

Sent by email to: Mr. Olivier Onidi (DG Energy), Mr Hugo Bassi (Head of Unit “Securities Markets”, DG Internal Market); Mr Gábor Butor, Barnabás Dezséri, Gáspár Molnár (Financial attachés of Hungary to the EU); Mrs. Anna Lekston, Counsellor “Budget and Finance Section” PL, Mr. Robert Kołakowski, Financial Attaché of Poland to the EU, Mr. Tomasz Krawczyk, First Secretary “Budget and Finance Section” PL.

29 June 2011

Dear Mr/ Mrs,

We are writing to you in relation to the coming Regulation on Energy Market Integrity and Transparency (REMIT).

ISDA members broadly welcome REMIT. We regard this initiative as a positive step towards increased convergence between financial and non financial regulation on the prevention of market abuse and particularly the misuse of inside information. We believe the regime created for the securities markets by the Market abuse directive (MAD) has worked well and we welcome the fact that much of what is proposed in REMIT is based on the requirements of MAD, given their inter-linkage. We also however acknowledge the importance of the REMIT regime, being a separate regime and one which is sufficiently tailored to the wholesale EU energy markets to meet the specificities of the physical market.

ISDA would highlight the importance of the authorities taking into account the significant change REMIT will bring, particularly to certain market participants. Accordingly, planning in relation to implementation/ interpretation should take account of this and adequate provision should be made for engagement with stakeholders so that effective and efficient regulation results. In this regard, we note the text clarifies the need for ACER to consult with other authorities, such as ESMA, and stakeholders, particularly in relation to developing delegated acts, and we welcome this increased engagement of ACER with other regulatory authorities and the broader industry. We believe this approach is essential to achieving a well functioning market abuse regime which provides appropriate coverage to both the financial and physical markets.

Given the inter-linkage between REMIT and the upcoming proposals for the revision of the MAD and of the MiFID, ISDA would also emphasize that while attention must be paid to acceptable market differences, any unnecessary inconsistencies should be avoided. It must be limited to a strict minimum and it must be clear, in case of overlap between these texts, how these will apply to market participants. In this context, future implementation rules and interpretations of REMIT will be of significant importance in order to clarify the application of these three separate regulatory requirements. We now comment in more detail on specific points of REMIT.

- **Scope**

We believe it is critical that there is clarity around the scope of MAD and REMIT to ensure that there is no under lap and, where there is overlap, it is minimal and it is clear how each regime will apply, including coordination in relation to enforcement action.

ISDA welcomes that the market abuse elements of REMIT apply to trading in wholesale energy products other than those which are financial instruments as defined in the MiFID and to which the MAD applies.

However, while MAD currently covers financial instruments traded on a Regulated Market (and OTC and physical products to the extent they affect the price of the commodity on the Regulated Market) and is likely to be extended to cover the same on MTFs, REMIT is expected to cover wholesale “contracts” and “derivatives” for the supply/ transportation of gas/electricity¹ without giving proper definitions of these contracts and derivatives (by definition a derivative will be subject to MiFID and consequently MAD). As a result, while REMIT attempts to carve out financial instruments covered by MAD from the market abuse offences in REMIT (but not the reporting obligations), without an appropriate definition of scope in REMIT both regimes could still apply to the same instruments.

In this context, ISDA notes that the text extends the scope to cover utilisation (as well as capacity) generally, and explicitly to cover Liquid Natural Gas facilities, as well as enlarging on the definition of ‘*wholesale energy market*’ to make clear it includes balancing markets, Regulated Markets, MTFs and OTC transactions, irrespective of where and how they are traded. This expansion of the scope of REMIT and, in doing so, of the overlap with MAD, reinforces the importance of clarifying how each market abuse regime will apply to market participants and to relevant instruments.

ISDA believes that full coordination between the regulatory authorities will be essential to the effectiveness of REMIT and MAD.

