



FIA – FIA EPTA – ISDA comments on REMIT Review

Executive Summary

The co-signed associations appreciate the opportunity to comment on the European Commission's REMIT proposal. We support the recent changes to the original proposal made in the latest Council text dated 5th May but would like to highlight some additional concerns that remain. In particular, we recommend:

1. retaining the current definition of Person Professionally Arranging Transactions;
2. deleting the proposed changes to the third paragraph of Art. 2 and retaining the current definition in conjunction with ACER guidance when information is considered to be precise;
3. clarifying that the act of cancelling or amending an order shall not be automatically considered insider trading if there was a justifiable rationale for the cancellation;
4. removing the inclusion of algorithmic trading and DEA providers in REMIT;
5. deleting new articles 7a – 7d and related recitals regarding the LNG benchmark regime;
6. retaining the current wording of Art. 9 (1) of REMIT and rejecting the amendment proposal;
7. We support the authorisation requirement for RRM's but recommend drawing parallels from the process for third-country firms under the Benchmark Regulation and EMIR;
8. deleting the newly introduced paragraphs in Art; 13, particularly proposed paragraphs 3-9;
9. replacing the terms client and investor with "market participant" and the term "investment decision" with "trading decision". We further recommend defining when an order is considered pending and clarifying which benchmark is referred to; and
10. deleting Art. 16 (b).

Please see below for further details regarding our positions.

1. Art. 2 (8a) - Definition of PPAT

The proposal amends the definition of Person Professionally Arranging Transactions (“PPAT”) by including a reference to persons *professionally engaged [...] in the execution of transactions in, wholesale energy products*”.

We are concerned that the additional reference to ‘execution’ could ultimately capture any person who, as part of its profession, is counterparty to a transaction relating to a wholesale energy product: including, for example, any end user¹ buying a wholesale energy product for its energy-intensive industrial process.

As a consequence, these persons will become subject to REMIT Art. 15, and will have to report to National Competent Authorities any suspicious order to trade or a transaction, a requirement which seems disproportionate, considering these persons’ actual activity in the market.

It is vital to stress that physical gas and power markets are very different from financial (commodity derivatives) markets. They are characterised by the activity of many more and different entities, including small and medium sized physical suppliers acting at local or national level and energy consumers that procure gas/power to cover their own consumption and not for trading purposes.

Recommendation: We recommend retaining the current definition of Person Professionally Arranging Transactions.

2. Art. 2 – Precise information

It is proposed to amend sub-paragraph (iii) of Art. 2 as follows: *“Information may be deemed to be of precise nature if it relates to a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, including future circumstances or future events, and also if it relates to the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event”...“An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article.”*

The objective of the proposed amendment is not clear and, in particular in the context of the gas and power markets, the additional wording is redundant and creates legal uncertainty. Ultimately, as the proposal recognises, any information (part of a protracted process or not) has to be classified as inside information *‘if, by itself, it satisfies the criteria of inside information’*.

We note that ACER has published guidance in relation to when information should be considered precise as well as when it is having an impact on prices. This existing guidance should be taken into account and states that rather than deeming all information of a certain type to be precise:

“The precise nature of the information is to be assessed by the information holder on a case-by-case basis and depends on what the information is, as well as on the surrounding context. In that assessment, the holder of the information may, among other things, take into

¹ End consumers above the 600 GWh per year threshold in REMIT Art. 2(5).

consideration: (i) that there is a realistic prospect that a fact will occur; (ii) that the estimation of the potential price effect of information disclosure is irrelevant for the assessment of the precise nature; and (iii) that intermediate steps in a lengthy process may be precise information.”

If the rationale for this change is to align the definition with that in MAR, the EU Commission’s proposal of 7.12.2023 for a Regulation to amend MAR put forward in the context of the EU Listing Act Package should be considered. This concerns in particular the disclosure of inside information in the context of a protracted process.

Recommendation: We recommend deleting the proposed changes to the third paragraph of Art. 2 and retaining the current definition in conjunction with ACER guidance when information is considered to be precise.

