7 December 2012

European Commission
Directorate General Internal Market and Services
B-1049 Brussels
Belgium

Via Email: ener-wholesale-markets@ec.europa.eu

Re: Stakeholder Consultation on implementation of a data and transaction reporting framework for wholesale energy markets

Dear Sirs,

The Global Financial Markets Association (GFMA)[1] is pleased to provide comments on the European Commission's Stakeholder Consultation on the implementation of a data and transaction reporting framework for wholesale energy markets.

GFMA welcomes the development of an EU wide transparency regime for the wholesale energy markets and supports the Commission's work in developing this regime. In particular, we support the Commission's efforts to eliminate any duplicative reporting requirements where firms are subject to multiple reporting regimes under REMIT, Regulation 648/2012 (EMIR) and Directive 2004/39/EC (MiFID). Our responses to the questions raised by the Stakeholder Consultation are set out in Annex 1 to this letter.

GFMA also provided comments in July 2012 to the Agency for the Cooperation of Energy Regulators (ACER) regarding its REMIT Data Collection Public Consultation Paper[2]. We have attached our response to ACER in Annex 2 to this letter. This response sets out the key points which we consider need clarification in order to develop a clear and robust regime.

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[1]The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, please visit http://www.gfma.org .

[2] PC_2012_R_10

However, where the Commission has raised additional questions or where our position has changed since July as a result of subsequent regulatory developments, we have included our further comments in the response set out in Annex 1.

GFMA appreciates the opportunity to provide comments on the Stakeholder Consultation and would be happy to discuss our response with you.

Sincerely,

Vickie Alvo
Executive Director
GFMA

Attachments:

- GFMA Comments on the European Commission's Stakeholder Consultation on implementation of a data and transaction reporting framework for wholesale energy markets
- July 2011 GFMA Response to ACER's REMIT Data Collection Public Consultation Paper

EUROPEAN COMMISSION STAKEHOLDER CONSULTATION ON THE IMPLEMENTATION OF A DATA AND TRANSACTION REPORTING FRAMEWORK FOR WHOLESALE ENERGY MARKETS

1. What, if any, verification of their capacity to effectively interact with ACER for the purposes of data transfer should be required of a) market participants reporting transactions or b) of third parties who report transactions on behalf of market participants?

As discussed in our response to ACER's Consultation (see Annex 2), we support the introduction of a standardised means of making transaction reports under REMIT. However, a distinction should be made between market participants reporting their own transactions and third parties who report transactions on behalf of market participants.

We welcome the statement in Article 23(6) of the proposed Markets in Financial Instruments Regulation (MiFIR)[1] that the reporting obligation under MiFID / MiFIR should be considered to have been satisfied where a counterparty reports to a Trade Repository (TR) in accordance with Article 9 EMIR, irrespective of whether that TR is also an Approved Reporting Mechanism (ARM).

We believe that this principle should also apply to reporting obligations under REMIT, so that those reporting obligations would be considered to have been satisfied where a counterparty reports to a TR or ARM, irrespective of whether that TR or ARM is also a Recognised Reporting Mechanism (RRM). Consequently, the proposals for all reporting parties to pass a predefined certification scheme with respect to verification of their capacity before being permitted to report to ACER seem to be overly restrictive, and could mean that existing ARMs and TRs would need to apply again for certification from ACER in order to make reports under REMIT. We suggest the following approach:

- We consider that where an ARM has been registered already by national competent authorities or where a TR has already been registered or recognised under EMIR, it should not be necessary for the TR/ ARM to be subject to further checks by ACER. The standards set to become a RRM, ARM or TR should be of a sufficiently high standard across the board and include measures to prevent hacking and spamming, so that the authorities receiving the transactions have confidence in the integrity of these systems. Firms should be able to report a single core data set to meet obligations under MiFID, EMIR and REMIT, with the ARMs, TRs and RRMs responsible for coordination of data transfer where required.
- Where a firm intends to become a RRM, reporting transactions on behalf of third parties, but is not a TR or ARM, then we agree that it may be useful to verify their capacity to interact with ACER.
  This verification could include confirmation that:
    - they ensure the security and confidentiality of the data reported;
    - they incorporate mechanisms for identifying and correcting errors in a transaction report;
    - they incorporate mechanisms for authenticating the source of the transaction report; and
    - they include appropriate precautionary measures to enable the timely resumption of reporting in the case of system failure.
- We do not agree that market participants would need to register themselves as RRMs where they wish to report their own transactions only, although we agree that market participants **could be** eligible to become RRMs. However, in practice it is unlikely that a market participant would use

[1] Council compromise text of 20 November 2012

another market participant as an RRM in relation to a transaction to which that market participant was not a party, as this may involve providing commercially sensitive information to another market participant.

2. What, if any, additional steps do you consider the Commission should take to ensure an effective interaction between transaction reporting under financial regulation and under REMIT

We welcome the Commission's dual intention that the implementation of REMIT does not impose unnecessary burdens on market participants and also that transaction and data reporting should be as smooth as possible, through using existing market architecture and the related data and information flows, to the extent possible. GFMA emphasizes that the key way in which the Commission could ensure an effective interaction between transaction reporting under financial regulation and under REMIT is by ensuring that firms do not need to sign up to additional reporting service providers in order to make their reports under REMIT. In other words, where a firm reports to an ARM under MiFID or EMIR, its reporting obligation(s) under REMIT, where they exist, should be considered to have been satisfied too.

We also note that other jurisdictions (e.g. the United States) are placing new reporting requirements on firms. We would urge the Commission to contribute to reaching global consistency to the extent possible in order to prevent a potential situation where firms are reporting, e.g. separate trade identifiers, to different global regulators in relation to the same trade.

3. Do you agree that it is not appropriate to include a de minimis threshold for reporting standard transactions carried out using organised market places, brokers or trade matching facilities or which are cleared?

In line with GFMA's response to ACER's consultation earlier this year[2], we agree it is not appropriate to implement a *de minimis* threshold, as this carries the risk of creating unintended loopholes and increasing complexity for market participants. Additionally, neither transaction reporting requirements under MiFID nor reporting requirements under EMIR have a *de minimis* threshold and from the perspective of aligning reporting requirements to facilitate operational implementation and avoid duplication, we do not see merit in setting a *de minimis* threshold under one piece of legislation and not the other.

4. Do you agree that the definition of "standard commodity transactions" and the creation of a white list for fully reportable transactions, as set out in the consultant's report, represents a suitable approach?

From the consultant's report we understand a "standard commodity transaction" to be a transaction where the offer and contract transaction stage can be transformed into the applicable REMIT standard reporting format (long form) although initially at least, it will not be mandatory to report all standard commodity transactions in long form – only those on the white list. Reporting in long form will also only apply to the contract stage of trading power and gas (not capacity, or the order stage or the scheduling/nomination stage for which there will only be one reporting form).

[2] GFMA Letter to ACER dated 31 July, attached as Annex 2.