- **Definition of market abuses**

We welcome the efforts to align the proposals for updating MAD with REMIT and we support both the proposed extension of MAD to cover attempts to manipulate the market and similar provisions in REMIT.

We note that the draft legislation for updating MAD, expected late Summer or early Autumn 2011, is likely to include changes to the definition of inside information for commodities, given the consultation paper on MAD made such a proposal; and we highlight that care must be taken to avoid the creation of two definitions of commodity market abuse.

- **Data collection**

As a general matter, ISDA supports full transaction-level transparency to the regulatory authorities both from a systemic risk monitoring perspective, as well as for market abuse detection purposes. However, we would highlight the need for clear and unambiguous standards and guidance to be developed, in consultation with the industry, which will ensure that data collected is accurate, meaningful and in a form which can be utilised effectively by the authorities and that duplicative regime are avoided.

¹ Contracts for the supply of natural gas or electricity with delivery in the Union; derivatives relating to natural gas or electricity produced, traded or delivered in the Union; contracts relating to the transportation of natural gas or electricity in the Union and derivatives relating to the transportation of natural gas or electricity in the Union

- **Disclosure obligations**

We believe robust and appropriately tailored disclosure requirements are key to enhancing market cleanliness standards and to establishing a level playing field in relation to inside information in wholesale energy markets. Consequently, it will be vital for all market participants to implement adequate systems and controls to ensure prompt and full disclosure of the required information to enable the authorities to effectively detect and deal with any abusive market practice.

We note that REMIT requires that: (1) disclosure obligations extend to a market participant's parent or related undertaking; (2) a market participant can delay public disclosure of inside information "*in exceptional circumstances*" so as not to prejudice its own legitimate interests, provided that relevant information is given to ACER and the national regulatory authority without delay and (3) accepted market practice is added as one of the drivers for disclosure but is not further defined.

We welcome the expansion of the disclosure obligation to parent and related undertakings to ensure complete capture of relevant entities and the text making more explicit ACER's role. With respect to the delay in disclosure, we would like to understand what is envisaged by an "exceptional circumstance", how this will be monitored by ACER and urge regulatory authorities to give a proper definition of this concept.

We note that the REMIT data collection provisions apply to both physical and derivative transactions. ISDA urges that in implementing the data collection provisions of REMIT, full consideration is given to other regulatory changes currently underway, including MiFID and EMIR, as these also cover reporting requirements for commodity derivatives, including those in the wholesale energy markets. In this regard, we would reiterate the importance of mandating that market participants make their reports once to a single global repository for the relevant asset class.

- **Publication of trading data**

Provision is made for ACER to make publicly available "parts" of the information it holds, and to grant access to this data to academics and others, provided that the commercially sensitive information on the market participant(s) or individual transactions is not released (it is unclear under what terms academics will be granted access). We are unclear from the text what is envisaged here and would seek more clarity around the intended purpose. We have concerns that inadequately tailored post trade transparency could damage market liquidity, particularly where market segments are thinly traded and that commercially sensitive data could 'leak' into the public domain.

We believe that ACER's role is essential to make public information "*on an anonymous and aggregate basis*", to ensure that information does not indicate "*individual market places*" and that ACER should develop and maintain a methodology setting out how it will make the information available. ISDA would seek to assist the authorities in the development of appropriately calibrated transparency measures.

- **Exemptions**

ISDA notes that the current version of REMIT, when compared to the Commission's original text, expands the exemption of what is considered inside information to cover information relating to a client that a market participant receives in their capacity as a representative of that client, as well as any other information conveyed by a client to the representative.

ISDA believes the wide scope of this exemption potentially undermines the likely effectiveness of REMIT. As a matter of principle, any party trading on inside information should be subject to sanction where the information is abused to the detriment of the client, as well as to the broader

market, and that all transactions should be reported to the authorities for market surveillance purposes. We would also highlight that there are likely to be practical issues with this approach, for example, we expect it would be difficult to clearly define what would constitute “not likely to influence the market” in the text to exempt contracts for the use of final consumers of less than a certain GWh per year.