3. Art. 3 (1) – Insider trading

We note the proposal to add this new sub-paragraph to Art. 3: *“The use of inside information by cancelling or amending an order concerning a wholesale energy product to which the information relates, where the order was placed before the person concerned possessed the inside information, shall also be considered to be insider trading.”*

We are concerned about the general assumption that each cancellation or amendment of such order would be considered insider trading without establishing if there was a justifiable rationale for the cancellation or amendment. This change would negatively impact market participants acting within their normal course of business.

In addition, we ask the Commission to consider providing ACER/NRAs, in consultation with market participants, with the power to develop a threshold(s) for inside information relating to gas and for power, e.g. for power 100MW would be a possible threshold.

Recommendation: We recommend clarifying that the act of cancelling or amending an order shall not be automatically considered insider trading if there was a justifiable rationale for the cancellation.

4. Art. 5 (a) – Algo trading and Art. 2 (19) for DEA providers

The current proposal states “The national regulatory authority of the Member State of the market participant may require the market participant to provide, a description of the nature of its algorithmic trading strategies and the key compliance and risk controls that it has in place”.

We are concerned that the newly introduced Art. 5 (a) and Art. 2 (19) introduce wide-ranging obligations that are not clearly defined and will thus lead to legal uncertainty. For example, it is not obvious, which information needs to be notified to ACER or a Member State NRA. We would also like to point out that current regulations already cover algorithmic trading and direct electronic access. Consequently, the proposed amendments are unnecessary as existing market conduct rules are sufficiently wide to cover the risks connected with these activities. For example, under MiFID, investment firms are already required to notify authorities when they engage in algorithmic trading or providing DEA access in gas and power derivatives. The

inclusion of algorithmic trading by market participants trading Wholesale Energy Products in REMIT would significantly expand the scope of what is already covered by financial regulation and would need to be carefully calibrated to avoid conflicts with existing regulation (e.g. MiFID algorithm rules) and remain proportionate to the risks.

If algorithmic trading and DEA regimes are included in REMIT, the regimes should clarify what are, if any, the specific risks which are not already covered by existing regulatory regimes (e.g. market conduct rules) and establish proportionate mitigations to any identified risks. Furthermore, we would recommend that clearly defined requirements be set out at Level 2 in a similar vein to RTS 6 under MiFID II to ensure consistent interpretation across Member States.

The wording of the current proposal is very concerning and includes excessive and disproportionate obligations which are not in line with the scope and purpose of REMIT.

It is important to note that many market participants, make use of third-party algorithms such as those provided by trading platforms or exchanges. These algorithms are used to improve execution efficiency in markets which include participants using high-frequency trading techniques. Notwithstanding the fact that NRAs could receive multiple notifications for the same algorithm, it could be difficult for market participants relying on these types of algorithms to be able to access all the proprietary information to meet the proposed notification requirements. In which case, less sophisticated market participants, might be excluded from using algorithms, reducing their ability to effectively manage their risk compared to more sophisticated market participants.

Where a firm has access to the required information, our members are concerned that “*details about trading parameters or limits to which the trading system is subject*” would require disclosing proprietary and strictly confidential information, which should only be required to be disclosed within the context of an investigation.

Finally, the definition of ‘algorithmic trading’ is taken from MiFID II but not completely aligned. The MiFID definition generated a lot of discussion when introduced in MiFID and ESMA followed up with a consultation. The definition as currently drafted is very broad and will cover execution tools that can include simple synthetic order types and algorithms that market participants generally regard as a standard way in which to trade in.

Recommendation: We recommend removing the inclusion of algorithmic trading and DEA providers in REMIT.

5. Art. 7 - LNG price reporting and assessment

The proposal introduces new articles 7a-7d in relation to LNG price reporting and the LNG benchmark. Additionally, Recital 16 requires a daily LNG price assessment and definitions for LNG trading, LNG market data, LNG market participant, LNG price assessment and LNG benchmark were added as paragraphs (21) – (25) of Art. 2.

