REMIT fee design & implementation consultation[1]

EEX Group response

Summary

EPEX SPOT and EEX welcome the opportunity to take part in the present consultation.[2]

We agree with the principle that ACER should be given the proper resources to carry out its REMIT activities to ensure a high level of integrity and transparency of wholesale energy markets in Europe. For this purpose, we highlight below the most important principles to consider in the final fee design in order not to endanger this integrity or transparency.

First, the most efficient way to ensure market integrity is not to punish or discourage valuable data streams for detecting market abuse or the use of most transparent and regulated markets to do so. To this end, the most appropriate approach is to levy the fees directly on Market Participants (MP) as they bear the "overall responsibility" for reporting according to Article 8 of REMIT. Registered Reporting Mechanisms (RRM) act on behalf of MPs for whom they report and directly contribute to the reduction of administrative costs for ACER by streamlining both the actual reporting of trades and contributing to market integrity. Hence, while they serve, facilitate and empower the system, any fee imposed on RRMs would *de facto* put an undue financial and administrative burden on them, which goes against the provisions in Article 32 of the ACER Regulation.

Second, we recommend that the final fee design and implementation is as clear and easy-to-understand as possible to enable a transparent fee calculation for each MP. RRMs can assist in collecting the fees to reduce the implementation and handling costs. For this, calculations should be done by ACER. Should the latter not be possible, at least the metrics and the data for the per MP calculation must be provided by ACER.

Third, in line with the fee model as presented at the public DG ENER-ACER workshop on 15 July 2020, we could see value in an approach entailing both a fixed and a variable component if the overall complexity remains manageable. We therefore propose to base the variable fee on number of executed trades. This should explicitly exclude orders and lifecycle events as this would discourage the generation of this data as such, which is indispensable to monitor and tackle abusive market behaviour. In addition, this would discriminate on-exchange trading compared to less transparent alternatives. To this end, the different marginal costs related to standardised and non-standardised contracts as well as the relevance of traded volumes should be addressed.

Finally, in light of the principle not to put undue financial or administrative burden on market participants or entities acting on their behalf, it seems a contradiction to include both the fixed and variable components as an upfront fee. It should not be assumed that RRMs are able to pre-finance this part of ACER's yearly budget or should in any way be liable when collecting fees on behalf. This would lead to a disproportionate burden on the markets. At least the variable fee should be calculated and collected on an ex-post basis, while the fixed fee could be charged upfront.

[1] European Commission consultation in preparation of a "Commission Decision setting the fees due to the Agency for the Cooperation of Energy Regulators for collecting, handling, processing and analysing of information reported under Regulation (EU) No 1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency".

[2] In addition to joint Europex response (association of European Energy Exchanges)

4.2 How to define the overall amount to be covered by REMIT fees each year?

Q.1. Do you agree with the methodology proposed for defining the overall amount to be covered by REMIT fees each year? If not, what alternative methodology would you propose? Please provide explanations.

As a matter of principle, we agree ACER should be given the proper resources to carry out its tasks, including all REMIT activities. However, the ACER Regulation[3] is clear that the Agency should be "mainly financed" from the general EU budget, with fees playing a complementary role. The total amount to be covered by fees should therefore be reduced, while activities covered by REMIT fees should be strictly limited to the legal scope of the ACER Regulation. The methodology itself should be transparent and allow for adequate scrutiny, including from those who pay and collect the fees.

ACER should be mainly financed from the general Union budget. The main policy objective of REMIT is to ensure a high level of integrity and transparency of wholesale energy markets in Europe, thereby enabling fair competition for the benefit of all final energy consumers. Energy consumers and the society at large are indeed the ultimate beneficiaries of the REMIT activities of ACER. It is therefore natural that also REMIT-related costs should be partly funded in a similar way as other ACER activities, in line with Recital (37) of the ACER Regulation, which states that: "*ACER should be mainly financed from the general budget of the Union.*" This basic principle of the Union budget as the main funding source for ACER seems to be in contradiction with the statement in the present Consultation Paper that *"the activities of collecting, handling, processing and analysing information reported pursuant to Article 8 of REMIT represent a significant portion of ACER's current costs […]",* should these activities be largely covered by fees[4]*.* As a consequence, the methodology for defining the overall amount to be covered should ensure that the fees do not represent a main funding source for ACER in line with the policy objectives of both REMIT and the ACER Regulation.

