



JEAG Comments on REMIT II Dialogues

Creating well-functioning energy markets and fostering market transparency and integrity without causing disproportionate costs

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The Joint Energy Associations Group¹ (JEAG) welcomes that the EU Commission (“EC”) has tabled its legislative proposal for a review of REMIT (Regulation on Wholesale Energy Market Integrity and Transparency – “REMIT II”) as REMIT has contributed to an improvement in the integrity and transparency of EU wholesale energy markets. This reform should ensure that any changes are clear and implementable without causing disproportionate costs, while enhancing transparent and well-functioning energy markets. This paper summarises our views on the changes proposed by the Council and EU Parliament (“EP”) to REMIT II, in particular:

- Market participants need to know how to comply with the new REMIT II framework based on clear, binding implementation rules issued by the EU Commission and non-binding ACER guidance.
- Market participants require a sufficient implementation time of 18 months for new obligations.
- Market participants should always be able to balance their (intermittent) production portfolio or to hedge their energy price risks.
- REMIT II should not raise market access barriers negatively impacting the competitiveness and liquidity of EU energy markets.

¹ JEAG = BDEW, EFET, Eurelectric, Eurogas, IOGP, VKU

- National regulatory authorities (“NRAs”) should remain solely competent and responsible for the supervision, investigations and sanctions to avoid the creation of a double layer of oversight and enforcement.

Creation of binding legal clarity

Market participants need to know how to comply with the new REMIT II framework, in particular the transparency obligations and market manipulation prohibitions. Therefore, we support the EP’s proposal to add a new mandate in Article 6 for the EC to define through delegated acts the following elements:

- A minimum threshold(s) for the disclosure of inside information as this also facilitates compliance and improves efficiency of the disclosure regime (see also EFET [study](#));
- A list of detailed examples of what constitutes market manipulation behaviour; and
- A definition of intermediate steps for “protracted processes”

Nonetheless, some changes proposed by the EU co-legislators to Article 2, subparagraph (1) and (2), relating to the definition of inside information and market manipulation contradict the principle of legal certainty and clarity since they bear uncertainties for the interpretation and application of REMIT. For example, the insertion of the new wording “engaging in any other behaviour” in Article 2 (2), point (a) substantially extends the scope of the definition of market manipulation, without any further definition of what is meant by it.

Need for an appropriate implementation period for new REMIT II obligations

Given the volume of substantial changes proposed to existing REMIT provisions, the number of newly introduced provisions and the need for numerous (new) EC implementing acts and supporting ACER guidance, we must set a realistic implementation date. We therefore welcome that the Council in Article 3 of the proposal (“Entry into Force”) and the EP in Article 23 of REMIT (“Entry into Force”) are considering such an implementation period. We propose that market participants receive an appropriate implementation time, in particular:

- 18 months for (a) the obligation of suspicious order and transactions reporting under Article 15; (b) for the regulation and supervision of algorithmic trading under Article 5a; and (c) the requirement for non-EU firms under Article 9 (1), as all of those provisions are newly introduced for physical power and gas markets.
- We support the Council proposal in Article 3 (“Entry into Force”) of the REMIT II proposal that provisions subject to the adoption of EC implementing acts shall apply with effect from six months after their adoption. This concerns the Articles 4a, 9a and 8(1a), but should be further extended to also include other provisions further defined through implementing or delegated acts such as Articles 2 (4), 6 and 7c.

Enable market participants to hedge their commercial risks in case of outage of Inside Information Platforms (IIPs)

It is important that market participants can use disclosure channels other than IIPs, including their own back-up solutions, for the disclosure of inside information in the event of any technical problems with an IIP which prevents the timely publication of inside information. Therefore, in such exceptional cases, market participants should be able to use other channels for the publication of inside information, including their own websites, as otherwise they are prevented from balancing their (intermittent)

production portfolio or hedging their energy price risks. For example, this will enable a power producer to buy the amount of power on the market it needs to fulfil its supply obligations vis-à-vis its counterparties in the event of an outage of its own power plant(s). We therefore support the EP's proposal in Recital 11 to allow market participants to use their websites to disclose inside information and this should be made more explicit in the body of the Regulation.

