest cost, regulation needs to follow **four design principles**.

1. It needs to be precise and clear in scope, responsibility of stakeholders and possible sanctions.
2. The roles of NRAs and ACER need to be clearly defined and mapped out to avoid double or interfering responsibility and thus create legal certainty. If accepted and proven arrangements already exist in similar regulatory frameworks, those should serve as a blueprint.
3. It needs to respect other regulatory regimes, in this case financial market regulation and their implementation. If similar provisions are incorporated, they need to be adapted to energy market regulation. At the same time, interference, multiple reporting channels or significant differences, e.g., in reporting standards, definitions of market manipulation or inside information need to be avoided.
4. Transparency relies on data and proper reporting channels. Thus, reporting platforms need to be available, responsibility and liability for reporting transactions needs to be clear, and data collection needs to be limited to a minimum. If too much data or redundant data by different market actors is to be collected, valuable information contained in the data might get lost in the noise of reported or published data. In addition, collecting data without creating additional insight or value for the regulator and the market actors will only add to the administrative cost of energy trading which will ultimately be passed on to the final customer.

In the following, we address all of the above four principles and list specific amendments to the text.

1 Scope and Responsibility

REMIT II introduces new definitions of market participants (MPs) (Art. 2 (7), persons professionally arranging (and executing) transactions (PPA(E)Ts) (Art. 2 (8a)), and organized market places (OMPs) (Art. 2 (20)). However, these definitions are set too broad and are overlapping such that no clear distinction between their individual roles in the market is given. In principle, the differentiation should follow the lines:

- **MPs** are only those persons executing transactions on their own account[1];
- **OMPs** are only operators of trading venues and brokers (such as exchanges, capacity platforms of any other person professionally arranging transactions);
- **PPATs** are only those persons who arrange transactions not executing them.

In addition, **Distribution System Operators, Storage System Operators, and LNG System Operators** are important market participants who should be subject to specific REMIT obligations, as they hold regularly disclosable inside information and fundamental data, even if they do not enter into transactions of wholesale energy products. Thus, they should become subject to obligations under Art. 4 and Art. 8 (5), only, in order to avoid an overly burdensome and unnecessary regulation.

The definition of **wholesale energy products** should not comprise the potential delivery in the Unions (Art. 2 (4)) as, in particular for LNG deliveries, this definition is unworkable. Scoping potential delivery for coupled electricity markets like SDAC or SIDC, however, might be feasible.

The Commission's text extends the definition of **Market manipulation** to "any other behavior relating to wholesale energy products". According to the Staff Working Document the intention of this extension seems to cover potential capacity withholding. Such behavior, however, will only lead to market impact in case of a dominant market position.

[1] A specific approach needs to be introduced for certain infrastructure operators, as is lined out in the following paragraph.

The treatment of dominant market players is already covered under existing competition law. In addition to that, the expansion of the definition leads to significant legal uncertainty while clarity is required for provisions that constitute a criminal offence, if violated.

The requirement for **3rd country firms to declare an office in the Union** (Art. 9 (1)) is unnecessary and likely to damage market liquidity[2]. Having a fully staffed and equipped EU established branch from which trading activities are controlled or even executed instead of trading cross-border is overly burdensome.

2 Role of ACER and the NRAs

In order to be consistent with the arrangement in financial market regulation and the distribution of responsibilities between ESMA and the NCAs, NRAs should remain solely competent and responsible for the supervision and enforcement of REMIT prohibitions under Article 3 (prohibition of insider trading) and 5 (prohibition of market manipulation) and of the obligation under Article 4 (obligation to publish inside information).

If at all, ACER should exercise such new supervisory and enforcement powers exclusively on IIPs and RRMs, for which ACER gets direct supervisory and enforcement powers under the new Articles 4a and 9a of the REMIT proposal. We thus suggest a complete deletion of the new powers for ACER for conducting parallel investigations (Art. 13 (3) to (9) and Art. 13 (a) to (d)).

BDEW generally welcomes the new competence for **ACER to issue guidelines and recommendations** (Art. 16b). However, the legal nature of these needs to be clarified. If they were binding, review and adoption by the EU Commission after public consultation must be mandatory.

BDEW also calls for **post-trade transparency be made mandatory for ACER** (Art. 12 (2)). However, ACER should follow discretion about publication of anonymised trading information.