The white list refers to a defined set of standard commodity transactions which must be reported in long form and in phase 1 these are transactions: (1) on electronic brokerage platforms, on exchanges, (3) confirmed by means of electronic deal matching systems and (4) nominated electronically for clearing by means of automated deal clearing systems (page 89 and 90 of the consultant's report). We consider that such transactions should be easily reportable in a standardised format. However, as we note under question 5 below, we are concerned this represents a cumbersome approach which may not meet the requirements of Article 8(2) REMIT.

5. In relation to transactions not covered by the "white list", a) Do you agree that these transactions should be subject to reduced "short form" reporting requirements? b) Should these transactions be reported at a defined interval or only upon request of ACER? c) Should the frequency of "short form" reporting be related to the size of the market participant or the overall frequency or volume of trading in which it is engaged?

The proposal to have two reporting regimes - a long-form report for transactions carried out on "*brokerage platforms, organised market places and trade matching facilities or which are electronically cleared*", and a short-form report for everything else - seems overly complicated, and may not be consistent with the Commission's mandate under Article 8(2) which provides that the Commission shall draw up a list of the contracts and derivatives which are to be reported. The Commission's proposal for the transactions which would be subject to the long-form report is to list "*all widely used organised market places, brokers or trade matching facilities*". We do not believe this will provide a "*list of contracts and derivatives*" as required under Article 8(2).

If all products traded on those "*organised market places, brokers or trade matching facilities*" are required to be reported, this seems to go beyond the scope of REMIT, which applies only to wholesale energy products. The Commission would need to list the "*contracts and derivatives*" traded on the listed markets which would be subject to the reporting obligation.

The proposal for the short-form report is also unclear. The Commission appears to propose that any wholesale energy product not required to be reported using the long-form report should be reported using the short-form report. A catch-all category of "*contracts not on the list*" does not seem to be a "*list of contracts and derivatives*" to be reported, as required under Article 8(2).

We believe the list proposed by ACER in its recommendations provides a more workable solution.

However, if the Commission does determine that non-standardised products should be subject to a reporting obligation we consider that it will be important to provide for phased implementation of the obligation, to allow market participants time to develop appropriate systems for reporting these contracts, and also to ensure that the timeframe for reporting these non-standardised products is appropriate. We discuss this further in our response to question 10 below.

6. Do you agree that the definition of wholesale energy products extends to contracts relating to LNG and storage, including landing and storage capacity?

The definition of wholesale energy products will only extend to contracts relating to LNG and storage where those LNG and storage contracts fall within the definition of "wholesale energy product" in REMIT: i.e., where they are:

- Contracts for the supply of natural gas where delivery is in the Union;
- Derivatives relating to natural gas produced, traded or delivered in the Union;
- Contracts relating to the transportation of electricity or natural gas in the Union; or
- Derivatives relating to the transportation of electricity or natural gas in the Union.

Any contract relating to LNG and storage which does not fall within this definition will not be a "wholesale energy product".

While we consider that from the perspective of having complete transparency, it would be helpful for participants to know how much capacity is available and what is in storage (noting that in the UK, this LNG information is available and published by the National Grid), we doubt whether "contracts relating to LNG and storage, including landing and storage capacity" qualify as "contracts for the supply of natural gas", "derivatives relating to natural gas" or "contracts or derivatives relating to the transportation of natural gas". The Commission states that "storage contracts are related to the delivery of gas in the EU". However, "contracts related to the delivery of gas in the Union" are not wholesale energy products, and it would seem difficult to argue that storage contracts would be either "contracts for the supply of natural gas", or "contracts relating to the transportation of natural gas". Similarly, "contracts relating to LNG" would appear not to be covered, unless they are contracts for the supply of LNG or contracts relating to the transportation of LNG.

We would also note, as discussed in our response to ACER's consultation (at Annex 2) that the transaction reporting obligation under Article 8 REMIT is a separate obligation from the obligation to publish inside information under Article 4 REMIT. These two obligations serve two different purposes and cover different types of information. As a result, we do not consider that it is possible to argue that because the definition of "inside information" would cover LNG and storage contracts, these contracts should also be covered by the reporting obligation.

7. Do you agree that generator connection agreements are normally a fundamental data item and not a contract relating to transmission?

We agree that generator connection agreements should be considered a fundamental data item and therefore reportable and visible to the market. We would highlight that in the UK power market, this information is available: all power stations must publish both the minimum and the maximum availability/power output they can produce.

8. Do you agree that where one of the parties to a transaction organises the market place, that party should have sole responsibility for reporting the transaction?

We agree that exchanges and TSOs which act as counterparty to all transactions should be able to report the transaction for both parties as this should rationalise the process for both market participants and the authorities. However, we consider that it is vital that reporting conventions under REMIT are harmonised with those under EMIR (and subsequently MiFID II) where the legislation imposes an obligation on both parties to report their transactions.

9. Do you agree that where neither party to a transaction organises the market place, that both parties should separately remain responsible for reporting the transaction?

In its response to the ACER consultation in July 2012, GFMA supported mandating that one primary reporting party reports a trade on behalf of both counterparties. However, ESMA has since issued its final Regulatory Technical Standards (RTS) to the European Commission (on 27 September 2012). These RTS require a confirmation to be agreed by both parties for transactions. As the Commission will be aware, in summary, both counterparties have an obligation to report details of any derivative contract (or modification or termination thereof) to a TR; however, counterparties subject to this reporting obligation may delegate the reporting of the details of the derivative contract to the other counterparty or a third party, including a CCP, to ensure details are reported without duplication. Also, to avoid inconsistencies in common data tables, each counterparty to a derivative contract is to ensure that the common data reported is agreed between the parties to the trade. We strongly suggest the Commission adopts a similar approach under REMIT to the approach taken under EMIR given, as we note above, that reporting conventions should be harmonised under REMIT, EMIR and MIFID II to facilitate reporting for participants.

As part of this goal to facilitate global, harmonised reporting, we would also emphasise our support for the use of Static Data Standards (unique identifiers at market participant and transaction level). The reporting obligations on firms are increasing significantly, across different jurisdictions and therefore we see a need for consistency across unique identifiers. The need for consistency of unique identifiers occurs at the following three levels:

- "unique participant identifier": each participant must have an ID and we strongly urge the Commission to adopt ISO Standard 17442 for Legal Entity Identification (LEI) as its "unique participant identifier", given it has now been endorsed by both the G20 and Financial Stability Board as the global standard for entity identification. ISO Standard 17442 is currently being used as the required entity identifier in OTC swaps transaction reporting to the CFTC and is expected to be used in other jurisdictions around the world as they implement the G20 mandate for OTC swaps reporting. We make further comment on this point at the end where we have comments on the consultant's proposals.
- "unique swap identifier": the unique swap identifier is a unique code for each transaction and assigned at point of execution by the reporting party which binds the trade on both sides
- "unique product identifier": a product taxonomy. We support a product taxonomy which is globally recognised and consistent across the commodities space. In this regard, we would like to draw the Commission's attention to the product taxonomy which has been developed by ISDA, which includes commodity products. This taxonomy was developed to assist the industry in implementing the reporting requirements under Dodd Frank, and is intended to evolve in response to feedback from interested parties, including feedback from different regulators. We suggest that the Commission leverage this work to the extent possible.