Market access barriers negatively impact the competitiveness and liquidity of EU energy markets

The requirement in Article 9 to establish an EU office for trading activities in the EU would create a barrier to trade which could have a significant negative effect on competitiveness, market liquidity and security of supply. It would be overly burdensome and trigger manifold consequential impacts (such as tax, human, IT and capital resources) to require a fully staffed and equipped EU established branch office from which the trading activities are executed and controlled, instead of continuing trading on a cross-border basis. Many firms may be unable to bear such disproportionate costs and adverse impacts and could consequently leave, or choose not to enter, the EU energy market. As third-country firms play a crucial role in providing physical energy and liquidity in the main EU energy markets, restrictions on access for these firms would negatively impact the market liquidity and EU's security of supply in particular in gas and LNG markets. Market access restrictions would therefore considerably reduce the ability of EU based firms to effectively hedge their energy price risks.

Third-country market players are, particularly in the Nordic power market, an integral part of the market. As the share of renewables grows in the European energy mix, third-country market players interlinked with regional European power markets provide crucial flexibility to the EU. If those market players are required to have a staffed and equipped office in the EU, those will be put in an unmanageable situation to the detriment of the Nordic market and other European markets linked to the Nordic power market.

We firmly believe that the EU energy system will benefit from promoting competition, enhancing liquidity and be accessible to a broad range of firms recognizing that the EU energy market is not an 'island' when it comes to supply, production and risk mitigation. We therefore support the Council wording in Article 9 to designate a representative in a Member State as a more balanced approach and reject the EP's proposal to establish an office from which market participants shall perform and control their trading activities.

ACER's guidance should be non-binding and is to be consulted

We welcome the proposals that ACER can issue guidelines and recommendations on various REMIT II provisions as it creates legal clarity and will harmonise the application of REMIT II by NRAs and market participants. While we support the EP's proposal to broaden the scope of matters on which ACER may issue guidance (Articles 3, 4, 4a, 5, 5a, 8, 9 and 9a), this guidance should remain – as proposed by Council – of a non-binding nature and should not be made binding through a so-called "comply-or-explain" approach. Any binding interpretation of REMIT II should remain the competence of the EC through delegated or implementing acts.

We also support the EP's proposal that the ACER guidelines and recommendations should be formally consulted with relevant market participants.

Similarly, the EP proposal in Article 16 that ACER shall publish a list of non-exhaustive indicators relating to insider trading and market manipulation in order to increase legal clarity. However, such a list should include both positive and negative indicators.

Avoid the creation of a double layer of supervision and enforcement

We believe that the supervision and enforcement by NRAs of REMIT has proved to work efficiently and effectively. We urge that NRAs remain solely competent and responsible for the supervision, investigations and sanctions. ACER may take a supportive role for investigations upon specific request, or with the agreement of competent NRAs in certain cross-border cases involving several EU Member States (and always in close collaboration with the respective NRAs). ACER's main current role is to monitor the market and should remain primarily one of informing NRAs of REMIT breaches and of coordination, i.e., to facilitate the investigations by NRAs of REMIT breaches which have a cross-border dimension. In such cases, NRAs should be given sufficient time to consider opening an investigation themselves. We therefore support the Council text on Article 13 et seq.

Make LNG data reporting more efficient

The LNG data reporting and the LNG benchmark would be better integrated into the REMIT reporting system, in particular into the Implementing Regulation 1384/2014, to create an efficient LNG data reporting scheme and avoid double or irrelevant reporting of LNG data. This would transform the LNG data reporting into a more advanced and adequate system similar to the existing REMIT data reporting. We therefore support the EP proposal in relation to LNG Market Data reporting (e.g., Article 7a-d and Article 8) although we believe there is still room for further improvement in integrating these requirements.

Review of the impact of REMIT II on energy markets and participants

We support the EP's proposal in a new Article 21a to introduce a review clause to assess the impact of REMIT II on the functioning and liquidity of energy markets within 3 years after the adoption of REMIT II. We believe that this should apply to at least all substantially amended and new REMIT II provisions.