

Memorandum of Understanding



European Securities and
Markets Authority

Agency for the Cooperation
of Energy Regulators

concerning

**the consultation and cooperation regarding their regulatory
responsibilities in relation to EU wholesale energy markets**

THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS AND THE
EUROPEAN SECURITIES AND MARKETS AUTHORITY,

Considering the respective mandates of the Agency for the Cooperation of Energy Regulators (ACER), founded by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators¹, and of the European Securities and Markets Authority (ESMA), founded by Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC²;

Considering the provisions of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on Wholesale Energy Market Integrity and Transparency (REMIT)³, Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR)⁴, Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (MAD)⁵, Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (MiFID)⁶ and further Union legislation in the energy and the financial field, stating that the closest co-operation should take place between ACER and ESMA for the purpose of carrying out their duties;

Considering the increasing internationalisation, harmonisation and interdependence of European Wholesale Energy Markets due to, inter alia, the use of modern technology, closer co-operation between European exchanges and the completion of the Internal Energy Market and the Internal Market for financial services;

1 OJ L 211, 14.8.2009, p. 1.

2 OJ L 331, 15.12.2010, p. 84.

3 OJ L 326, 8.12.2011, p. 1.

4 OJ L 201, 27.7.2012, p. 1.

5 OJ L 96, 12.4.2003, p. 16.

6 OJ L 145, 30.4.2004, p. 1.

Considering that wholesale energy markets encompass both commodity markets and derivative markets, which are of vital importance to the energy and financial markets, and that price formation in both sectors is interlinked. They include, inter alia, regulated markets, multilateral trading facilities and over-the-counter (OTC) transactions and bilateral contracts, direct or through brokers;

Considering that derivative trading, which may be either physically or financially settled, and commodity trading are used together on wholesale energy markets, it is therefore important that the definitions of insider trading and market manipulation, which constitute market abuse, be compatible between derivatives and commodity markets;

Considering that ACER and ESMA should cooperate to ensure a coordinated approach on wholesale energy markets and that such cooperation should contribute to a coherent and consistent approach to the application of the market abuse framework and the application of reporting obligations under REMIT and EMIR;

Considering that ACER and ESMA should consult each other in preparing guidelines, recommendations and draft regulatory technical standards concerning their respective competences in order to ensure that the particularities of the financial and the energy sectors are fully taken into account;

Considering the evolving regulatory landscape and the potential for future changes to ACER's and ESMA's mandates;

Considering that the most expedient way to define the scope and practical terms of implementing the cooperation between ACER and ESMA is a Memorandum of Understanding (MoU), without limiting their abilities to cooperate or share information outside the terms of the MoU, this MoU itself encompasses consultation, cooperation and the exchange of information;

HAVE REACHED THE FOLLOWING UNDERSTANDING:

Chapter 1

General principles and scope

Article 1

General principles

Without prejudice to the provisions set forth by the Union legislation, the purpose of this MoU is to establish a general framework for consultation and cooperation between ACER and ESMA in order to facilitate the fulfilment of their regulatory responsibilities.

Article 2

Scope

This MoU is a statement of intent to consult, cooperate and exchange information in connection with the regulatory responsibilities of ACER and ESMA in relation to wholesale energy markets, which encompass both commodity and derivatives markets, in a manner consistent with, and permitted by, the rules and requirements that govern ACER and ESMA.

ACER and ESMA anticipate that cooperation will primarily be achieved through on-going consultations, exchange of information and participation in meetings of ACER and ESMA working groups and task forces. The provisions of this MoU are intended to support such consultations and cooperation, as well as to facilitate the written exchange of non-public information where necessary.

This MoU does not prejudice, limit or alter the terms and conditions of any bilateral or multilateral Memoranda of Understanding or other arrangements concerning cooperation in regulatory matters between or among either ACER and national regulatory authorities, ESMA and competent financial authorities or ACER, ESMA and any other competent authority.

ACER and ESMA will periodically review the functioning and effectiveness of the cooperation arrangements between them with a view, inter alia, to expanding or altering the scope or operation of this MoU.

Chapter 2

Cooperation and coordination

Article 3

Consultations

ACER and ESMA recognise the importance of close communication concerning wholesale energy markets, and intend to consult regularly at staff level.

Cooperation will be most useful in, but is not limited to, the following circumstances where issues of common regulatory concern may arise:

- a. the advancement of Union legislation with regard to market abuse under MAD and REMIT and on data collection under MiFID, EMIR and REMIT or with an impact on the overall functioning of wholesale energy markets in the Union, in particular concerning advice on legislative proposals, technical advice and recommendations to the European Commission on delegated acts and implementing acts, regulatory technical standards and implementing technical standards, and guidance, including guidelines and recommendations with a view to establishing consistent, efficient and effective regulatory practices and to ensure the common, uniform and consistent application of Union legislation;
- b. the enhancement of the efficiency and effectiveness of market monitoring activities of competent authorities, including the use by competent financial authorities of various market surveillance tools (including analysis of transaction reports); and
- c. the information technology (IT) governance of ACER and ESMA for data collection.