10. Do you agree that daily reporting of transaction is the most appropriate frequency to allow ACER to effectively monitor wholesale energy markets?

In considering this question we have also taken into account whether this timeframe aligns with reporting requirements under EMIR and MiFID, mindful of the need for alignment if a participant wishes to fulfil more than one reporting obligation with one report. Under MiFID I today and under the MiFID II proposals, firms must report their transactions as soon as possible and no later than T+1.

Similarly, under EMIR counterparties are required to report the details of any derivative contract they have concluded and any modification or termination of that contract to a TR no later than the working day following the conclusion, modification or termination of the contract. The technical standards under EMIR provide for a phase-in schedule depending on the type of derivative contract. In the interests of consistency, we consider that reporting under REMIT should also be required to take place no later than T+1.

However, it may be useful for ACER or the Commission to prescribe a phase-in schedule for types of contract which are not currently reported by T+1, to allow market participants time to build appropriate systems and procedures to permit compliance with REMIT.

For example, if the Commission decides to divide the reportable contracts into standardised and non-standardised, it may be appropriate for market participants to have a transitional period in which they may report over a longer time-frame (e.g., at least a month). (see also our response to question 5 above)

11. Do you consider it would be possible for market participants to report their transactions on a daily basis?

We consider that it is possible to report transactions daily. However, we are mindful that these new obligations may pose particular challenges for smaller participants which to date have not been subject to such reporting requirements nor have the same operational capacity as larger participants currently. We would suggest the EC consider a phased in approach to implementation and welcome that this is envisaged in the consultants report. If smaller participants are closed out of the market, this would have a negative impact on liquidity.

12. Do you agree that reporting of orders to trade (bids) should not be collected by ACER from market participants, other than organised market places, at least initially?

We agree that orders to trade should be reported through organised market places only. We would highlight that information pertaining to unexecuted bids and offers is only stored in, and therefore must be collected from, organised market places as it is not feasible for market participants to report orders to trade where the transactions are not channelled through an organised market places.

We would additionally note that EMIR does not require reporting of pre-trade information and legislation which will require such under revised MiFID and MAD is not yet finalised. For market participants, as well as for the Commission and ACER, this is new territory. We would make the point we make throughout our response that there needs to be consistency between reporting obligations under REMIT, EMIR and MIFID and that when the obligation to report orders to trade extends to other asset classes there must be alignment between what ACER implements and what other regulators implement to avoid asset classes arbitrarily being subject to greater or lesser stringent requirements.

13. For which stages in the lifecycle do you consider that it is necessary to collect transaction data?

We agree with the proposals that there are three different stages in the life cycle: order (bid/offer), contract (matching/clearing) and scheduling/nomination and that it is appropriate to capture data at each stage.

However, although MiFID II may require reporting of orders, most firms' reporting systems are not currently set up to capture orders, and any reporting obligation in relation to orders would currently have to be met through the exchanges / platforms, a point we emphasise under question 12 above.

We note that the discussion in section 4.1 refers to Article 15 of REMIT requiring persons professionally arranging transactions to make bid data available to ACER and national regulatory authorities. However, Article 15 is a suspicious transaction reporting obligation (i.e., an obligation to report suspected abusive transactions), not an obligation to make general reports of bid data. The general obligation to report bid data is set out in Article 8(1), which requires market participants to report orders to trade to ACER. As both regimes contain an obligation to report bid data (although the obligation arises in very different circumstances) this does not make a significant difference to our responses. However, we consider that it is important to ensure that the distinction is preserved between the insider dealing regime under REMIT and the general reporting obligation, to avoid confusion and also to ensure that any delegated acts or technical standards are based on appropriate provisions under EMIR.

14. Do you agree that it is appropriate to develop a specific standard product taxonomy for reporting transaction data to ACER?

We support a globally consistent and harmonised product taxonomy which is globally recognised and is consistent across the commodity space. As we note in our response to question 9 above, we would draw the Commission's attention to the fact that product taxonomies are already being developed (e.g., by ISDA), including in relation to commodity products, to assist the industry in meeting its reporting requirements under Dodd Frank. We urge the Commission to leverage the existing work undertaken in this field to the extent possible, to avoid multiple taxonomies and fragmentation.

15. Do you consider the items reportable under the draft electricity transparency rules envisaged by the Commission's consultation mentioned above sufficient for monitoring with regard to electricity fundamental data and which reporting channel(s) would you consider appropriate?

We consider that there is sufficient real time data available in the power markets. With respect to the most appropriate reporting channels, the TSOs are best placed to know whether an asset is down.

16. What gaps do you consider to exist in relation to fundamental data related to gas, and can this be accessed without the creation of a framework for gas equivalent to that envisaged for electricity and which reporting channel(s) would you consider appropriate?

There is less transparency in the gas markets currently than in the power markets. However, the TSOs do hold a considerable amount of data regarding gas flows as they perform allocation of capacity, invoicing, and monitoring of gas meters. The one key piece of information of which they do not have sight is the price at which gas trades; however, ACER will receive this information from the market participants when they report their transactions. Therefore, we believe that the most appropriate reporting channel would be via the TSOs.

Additionally, please provide any comments you may have on the specific recommendations set out in the final report of the consultants engaged by the Commission.

We note the consultants' recommendation to "*Use the EIC code as a basis for the ACER code, used to identify market participants in the REMIT reporting format or at least supply as a secondary code*" (Page 87 of report). However, as previously stated, we urge the Commission to adopt ISO Standard 17442 for Legal Entity Identification (LEI) as its "unique participant identifier", given that the LEI has now been endorsed by both the G20 and Financial Stability Board as the global standard for entity identification.

Such an approach would be consistent with ACER's second recommendation[3] which proposes "*The unique identification of each market participant should be achieved through using the Legal Entity Identifier (LEI). Should the LEI not be available or applicable when reporting under REMIT starts, market participants should use either the BIC, e.g. if also active in derivatives markets and subject to reporting under EMIR, the GS1/GLN, the EIC, provided that the market participant has communicated a unique GS1/GLN or EIC used at the time of registration, or the "ACER code" for registration as interim solution as unique identifier until the LEI applies*". Now that ISO Standard 17442 has been endorsed and entities can be registered and receive their LEI leveraging the CICI Utility (ciciutility.org), there is no requirement for alternative identifiers. In fact, allowing a system that tolerates multiple identifiers to be issued to the same entity for use in reporting in different jurisdictions creates huge operational issues in aggregating data across countries. Multiple identifiers would mean that regulators and firms alike will need to maintain all the identifiers in their systems and would need to have the capability to link them together to measure the risks taken by a single entity. This is very much the system that exists today, which has proven inefficient for systemic risk management purposes.