The LNG benchmark was introduced through emergency legislation to deal with the energy crisis, i.e. increased volatility and lack of supply arising from the Russia/Ukraine conflict. An emergency measure is introduced on a temporary basis to address issues which are not related to market abuse and should not be transferred into a permanent measure. REMIT’s main

objective is to monitor market abuse and data reported under Art. 8 should be sufficient to fulfil this objective.

Further, if the proposals were included, we are concerned about the general inclusion of bids and offers in Art. 2 (21): “LNG trading means bids, offers or transactions for the purchase or sale of LNG: (a) that specify delivery in the Union; (b) that result in delivery in the Union; or (c) in which one counterparty re-gasifies the LNG at a terminal in the Union”. We recommend that bids/offers should only be reportable once an EU regasification facility is nominated as they may be significantly outdated by the time the nomination takes place, which makes the information reported seem somewhat redundant and misleading. Once the regasification nomination has taken place, it would further be sensible to report useful information only (e.g. time of nomination, volumes, delivery dates, etc.) – any related bids/offers seem superfluous.

We would also like to point out that the requirement to submit all LNG data in terms of bids, offers and other data for the LNG price assessment is not necessarily reflective of where the market may be trading at and if the LNG price assessment were to be considered to be a benchmark, persons submitting such information could be at risk of being alleged to have attempted or committed benchmark manipulation.

Recommendation: We propose deleting new articles 7a – 7d and related recitals regarding the LNG benchmark regime.

7. Art. 9 – Declaration of office

We note the proposed changes to Article 9 with respect to third-country firms: *Market participants resident or established in a third country shall declare an office, in a Member State in which they are active and register with the national regulatory authority of that Member State*”.

We are very concerned about this proposal as this will create an unjustified and disproportionate market barrier with negative impact on the EU gas and power market and its liquidity, especially as it is unclear whether the proposed change requires establishing an EU branch/ entity or if it would suffice to provide an address.

The choice of the word “declare,” rather than “establish”, supports an interpretation that the proposal is a requirement for a third country market participant to inform (i.e., declare to) a Member State authority its address on registration. However, such requirement is superfluous, since third country market participants are already required to register with Member State regulators and provide their address as part of the registration process.

If Article 9(1) requires third country firms to open an office or establishment in the EU, it would be highly problematic for the functioning of European energy derivatives markets and the EU’s flagship policy ambitions. Europe’s main gas and electricity derivatives markets are traded globally and play a crucial role in the energy transition and the decarbonisation of the European economy. Market participants use these markets for risk management purposes by locking in future prices, thereby protecting themselves and ultimately consumers against price fluctuations.

Opening an EU office or establishment is very onerous and does not only require setting up an entity, human and capital resources but also involves tax considerations and how a new entity

would fit within the current group trading and licencing structure. Firms located in third countries may use various entities within their group to trade on European energy derivatives markets in scope of REMIT.

We believe introducing a requirement to establish EU entities would lead to a competitive disadvantage for the European power and gas market as well as a significant reduction in liquidity. When access to these markets from third countries becomes increasingly burdensome, third country firms may decide to stop trading in the EU, whilst potential new entrants to these markets are unlikely to become active in European energy markets, due to this high initial barrier. Reduced liquidity may negatively impact the functioning of European commodity markets and the ability to trade on wholesale markets to lock in future prices. When firms are unable to adequately hedge their exposure, it can have significant negative consequences for energy firms, making it more difficult for them to operate, invest and compete in the energy market.

The negative impacts are exacerbated by the proposal to expand the definition of market participants as a many additional entities would be brought in scope.

Recommendation: We strongly recommend retaining the current wording of Art. 9 (1) of REMIT and rejecting the amendment proposal.

8. Art. 9 (a) – RRM location and authorisation requirements

The proposed amendments to Article 9(a) of REMIT would require RRM's to become authorised and located in an EU Member State.

We support the proposal for the authorisation of RRM's based on harmonised requirements and their subsequent supervision by ACER but are very concerned about the requirement that RRM's should be located in an EU Member State and strongly suggest establishing a workable third country regime, which allows appropriately regulated and supervised third country RRM's to continue providing reporting services to EU customers. We note that there are currently 17 RRM's which are not established in the Union².