Article 4

Coordinated and consistent approach to market abuse

ACER and ESMA shall cooperate with the aim of ensuring a coordinated and consistent approach to market abuse on wholesale energy markets.

ACER shall inform ESMA according to Article 16(3)(b) of REMIT where it has reasonable grounds to suspect that acts are being, or have been, carried out on wholesale energy markets which constitute market abuse within the meaning of Directive 2003/6/EC and which affect financial instruments subject to Article 9 of that Directive.

ACER and ESMA shall each nominate a list of liaison officer(s) for the purposes of cooperation undertaken under this MoU in the Annex.

ESMA will provide ACER with the relevant contact persons in the competent financial authorities in the Member States. The contact persons and the mechanism for the exchange of information between ACER, ESMA and the competent financial authorities according to Article 16(3)(b) and (c) of REMIT shall be defined in the procedure (Ref. 2013/BS/101 Annex1) accompanying this MoU.

Article 5

General procedures for the cooperation

ACER and ESMA shall establish efficient and effective communication channels for the proper compliance with the objectives of this MoU at all times.

ACER and ESMA shall each set up an email address for the purposes of cooperation undertaken under this MoU.

Depending on the subject of the interaction, the concerned liaison officer(s) will determine the most efficient way of interaction, which may be in written or oral form.

Chapter 3

Request for assistance

Article 6

Request for assistance

To the extent possible, a request for written information should be made in writing, and addressed to the relevant liaison officer. A request should ordinarily specify the following:

- a. the assistance sought;
- b. a general description of the matter which is the subject of the request and the regulatory purpose for which the assistance is sought, including identification of the underlying provisions in Union law; and
- c. the desired time period for assistance and, where appropriate, the urgency thereof.

Article 7

Execution of requests for assistance

To the extent permitted by Union legislation, the requested party shall take all reasonable steps to obtain and provide the assistance sought.

The requested party shall use the relevant means at its disposal for the execution of the request. ACER and ESMA shall consult and agree on the types of enquiry that may be necessary for the execution of a request.

To the extent permitted by Union legislation, the requesting party shall provide the requested party with such further assistance as may reasonably be required.

Article 8

Permissible uses of information

Subject to any restrictions in Union law, ACER and ESMA (the parties) may use non-public information obtained from each other under this MoU for the purpose of its regulatory responsibilities under applicable Union legislation.

ACER and ESMA recognise that, while information is not to be gathered or shared by them under the auspices of this MoU for enforcement purposes, subsequently they may want to use the information for enforcement purposes, under the competences attributed to them under applicable Union legislation. In cases where one of the parties seeks to use information obtained under this MoU for enforcement purposes, including in conducting investigations or bringing administrative proceedings, prior consent must be sought from the requested party.

Article 9

Data protection

This MoU shall be without prejudice to the obligations of ACER and ESMA, when fulfilling their responsibilities relating to the processing of personal data under Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection

of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.⁷

Article 10

Professional secrecy

Any confidential information received, exchanged or transmitted shall be subject to the conditions of professional secrecy laid down in Article 17 of REMIT and Article 70 of Regulation (EU) No 1095/2010 and applicable Union legislation.

Information shared between ACER and ESMA, within the scope of this MoU, shall be used exclusively for the purposes of exercising their respective regulatory responsibilities within the boundaries of their functions under Union law.

Chapter 4

Final provisions

Article 11

Publication

ACER and ESMA agree to publish this MoU.

Article 12

Amendments to the MoU

ACER and ESMA may, by consent, make amendments and add further Annexes to the MoU as necessary, in particular once the mechanisms for the sharing of information between ACER and other authorities according to Article 10 of REMIT are developed.

⁷ OJ L 8, 12.1.2001, p. 1.

Article 13

Entry into effect and termination

This MoU shall enter into effect on the date of its signing.

This MoU shall be concluded for an unlimited period of time. If either party intends to terminate this MoU, it should endeavour to provide at least 30 days prior written notice to the other party.

Done at Ljubljana on 18 July 2013.

signed

Steven Maijoor
Chair of the European Securities
and Markets Authority
ESMA

signed

Alberto Pototschnig
Director of the Agency
for the Cooperation of Energy Regulators
ACER

List of liaison officers

Authority	Contact person	Position	Telephone	Email
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