[3] Page 12. ACER's Recommendations to the Commission as regards the records of wholesale energy market transactions, including orders to trade, according to Article 8 of Regulation (EU) No 1227/2011

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31 July 2012

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Via Email: consultation2012R09@acer.europa.eu

Re: REMIT Data Collection Public Consultation Paper

Dear Sirs,

The members of the Commodities Working Group of the Global Financial Markets Association (GFMA)[1] welcome the opportunity to provide comments to the Agency for the Cooperation of Energy Regulators (ACER) regarding the REMIT Data Collection Public Consultation Paper (CP)[2]. Our members are interested in maintaining an active dialogue with ACER throughout this process of consultation, and would therefore like to offer some constructive comments that we hope will serve as part of that ongoing dialogue.

We welcome the development of an EU wide transparency regime for the wholesale energy markets and support ACER's role in preparing recommendations for the Commission to

[1] The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, please visit http://www.gfma.org
[2] PC_2012_R_10

develop this regime. Our responses to the questions raised by the CP are set out in the Annex to this letter. These raise some points which we consider need clarification in order to develop a clear and robust regime.

In summary:

- **Ensuring no duplicative requirements**: we welcome ACER's efforts to eliminate any duplicative reporting requirements where firms are subject to REMIT, Regulation 648/2012 (EMIR) and Directive 2004/39/EC (MiFID). However, we note that these proposals will only be effective where the scope of the reporting obligations under REMIT, EMIR and MiFID are aligned. Otherwise, even if counterparty has reported under EMIR, they will still be required to report under REMIT if the REMIT reporting obligation requires additional information or requires reporting on a shorter timeframe than that under EMIR.

- **Alignment with EMIR and MiFID**: whilst we note and welcome the intention to minimise duplicative reporting requirements, we are concerned that, aside from REMIT, there are a number of other proposed legislative changes which, when finalised, will introduce further reporting requirements. However, the detail of these requirements is not yet final and the different requirements are being finalised at varying speeds. For example, EMIR will introduce reporting requirements in relation to derivatives transactions, and the proposals for a revised Markets in Financial Instruments Directive (MiFID2) seem likely to increase significantly the scope of the trade and transaction reporting obligations under the existing MiFID. The details of the reporting obligation under EMIR may not be finalised until the end of this year, and the reporting obligations under MiFID may not be finalised until later in 2013. In order to minimise duplicative reporting requirements, it will be necessary to review the reporting obligation under REMIT once the EMIR and MiFID proposals have been finalised.

- **Alignment with other global reporting regimes**: in addition to new reporting regimes in the EU, other jurisdictions are also introducing new reporting obligations. In some cases these regimes have been the subject of much discussion and there are points which have arisen which could usefully be considered in the context of developing the reporting regime under REMIT. In particular, in responding to the CP and aiming to provide ACER with constructive comments, we have considered the reporting obligations arising under Dodd Frank, and protocols agreed in that respect. We believe that it is desirable to aim for global consistency to the extent possible (and particularly in relation to trade identifiers), to avoid the potential situation where firms are reporting the same transaction to multiple regulators, using different trade identifiers.

- **Key principles for reporting requirements**: we would propose the following key principles for developing reporting requirements:

    - Standardisation of reporting party convention:
        - Ensure that each transaction is reported by one counterparty (on behalf of both counterparties) to one data repository only;
        - Avoid the position where the same transactions are reported to multiple repositories under different unique identifiers;
        - Avoid the position where a transaction is not reported, as each counterparty applies a different reporting party convention and considers that they are not required to report;

    - Use of Static Data Standards (unique identifiers at market participant and transaction level):
        - Enables common aggregation and transparency for regulators;
        - Simplifies aggregation and minimises market participants' and regulators' build costs.

- **Requirement to develop new systems and processes**: REMIT will introduce reporting requirements in a number of products for the first time, particularly for non-standardised contracts. As a result, market participants will need sufficient time to build reporting systems and develop appropriate processes before the reporting requirements are enforced. The comments that we have provided below reflect our initial thoughts on what is a very complex area. Our thoughts are likely to develop further as the detail of the reporting obligation develops and emerges. As a result, we look forward to further opportunities to discuss these issues and to work with ACER to develop a robust and effective reporting regime.

In addition to our responses to the questions raised by ACER, we would also like to highlight a point regarding the registration process. On page 10 of the CP, ACER states that "market participants have to register before entering into a transaction". Under Article 9(4) REMIT, market participants are only required to "submit the registration form to the national regulatory authority prior to entering into a transaction which is required to be reported". There is no requirement under REMIT for the registration process to be complete before a market participant may enter into a transaction.

This is an issue that we have raised in our previous comment letters[3], however we would like to state again that REMIT does not require firms to be registered prior to trading, and does not contain provisions dealing with the consequences of failure to obtain registration prior to trading (e.g., the basis on which ACER may refuse to register a firm, appeal mechanism,

[3] See our comment letter of 21 May 2012

whether this would invalidate a trade). This is a key issue of legal certainty under REMIT, and we would be happy to discuss this further with ACER if necessary.

The members of the Commodities Working Group welcome the opportunity to respond to this Consultation Paper and trust that you find our comments helpful. As financial institutions, our members are subject to transaction reporting obligations under MIFID today, and are engaged in the current detailed discussions regarding how the reporting requirements under EMIR (to which they will also be subject) will be implemented. Our members therefore have considerable knowledge and understanding of reporting requirements at both a practical and operational level. We would be pleased to discuss with ACER any questions or issues raised and look forward to maintaining an ongoing dialogue with ACER on these and other issues of importance to the wholesale gas and power markets.

Yours sincerely,

Vickie Alvo
Executive Director
GFMA

Annex – Responses to Questions

Question 1

1. Do you agree with the proposed definitions? If not, please indicate alternative proposals.

We agree that there are some key terms in Article 8 which should be clarified in order to avoid ambiguity for the market participants who have to report information. However, we are concerned that ACER is seeking to define terms which are currently used in other legislation without being defined, and which can simply take their ordinary dictionary meaning. For example, words such as "agreement" or "contract" are widely used in EU legislation and do not require definition. Similarly, words and phrases such as "trade", "bid and offer" and "execution" are currently used in EU financial market legislation without definition, and without causing unnecessary ambiguity or confusion to the financial markets. By seeking to define these terms, ACER risks creating new ambiguity and uncertainty where its definitions do not align with the meaning that these terms are understood to have under financial market legislation.

For example, ACER may create a definition of a term which is narrower than the meaning currently given to that term, potentially carving some transactions out of the scope of REMIT. An example of this would be the proposed definition of "transaction": "an agreement between two entities to exchange a wholesale energy product". This could have the effect that parties would be required to report only agreements to exchange a wholesale energy product, but not to report entering into that wholesale energy product (it would be difficult to describe entering into a contract for the supply of electricity or natural gas as "exchanging a wholesale energy product").

The proposed definitions also risk creating additional ambiguity and uncertainty. For example, it is unclear how the definitions of "transaction", "agreement", "contract" and "trade" work together. The process of defining these terms appears to have generated more terms requiring definition, and this increases the risk of uncertainty, particularly where these terms are already used widely in other contexts, and are already understood to have a particular meaning with no need for a definition.