- **Protection of legitimate interests**

ISDA requests clarifications of the discharge of obligations concluded prior to holding inside information and, particularly, while supporting this proposal, would like to understand how ACER would police the following requirement, with respect to insider dealing exemptions: *"transactions entered into by gas and electricity producers, operators of gas storage facilities, operators of LNG import facilities covering strictly the immediate physical loss resulting from unplanned outages, if a failure to do so would be likely to impose substantial damage to technical or economic stability of the system"*. .

- **Registration/authorisation of market participants**

The registration/authorization regime remains unclear, especially for energy traders who are not already authorised as investment firms. As ISDA noted in our response to the MiFID Review, we welcome steps which result in an appropriate but nevertheless more consistent regulatory treatment between commodity and financial firms and agree conceptually with this proposal, although we question whether REMIT, which addresses market abuse, is the appropriate legislative vehicle for introducing an authorisation regime. More specifically, as ISDA has set out in its response to CEER’s recent consultation, we would seek further clarity in what is intended by a voluntary regime and question how this could, in practice, support a consistent set of rules across the EU, which we believe is vital.

- **Coordination between ACER and ESMA**

ISDA notes that REMIT gives ACER the ability to monitor the gas and power markets for abusive behaviors and practices, including the derivatives market.

Given the interconnected nature of the financial and physical wholesale energy markets, as well as the existence of multiple regulatory authorities across Member States, we see strong coordination (including appropriate information sharing) between all the authorities, including ESMA and ACER, as fundamental to the success of enhancing market cleanliness standards across the EU.

We would also highlight the point that much of the information which will be provided to the regulatory authorities will be highly commercially sensitive and we underline the importance of the confidentiality of that information being maintained at all times. The lack of appropriate levels of information security at a number of EUA registries and the resulting problems in the emission’s market highlights the importance of this issue.

We welcome the requirements in REMIT for ACER to consult with the other authorities before establishing mechanisms for processing information and to pay special attention to safeguarding the information’s confidentiality.

- **Harmonisation of penalties and sanctions**

ISDA welcomes an enforcement regime for REMIT which is proportionate and dissuasive. However, as the Commission is already aware, enforcement powers and enforcement outcomes within the

existing regulatory frameworks across the EU widely differ. Accordingly, we would urge the Commission to take steps to ensure that the regime proposed under REMIT is consistently implemented across Member States and is also consistent with the provisions of MAD to avoid opportunities for regulatory arbitrage.

Consequently, we support the principle that penalties must reflect the gravity of the breach, exceed potential gains and, with ACER and ESMA, Member States should coordinate their sanction system and agree minimum standards. We believe these measures are necessary to prevent divergent regimes emerging between Member States and we would further propose that REMIT makes explicit the need for consistency with sanctions under MAD to avoid regulatory arbitrage between the financial and wholesale energy market regimes.

▪ **Adequate resource for ACER**

Finally, we would end by stating that we fully support the requirement that *“the Agency shall be provided with the additional financial and human resources necessary for it to adequately fulfil the additional tasks assigned to it under this Regulation.”* As we have raised with regards to ESMA, given the important and full agendas of these regulatory bodies, we welcome the recognition of the need for ACER to be adequately resourced.

Yours sincerely,

Benoît Gourisse
Director of European Policy, European Regulatory Team
International Swaps and Derivatives Association, Inc.
Tel: +32 (0)2 401 8763 | bgourisse@isda.org | www.isda.org
38/40 Square de Meeus
Brussels 1000



Anthony Belchambers
Chief Executive
The Futures and Options Association
Tel: +44 207 7929 0081 | belchambersa@foa.co.uk | www.foa.co.uk
2nd floor, 36-38 Botolph Lane
London EC3R 8DE