You may wish to consider established third country arrangements as used in EMIR, which guarantee the appropriate regulation and supervision of firms providing such services. Under EMIR, trade repositories ("TRs") centrally collect and maintain the records of derivatives. Following their registration, ESMA supervises the TRs to ensure that they comply on an ongoing basis with all regulatory requirements. A TR established in a third country may provide its services and activities to EU customers when it is recognised by ESMA if certain conditions are met, including an equivalence decision for the third country, an international agreement with the third country and a cooperation agreement between the authorities of the involved jurisdictions. RRM's based in third countries and their EU clients should be able to benefit from a similar market access arrangement.

The applications for recognition and authorisation will require further analysis and level 2 legislation. To facilitate an orderly process for the authorisation and recognition of RRM's, we recommend grandfathering currently registered RRM's until a new process has been established with clear application timelines.

² <https://data.europa.eu/data/datasets/acer-remit-list-of-registered-reporting-mechanisms-rrms?locale=en>

Recommendation: We support the authorisation requirement for RRM's but recommend drawing parallels from the process for third-country firms under the Benchmark Regulation and EMIR.

9. Art. 13 - Additional powers for ACER

Proposed changes to Art. 13 are providing new wide-ranging powers to ACER for investigations currently undertaken by NRAs.

Any consideration to expand ACER's direct supervisory, investigation and enforcement powers with regard to REMIT should respect the subsidiarity and proportionality principle according to Article 5 of the Treaty of the European Union. Furthermore, they would need to be necessary, appropriate and proportionate.

There are considerable doubts if the EC proposals can meet those requirements.

This would at first require an in-depth impact assessment, including corresponding cost/benefit analysis and – according to the EU's Better Regulation Principles - preceding consultation of concerned entities such as market participants, OMPs and IIPs and national regulatory authorities.

Furthermore, we are concerned as to how these would be exercised and whether it would be alongside the enforcement or investigation powers of NRAs. There is a risk of legal uncertainty if several authorities have enforcement or investigative powers for the same market.

Recommendation: We recommend deleting the newly introduced paragraphs, particularly proposed paragraphs 3-9.

10. Terminology – other definitions

- a) We note the addition to Art. 2.1 of the following point (e): *“information conveyed by a client or by other persons acting on the client's behalf and relating to the client's pending orders in wholesale energy products, which is of a precise nature, relating directly or indirectly, to one or more wholesale energy products”;*

The term “client” is not defined and not typically used within REMIT. We propose to replace this with “market participant”. Further, the term “pending orders” is not defined and our members would welcome clarification when an order is considered pending.

- b) It is proposed to include a new paragraph (c) in Article 2: *“(c) transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input EN 26 EN knew or ought to have known that it was false or misleading, or engaging in any other behaviour which leads to the manipulation of the calculation of a benchmark.”;*

It is unclear which benchmarks this new paragraph refers to as the term is undefined.

Recommendation: We recommend replacing the terms client and investor with “market participant” and the term “investment decision” with “trading decision”. We further

recommend defining when an order is considered pending and clarifying which benchmark is referred to.

11. ACER Guidelines, Art. 16 (b)

We recommend maintaining the current regime regarding guidelines. NRAs are the closest to markets and their developments. The current framework allows them to apply the rules and have the flexibility to take into account the specific features of the markets that they supervise.

Recommendation: We recommend deleting Art. 16 (b).

About the co-signatories

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA's clearing firm members play a critical role in the reduction of systemic risk in global financial markets. Information about FIA and its activities is available on www.fia.org.

About FIA EPTA

The European Principal Traders Association (FIA EPTA) represents Europe's leading Principal Trading Firms. Our members are independent market makers and providers of liquidity and risk transfer for markets and end-investors across Europe, providing liquidity in all centrally cleared asset classes including shares, bonds, listed derivatives and ETFs. FIA EPTA works constructively with policymakers, regulators and other market stakeholders to ensure efficient, resilient and trusted financial markets in Europe. More information about FIA EPTA and independent market makers is available on: www.fia.org/epta and www.wearemarketmakers.com

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 79 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on www.isda.org.