We are also concerned that ACER is suggesting the introduction of terms such as "energy commodity" (it is not clear whether this is intended to form a sub-set of wholesale energy market products, or to expand the definition of "wholesale energy market products") without making it clear how these terms would be used in any possible implementing acts.

However, as mentioned above, we do agree that there are key terms in Article 8, and in REMIT more broadly, which require definition. These include "derivative", and we welcome ACER's suggestion that the definition of "derivative" under REMIT be linked to Annex I of MiFID. However, it is not clear why the proposed definition of "derivative" should be

"without prejudice to the definition of energy commodity". If the intention is to make it clear that REMIT only applies to derivatives as set out in Annex I of MiFID, this should already be clear from the text of REMIT, which states that it applies to "derivatives relating to electricity or natural gas produced, traded or delivered in the Union" and to "derivatives relating to the transportation of electricity or natural gas in the Union". As a result, we consider that the wording "without prejudice to the definition of energy commodity" should be deleted.

We welcome the distinction ACER has drawn between "standardised" and "non-standardised" contracts. However, the definition of "standardised contract" given in the CP is unclear (referring to "standard agreements", which would then require a definition for "standard agreement") and does not tie in with the proposals for reporting contained in the CP. We understand that ACER proposes that orders to trade in "standardised contracts" should be reported, and also that only orders to trade in transactions which take place on an organised market should be reported.

As discussed below, the proposal that orders to trade should only be required to be reported where they relate to transactions which take place on an organised market is practical and appropriate. However, if orders to trade in "standardised contracts" must be reported, and "standardised contracts" covers a range of contracts which is broader than simply those traded on an organised market, this risks creating inconsistency. As a result, we would suggest that the definition of "standardised contract" should cover only contracts admitted to trading on an organised market.

We would also welcome a definition of "organised market"[4], which is a term used in REMIT but not defined. However, we are concerned that the proposed definition may not be appropriate in the context of wholesale energy markets, and we would ask ACER to refine this definition to ensure that it is consistent with the requirements of REMIT and of the wholesale energy markets.

Question 2

2. What are your views regarding the details to be included in the records of transactions as foreseen in Annex II? Do you agree that a distinction should be made between standardised and non-standardised contracts?

We welcome ACER's work in seeking to avoid duplicative reporting requirements for firms already required to make reports under MiFID or the Regulation on OTC derivatives (EMIR), and suggest that to assist with this aim ACER should seek to conform its proposed

[4] For consistency with REMIT and to avoid confusion we would note that the term used in REMIT is "organised markets", not "organised market places". In our response we use the term "organised markets".

reporting format to those already established under MiFID and being developed under EMIR.

We welcome the acknowledgment that it may be challenging to report non-standardised contracts on the same form as standardised contracts. Rather than creating a parallel reporting process for standardised and non-standardised contracts, it may instead be possible to create a form with free text fields where appropriate, which could be used to supply the relevant information where available, or the nearest approximation where the relevant contract is non-standardised.

We consider that any change in price and quantities should only be reported as a new transaction if the previous report has been cancelled and withdrawn. Otherwise this risks creating a distorted view of the market.

We are concerned by ACER's proposal that contracts should be submitted to ACER in addition to any transaction reports. Contracts may contain information which is confidential or market sensitive. We note that under Article 30 (Access to documents) of the regulation establishing ACER[5], ACER is required to make any documents that it holds available to the public, unless one of the limited exceptions applies. Although there is an exception where disclosure of a document would "undermine the protection of commercial interests of a natural or legal person, including intellectual property", it is not clear that this would protect firms in all cases. In addition, ACER itself is not subject to confidentiality obligations equivalent to those imposed on financial markets competent authorities.

In order to avoid the risk of disclosure of commercially sensitive information, market participants should not be required to provide contracts to ACER. It would be useful to understand what additional information ACER considers it would obtain from the contracts which would not be included in the transaction report, as it may be possible to expand the fields in the transaction report rather than require market participants to provide copies of contracts. We also note that there is no requirement under MiFID or EMIR to provide copies of a contract along with a transaction report. As a result, firms reporting under MiFID or EMIR would not simply be able to rely on the fact that they have reported in accordance with this legislation, but would also need to ensure that they have submitted any relevant contracts to ACER.

Do you agree with the proposal on the unique identifier for market participants?

As a preface to our specific comments on ACER's proposals regarding market participant unique identifiers (UIs), we make the following broader remarks in relation to the important role UIs play in data reporting. The reporting obligations on firms are increasing

[5] Regulation 713/2009

significantly, across different jurisdictions, and therefore we see a need for consistency across UIs at a global level, as this will:

- Lead to common aggregation and transparency for regulators;
- Make it simpler to aggregate correctly and reduce errors; and
- Minimise the build cost for market participants and regulators.

The need for consistency of UIs occurs at the following three levels (given discussions to implement the Dodd Frank Act in the US are more advanced than equivalent discussions in the EU, we have given the US terms and translated them into the EU context):

- "unique participant identifier": each participant must have a unique identifier, and we welcome ACER's inclusion of the legal entity identifier (LEI) as a possible unique identifier, as this has now been confirmed as a globally acceptable identifier. We comment further below on how the unique participant identifier should be applied.
- "unique swap identifier": this is a unique code for each transaction and is assigned at the point of execution by the reporting party.
- "unique product identifier": this is product taxonomy. We welcome ACER's proposal regarding a product taxonomy and comment on this further in our response to Question 6.

In relation to ACER's proposal for a unique participant identifier, we welcome the statement from ACER that it will recognise existing codes provided the market participant has communicated this code to ACER. We would recommend that ACER establishes a hierarchy which prescribes which unique participant identifiers market participants should use where they may have more than one option available, as we believe that over time this will lead to a more uniform approach globally (particularly given the increased global recognition of the LEI). We would suggest that the hierarchy should be as follows:

1. LEI, where the firm has an LEI;
2. BIC, where the firm does not have an LEI;
3. EIC, where the firm does not have an LEI or BIC;
4. GS1/GLN;
5. Code given by ACER if the firm has none of the above.

As ACER may be aware, the UK financial markets regulator, the Financial Services Authority (FSA), recently set out a similar proposal in issue 38 of its "Market Watch" publication[6], intending to facilitate the harmonisation of transaction reporting within the EEA by removing the option for firms to identify themselves with their FSA reference

[6] www.fsa.gov.uk/pubs/newsletters/mw_newsletter38.pdf

number. Consequently, all firms would have to make transaction reports using a BIC in the reporting firm field instead of their FSA reference number. The project is currently on hold, but we mention it as an example of other regulators recognising this issue and taking steps to facilitate harmonisation.

We note that ACER states in the CP that it will reject any report where the ACER code and any existing codes do not match. In this case, it is not clear what impact that this may have on firms' liability for failure to report, and whether firms would be considered to have complied with their reporting obligations under REMIT even if the report is rejected for this reason. We would ask ACER to clarify this issue.