[2] This is particularly important for the security of supply with LNG, as many LNG importers are located outside the Union.

3 Delineation with Financial Market Regulation, especially MAR

A substantial volume of energy is today traded on long-term markets off or on exchange. A large share of these contracts is settled financially, in particular on exchanges, thus rendering them financial instruments in the sense of MiFID and their trading being regulated by MAR. REMIT II has to respect the boundaries between the financial and energy market regulation. Unfortunately, the REMIT II proposal by the EU Commission falls short in this respect and contrary to its intention creates a double layer of regulation for energy derivatives markets. This will create new trading barriers for the long-term electricity markets and will impact their liquidity, which is opposed to the aim of the EU Commission's proposal to actually enhance and strengthen these markets.

BDEW acknowledges the EU Commission's efforts to create better alignment between REMIT and MAR. However, a more tailor-made approach, further alignments to *inter alia* accepted market practices and technical improvements are necessary.

Therefore, wholesale energy products which are financial instruments and are already regulated under MAR should be scoped out of the provisions for **algorithmic trading** (Art. 5a), **direct electronic access** (Art. 5a) and **suspicious transaction and order reporting** (Art. 15) as well as in the according definitions in Art. 2 (8a), (18) and (19).

We thus suggest the following changes to REMIT to achieve better alignment with MAR and its ongoing review:

- REMIT II should strengthen the concept of **accepted market practices** like in MAR.
- The extension of the definition of **market manipulation** to "any other behaviour" is too broad and unspecified; It should thus be deleted.
- Similarly to MAR, an Annex I to REMIT II would allow the definition of a list of **positive and negative indicators for certain market abuses.**
- The scope of the disclosure obligation for inside information in the context of **protracted processes** should be adjusted to the sector specific conditions to create legal certainty.
- An EU Commission Delegated Act for a **list of relevant inside information and the definition of a threshold for the disclosure of such information** would create clarity and legal security.

4 Data Reporting and Transparency

Market transparency and integrity heavily relies on clear and feasible reporting duties and standards. As laid out in the introduction, more data do not necessarily need to be better data. In case of redundant reporting obligations, the relevant information for regulators contained in the reported data might be lost in the sheer amount of reported data points. We therefore **advocate for a parsimonious approach, limited to the necessary data collection only,** that allows all stakeholders to focus on data quality instead of implementing mechanisms for double or even triple reporting under different regulatory regimes or standards.

REMIT II should only oblige stakeholders to report the data that are relevant to their own transactions or transactions concluded on their platforms, i.e., data they own, and they can thus be made responsible for. In light of Art. 8 we suggest that OMPs are responsible and liable to report OMP-traded transactions, whereas MPs continue to report their bilateral OTC transactions concluded outside the OMPs. The technical details should continue to be defined via implementing acts.

The **Suspicious transactions and order reporting (STOR) Regime (Recital (14), Art. 1 (2), Art. 2 (8a), Art. 15)** should only be applicable to PPATs and OMP transactions and not to persons executing transactions or bilateral OTC transactions. The STOR regimes of REMIT and MAR need to be clearly delineated to avoid overlapping regulation with regard to financial instruments.

BDEW welcomes the regulation of platforms for inside information reporting (IIP) as well as the regulation for registered reporting mechanisms (RRM). In order to achieve good oversight for IIPs and RRMs as key parts of the disclosure and reporting infrastructure, they should be given more time to ensure an orderly transition to the new regulatory regime. MPs should be allowed to use fallback solutions, e.g., their own website, to disclose relevant information in case of non-availability of the reporting platforms.

For the publication of inside information, ACER or the EU Commission should be able to **set a disclosure threshold** either by an EU Commission list of relevant inside information (Art. 4 (1a)) or binding guidelines/recommendations of ACER (Art. 16b). Such thresholds create legal clarity and certainty facilitating compliance with the REMIT inside information disclosure regime. Also, it would avoid publishing information that is not price relevant and hence render the disclosure regime and the IIPs more effective.

Articles 7a to 7d introduce a **new data reporting regime for LNG price assessments and benchmarks** which was introduced via EU emergency legislation that was borne out of the energy price crisis in 2022 and the switch from Russia-supplied natural gas to globally procured LNG.

However, this reporting regime should be integrated into the genuine REMIT-reporting framework in order to reduce the operational burdens and avoid overlapping reporting activities that refer to the same underlying transactions.

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