Primary reporting party and reporting logic

We strongly urge ACER to mandate that one primary reporting party should report a transaction on behalf of both counterparties, rather than both parties entering the transaction into a data repository and then undertaking matching to ensure that the information is accurate and consistent. We believe that mandating a primary reporting party results in greater accuracy and transparency, reduces the margin for error, and removes the need for matching trade identifiers.

Mandating a single primary reporting party would be consistent with the approach taken under Dodd Frank, and also the approach being discussed in relation to implementation of the reporting obligation under EMIR (under which counterparties are permitted to delegate reporting, and it is likely that non-financial counterparties will delegate reporting to financial counterparties). Under Dodd Frank, a hierarchy is also being developed to determine which party reports the trade, depending on the status of the counterparties to the trade (e.g., whether they are a swap dealer, major swap participant etc).

Most of the current discussion in the US centres on who will report the trade where the two counterparties are of the same status. This discussion is likely to be relevant to our discussion in relation to REMIT, where many transactions will be between two wholesale energy market participants. There are a number of solutions being proposed (e.g., requiring the seller to report the trade). We would be happy to discuss these further with ACER.
We believe that it is important that ACER, as regulator, should set the hierarchy following consultation with the industry, to ensure consistency of approach.

Question 3 - 5
3. Do you agree with the proposed way forward to collect orders to trade from organised market places, i.e. energy exchanges and broker platforms?

We agree with ACER's Recommendation (recommendation 2, page 12) that reporting could be carried out through organised market places[7]. As ACER recognises in its recommendation, we would like to emphasise the importance of ensuring the parameters prescribe that the orders to trade which must be reported are limited to:

- Orders to trade in standardised contracts; and
- Orders to trade in wholesale energy products that are admitted to trading on organised markets.

Where ACER states that such orders to trade "could" be reported through organised markets, we would highlight that information relating to unexecuted bids and offers is only stored in, and therefore must be collected from, organised markets. It is not feasible for market participants to report orders to trade where the transactions are not channelled through an organised market.

Do you think that the proposed fields in Annex II.1 will be sufficient to capture the specificities of orders, in particular as regards orders for auctions?

As ACER will be aware, EMIR does not require reporting of pre-trade information, and the legislation which is likely to require such information in relation to non-equity markets under MiFID2 has not yet been finalised (but the legislative proposal suggests that only orders to trade on regulated markets or MTFs will be required to be reported). As a result, ACER is the most advanced in considering how reporting of orders to trade in non-equity markets will be implemented. For market participants, as well as for ACER, this is new territory. We would make the point that we make throughout our response, that there needs to be consistency between reporting obligations under REMIT, EMIR and MiFID, and that when the obligation to report orders to trade comes into effect in relation to asset classes other than wholesale energy products there must be alignment between ACER and other regulators to avoid a situation where some asset classes are arbitrarily subject to more or less stringent requirements.

4. Do you agree with the proposed way forward concerning the collection of transactions in non-standardised contracts? Please indicate your view on the proposed records of transactions as foreseen in Annex II.2, in particular on the fields considered mandatory.

As ACER recognises, non-standardised contracts are "highly customised" (page 10 of the CP) and we consider it unlikely that details of such contracts will fit into "standard" reportable item fields.

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[7] As mentioned previously, for consistency with REMIT and to avoid confusion we would note that the term used in REMIT is "organised markets", not "organised market places". In our response we use the term "organised markets".

For example:

Tolling contracts: a tolling contract is an agreement under which a party supplies gas to the other party and receives electricity in return, while paying a fee to the other party. It is not possible to split the gas supply and electricity off-take in order to fit them into the proposed reportable fields, as there would be no way of recording the tolling fee. As a result, the pricing of each component would not be comprehensible or provide useful information to ACER.

"Clean" options/supply: under "clean" options/supply, the pricing of the gas/electricity is affected by emissions allowances which may be physically delivered. As emissions allowances transactions are not currently reportable under REMIT (but may become so under MiFID2), this component would need to be stripped out, which would add further complexity to the reporting of the transaction. As with the example of tolling contracts, the gas/electricity element of the transaction would not be comprehensible or provide useful information to ACER without the emissions allowance element.

We would welcome further consideration from ACER regarding an appropriate solution to permit appropriate reporting of non-standardised contracts.

5. Please indicate your views on the proposed collection of scheduling / nomination information. Should there be a separate Annex II.3 for the collection of scheduling / nomination data through TSOs or third parties delegated by TSOs?

We agree with the proposed collection of scheduling/nomination information. However, we would emphasise that this information can only be obtained from TSOs, which are able to provide a comprehensive view of physical flows of gas and power. Therefore, we strongly recommend that this information should be reported by TSOs or by third parties to which TSOs have delegated reporting. If the onus to report scheduling/nomination information is placed on counterparties, we believe that the additional burden will increase barriers to entry for new entrants into the wholesale energy markets and lower competition in the market as a result. More importantly, it will ultimately increase costs which will be passed on to the end consumers.

We support the creation of a separate annex for scheduling/nomination information which sets out the details of the information that TSOs will be required to provide. Scheduling/ nomination information is limited to a firm's net position, volume and counterparties, and therefore the reporting format should be tailored accordingly.

Question 6

6. What are your views on the above-mentioned list of contracts according to Article 8(2)(a) of the Regulation (Annex III)? Which further wholesale energy products should be covered? Do you agree that the list of

contracts in Annex III should be kept rather general? Do you agree that the Agency should establish and maintain an updated list of wholesale energy contracts admitted to trading on organised market places similar to ESMA's MiFID database?

We would agree with the proposed list of contracts set out in Annex III. We consider that it is most beneficial to market participants where the scope of application of regulation is clear and specific. The proposed list is broad enough that all gas and power contracts will fall within scope, which is welcome to the extent that it removes ambiguity.

However, we are concerned by the addition of Section A(7): "any other commodity contract for which delivery is scheduled to be made within the period generally accepted in the market for that commodity as the standard delivery period…". The contracts listed in Section A(7) should not go beyond the scope of the definition of "wholesale energy market product" in REMIT. If Section A(7) is retained, it should be revised to read "any other contract for the supply of electricity or natural gas for which delivery is scheduled to be made…"

What are your views on the idea of developing a product taxonomy and make the reporting obligation of standardised contracts dependent from the recording in the Agency's list of specified wholesale energy contracts?

We would support a product taxonomy which is globally recognised and consistent across the commodities space. In this regard, we would like to draw ACER's attention to the product taxonomy which has been developed by ISDA, which includes commodity products. This taxonomy was developed to assist the industry in implementation of the reporting requirements under Dodd Frank, and is intended to evolve in response to feedback from interested parties, including feedback from different regulators. We suggest that ACER give consideration to whether it can leverage off this work in developing a product taxonomy suitable for its purposes. GFMA would welcome the opportunity to discuss this point further with ACER.

Questions 7 and 8

7. Which of the three options listed above would you consider being the most appropriate concerning the de minimis threshold for the reporting of wholesale energy transactions? In case you consider a de minimis threshold necessary, do you consider that a threshold of 2 MW as foreseen in Option B is an appropriate threshold for small producers? Please specify your reasons.

8. Are there alternative options that could complement or replace the three listed above?

We support Option A (that the implementing acts would not specify a de minimis threshold). As ACER acknowledges, an exclusion already exists for final customers with a consumption capacity of less than 600 GWh, a threshold which we believe is sufficiently high, as capacity up to 600 GWh (equivalent to 68 MW of baseload capacity) in a marginal

plant or located in an area prone to congestion could influence the market sporadically. We are concerned that setting a de minimis threshold in addition to this exclusion carries the risk of (i) creating unintended loopholes which enable the avoidance of the reporting requirement and (ii) increasing complexity for market participants in determining what is in and out of scope for reporting purposes. In our experience it is simpler to carve out exclusions at the product level rather than set a minimum threshold and consequently risk compromising the integrity of the reported data.

Finally, we note that transaction reporting under MiFID does not currently have a de minimis threshold.

Question 9

9. Do you agree with the proposed approach of a mandatory reporting of transactions in standardised contracts through RRMs?

We support the introduction of a standardised means of making transaction reports under REMIT, and also support the introduction of RRMs as an equivalent to the existing ARMs. However, in the interests of building a reporting system that is both robust and operationally practical we consider that it will be necessary for ACER to consider thoroughly the form that this reporting process should take, and the impact that this may have both for the market and for ACER.

We consider that reporting through an RRM should not be mandatory, and that firms should continue to be able to make their transaction reports themselves or through a designated third party. Firms which make their own transaction reports directly to ACER should not be required to register as an RRM, unless they are also reporting on behalf of other market participants.

As a general principle, we would expect that all activity which takes place on an organised market would be reported to ACER by that organised market. As a result, market participants would only need to make arrangements to report transactions which do not take place on an organised market. This will rationalise the process for both ACER and for market participants.

We suggest that ACER gives further consideration to the structure for reporting of transactions. Under the proposed model (page 18 of the CP), ACER will receive transaction reports from a large number of RRMs (particularly if a number of market participants register as RRMs). We believe that it would be appropriate to rationalise this structure. By way of example, for reporting purposes under Dodd Frank we understand that there will be three Swap Data Repositories (SDRs) which will stand between the regulator and the reporting counterparties. Even with this limited number of SDRs, the following issues have been highlighted:

- Participants will need to connect to all three SDRs to that, where they are not the primary reporting party, they can validate that the reporting counterparty has reported correctly on their behalf (as they do not control which SDR their counterparty reports to);
- There is a greater risk of duplicative reporting; and
- The SDRs will need to establish intelligent co-operation with each other.

In the EU, where the number of TRs, ARMs and RRMs is likely to be higher, the issues raised above will be exacerbated.

We would also welcome confirmation from ACER that ARMs which have already been registered by national financial markets competent authorities would also be recognised by ACER as being able to conduct activities as an RRM without the need to undergo further authorisation.

We welcome ESMA's efforts towards the objective of a common reporting mechanism through its consultation on EMIR, and we welcome the draft MiFID proposals in relation to reporting to an ARM. The Commission suggests[8] that the reporting obligation under MiFID should be considered to have been satisfied where a counterparty reports to a TR, irrespective of whether that TR is also an ARM. We believe that this principle should also apply to reporting obligations under REMIT, so that the reporting obligation under REMIT would be considered to have been satisfied where a counterparty reports to a TR or ARM, irrespective of whether that TR or ARM is also an RRM.

Question 10

10. Do you believe the Commission through the implementing acts or the Agency when registering RRMs should adopt one single standardised trade and process data format for different classes of data (pre-trade / execution / post-trade data) to facilitate reporting and to increase standardisation in the market? Should this issue be left to the Commission or to the Agency to define?

We do not agree that one single standardised trade and process data format is appropriate for reporting different classes of data. As we note above, we believe that increased standardisation is desirable, and that in achieving this goal it is critical to have:

- Standard reporting conventions; and
- Standard unique identifiers at market participant and transaction level with a common product taxonomy.

[8] Recital 29 of the proposed Markets in Financial Instruments Regulation

However, we do not believe that the data reported for different data classes can be consolidated into a single format. The level and type of data reported needs to be differentiated depending on when the report is made in the lifecycle of the transaction.

In particular, to avoid providing confusing and misleading information to ACER, it will be crucial that ACER can distinguish easily whether a report relates to pre-trade data, execution data or post-trade data. If ACER receives reports that it perceives to be post-trade data, which are actually pre-trade data, this risks giving ACER a badly distorted and misleading picture of the market.

We believe that ACER (rather than the Commission) should play a leading role in implementing data collection and defining the data format, given ACER's technical expertise and regulatory role in these markets.

Question 11

11. Do you agree that market participants should be eligible to become RRMs themselves if they fulfil the relevant organisational requirements?

We agree that market participants could be eligible to become RRMs, although market participants should not be required to register as an RRM where they only report their own transactions. However, we believe that in practice it is unlikely that a market participant would use another market participant as an RRM in relation to a transaction to which that market participant was not a party, as this may involve providing commercially sensitive information to another market participant.

Question 12

12. In your view, should a distinction be made between transactions in standardised and non-standardised contracts and reporting of the latter ones be done directly to the Agency on a monthly basis?

We do not agree that it is necessary to make a distinction in the process for reporting standardised and non-standardised contracts. Reporting directly to ACER or through an RRM/TR/ARM should be the mechanism for all reporting (in line with EMIR and the current draft of MiFID2).

Further, it will be necessary to clarify whether reporting of non-standardised contracts "on a monthly basis" means that reporting should be done at the end of each month for all non-standardised contracts entered into or amended since the previous report, or whether it means that all non-standardised contracts should be reported within a month from being entered into or amended.

It will also be necessary to continue to monitor developments with the timing for reporting under EMIR, to ensure consistency.

Question 13

13. In view of developments in EU financial market legislation, would you agree with the proposed approach for the avoidance of double reporting?

We agree that measures should be in place to ensure that the provisions of Article 8(3) are respected and that market participants are not subjected to double reporting obligations. We consider that the most appropriate way to ensure this would be to align the reporting obligation under REMIT with those under MiFID and EMIR (including requirements as to form, content and timing). This will avoid the need for market participants to supplement a report that they have already made under MiFID or EMIR, to ensure compliance with REMIT (which would effectively result in a double reporting obligation).

We support the proposed approach of obtaining any relevant information from TRs and from ARMs. However, the CP also states that "where a substantial part of the REMIT data requirement is not met under EMIR (or MiFID), RRMs should be required to report the complete data set directly to ACER where it is efficient to do so or where it would be undesirable for every market participant to maintain technical specifications that marked each instrument for reporting in one direction or another". It is unclear how this would operate. RRMs are simply a conduit for reporting, and will only have the required information (or the authorisation to release it) where it has been provided by market participants. If a market participant has not provided information to an RRM (e.g., because it is reporting under EMIR or MiFID, or because it is reporting directly to ACER), the RRM will not be able to report the complete data set directly to ACER.

In addition, where the same transaction is reported multiple times through different channels, this may lead to an increased risk of inaccuracies in the data (simply by virtue of the fact that the same data is being entered or corrected in multiple systems) and may result in the following adverse consequences for regulators:

- The need to spend significantly more resources on supervising data quality to resolve data inconsistencies;
- Obstacles to conducting efficient investigations. We note that in an investigation, regulators will always verify the integrity of the data by going to the underlying sources. If there are inconsistencies in the reported data, the data would need to be corrected in all systems before the investigation can progress, to avoid the individual or firm launching a defence based on the unreliability of the source data.

Questions 14 and 15

14. Do you agree with the proposed approach concerning reporting channels?

15. In your view, how much time would it take to implement the above-mentioned organizational requirements for reporting channels?

We support the proposed approach concerning reporting channels. As mentioned above, in particular we would welcome confirmation that ARMs registered with national financial markets competent authorities and TRs registered or recognised under EMIR will be recognised as RRMs under REMIT.

As noted above, firms are being required to report an increasing quantity of information for regulatory purposes, and so are being required to build systems to record and report this information. In this regard, we welcome ACER's efforts to avoid imposing duplicative requirements on firms which are also subject to EMIR and MiFID. We are keen to provide ACER with as much assistance in this matter as we can, but we would like to note the following:

- The precise reporting requirements under EMIR have not yet been finalized (as ACER will be aware, ESMA is currently consulting on this issue, with the consultation to close on 5 August 2012); and
- The legislative proposal for MiFID2 is still under negotiation, and is likely to extend significantly the categories of instruments reportable for transaction reporting purposes.

Consequently, the detail on what is to be reported is still unknown, which is a considerable constraint on achieving the desired streamlined approach to reporting. Similarly, the challenges that firms, as well as ARMs/TRs/RRMs, will have to face to make the necessary changes to their systems and infrastructures should not be underestimated.

In light of this, we strongly recommend that there should be a transition period of 3 years before the reporting obligation becomes mandatory. Over this period, the detail of what is reportable under EMIR will be concluded, providing firms and ACER with certainty on this point. This will enable ACER to ensure cohesion with EMIR reporting requirements and avoid a situation where firms have to undertake duplicative reporting simply because what is required under one reporting mechanism does not precisely capture the requirements under another. Further, MiFID2 should be agreed at Level 1 during this period, even if the detail of the Level 2 standards may still be unknown.

Questions 16 and 17

16. Do you agree with this approach of reporting inside information?

17. Please indicate your views on the proposed way forward on the collection of regulated information.

Although we strongly support ACER's aims regarding availability and accessibility of disclosable inside information, we do not agree with the proposed interpretation of Article 8(5). We consider that it would be more appropriate to issue guidance on the interpretation of Article 4 to address the concerns regarding disclosable inside information, rather than seeking to bring disclosable inside information within the scope of Article 8(5).

We strongly agree that inside information must be published in a way that means that it is easily available to all market participants and also to ACER and all national regulatory authorities. As we have mentioned in previous comment letters[9], we consider that inside information cannot be considered to have been effectively publicly disclosed (in compliance with Article 4) where it is only published on a firm's individual website. This would require market participants to be aware of all the individual firm websites of all potential market participants, and to monitor these constantly. As we have also highlighted previously, we would support a requirement for all publication of inside information to be made through a Regulatory Information Service (RIS), or through ACER itself.

If this core requirement is implemented, there will be no need for ACER to monitor the websites of all individual firms to ascertain whether they have "published" any inside information, as the information would already be readily available to ACER.

We understand that ACER considers that, because Article 8(5) requires market participants to provide ACER with "information related to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability in these facilities", and because the same wording is used in Article 2(1)(b) as one of the types of information which may constitute inside information, as a result Article 8(5) requires market participants to provide ACER with all inside information.

We would not agree with this interpretation. The definition of "information" used for the purposes of the definition of "inside information" also includes "information" under Articles 2(1)(a), (c) and (d). In addition, in order to be "inside information", any information must also be "information of a precise nature which has not been made public, which relates, directly or indirectly, to one or more wholesale energy products and which, if it were made public, would be likely to significantly affect the prices of those wholesale energy products". Further, if the Commission had intended Article 8(5) to require the reporting of inside information to ACER and national regulatory authorities, it would have stated this explicitly in Article 8(5).

As a result, we consider that Article 8(5) requires market participants to report information of the sort described in Article 2(1)(b) to ACER and to national regulatory authorities,

[9] See our comment letter of 20 January 2012

whether or not that information is "inside information". Similarly, Article 8(5) does not require market participants to report information of the sort described in Articles 2(1)(a), (c) or (d) to ACER or to national regulatory authorities.

As mentioned above, we strongly support the development of a regime for publishing inside information under REMIT which results in that information being widely and easily available to all market participants, to ACER and to national regulatory authorities, and we would be happy to provide any assistance necessary to ACER in order to develop this regime. However, we do not consider that it is possible to use Article 8(5) to develop this regime.

Question 18

18. Do you agree with the proposed approach for the reporting of regulated information? Please indicate your view on the proposed mandatory reporting of regulated information through RISs and transparency platforms. Should there remain at least one reporting channel for market participants to report directly to the Agency?

In general we support the proposed approach for the reporting of regulated information.

We consider that there should remain at least one reporting channel for market participants to report directly to ACER. This will allow firms to make arrangements in the event that their normal reporting channel is unable to provide reporting services for any reason.

Question 19

19. The recommendation does not foresee any threshold for the reporting of regulated information. Please indicate whether, and if so why, you consider a reporting threshold for regulated information necessary.

The question of whether or not to set a threshold for reporting regulatory information has been much debated in the financial markets sector. There is the potential for minimum thresholds to have other distortive effects on the market and consequently it is difficult to establish parameters for a minimum threshold. As a result, we do not support setting a threshold.

However, we would encourage ACER to work to ensure consistency between the reporting requirements under REMIT and those under MiFID, MiFID2 and EMIR. For example, we note that MiFID currently contains provisions which would permit deferred reporting of certain transactions (e.g., where they are large in size). We would welcome guidance from ACER which would ensure that firms will not be subject to duplicative reporting requirements as a result of differences in the timing and scope of reporting requirements under the different legislation.

Question 20

20. What is your view on the proposed timing and form of reporting?

As discussed above in our response to Questions 16 and 17, we do not consider that the information require to be reported under Article 8(5) includes all inside information.

In any event, any inside information that is required to be disclosed will be available from an existing source (as it will have been reported through an RIS or otherwise made public under Article 4), so market participants should not be under an obligation to report this information to ACER and to national regulatory authorities. It seems to us that the type of information intended to be covered by Article 8(5) is more fundamental background information on the wholesale energy market. Much of this should already be available through registration notifications.

ACER should consider what additional information it will require, and how frequently it will require it.