The total amount to be collected through fees must not go beyond the legal scope of covered activities and should be proportionate to the costs incurred. Article 32(1)(b) of the ACER Regulation stipulates that fees shall be due to ACER for "*collecting, handling, processing and analysing of information reported by Market Participants or by entities reporting on their behalf pursuant to Article 8 of REMIT"*.

However, the tasks proposed to be funded by REMIT fees that are outlined in the Consultation Paper go beyond the legal scope of Article 32(1)(b) of the ACER Regulation and should be narrowed down to better reflect the activities stipulated therein. For example, the following activities listed under '*REMIT market surveillance and conduct*' do not constitute activities related to collecting, handling, processing and analysing information reported by Market Participants or by entities reporting on their behalf pursuant to Article 8 of REMIT:

- *"case cooperation with national regulation authorities for energy (NRAs) on market abuse assessments, including providing guidance"*;

[3] Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators.
[4] ACER'S Draft Outline of the 2021 Work Programme (Version 23.10.2019) envisages a budget for the Agency of EUR 91 million for the next seven years, i.e. EUR 13 million on average per year. The EUR 8.8 million as stated in the Consultation paper as an estimate for ACER Article 8 activities in 2021 would constitute 67.7% of this number.

- *"support NRAs on REMIT breach assessments"*; or
- *"case cooperation with ESMA"*.

Instead, they are services directed to assist NRAs in fulfilling their duties under REMIT and ESMA under MAR, MiFID II / MiFIR, EMIR and others.

Furthermore, REMIT infrastructure costs (i.e. fixed costs related to investments) should not be recovered by fees as a general principle. We therefore suggest that the methodology for defining the overall amount to be covered by REMIT fees each year considers *only running costs* related to REMIT information management and REMIT market surveillance and conduct[5]. These must be proportionate to the structural diversity of data that ACER collects, handles, processes and analyses. As for "*the activities of collecting, handling, processing and analysing information reported pursuant to Article 8*", it is our understanding that the running costs should be limited to the following:

- Collection of records of wholesale energy market transactions, including orders to trade, fundamental data, inside information, derivatives transactions and emission allowances;
- REMIT data analysis to ensure completeness, accuracy and timeliness of reporting of information according to Article 8 of REMIT;
- Operational reliability and data protection of REMIT information reported to the Agency; and
- Market surveillance of trading activity in wholesale energy markets.

In summary, it is important that the upcoming Commission Decision transparently reflects the precise costs of the services covered by REMIT fees as stipulated in Article 32(1)(b) of the ACER Regulation. The scope of the fees must be strictly limited to the activities outlined therein and the burden borne by the market must be proportionate to the activities and services ACER provides under REMIT. To this end, the total suggested amount of 8.8 million euros to be collected through fees should be significantly decreased to preserve the liquidity and benefits of a competitive, efficient and transparent wholesale energy market in Europe.

The amount to be covered should be clearly defined and preferably calculated on a multiannual basis to provide transparency and predictability. Currently, there is a lack of detail on the process to determine the total amount to be covered by REMIT fees. Article 33 of the ACER Regulation only stipulates that it should "*be based on the objectives and expected results of ACER's Programming Document that the Director shall submit to the Administrative Board […] and […] shall take into account the financial resources that are necessary to achieve those objectives and expected results*."

As it stands, an annual calculation of the budget may result in significant variations in the total amount to be covered by REMIT fees year-on-year, which introduces planning uncertainty and financial risks for those paying and collecting the fees. ACER's latest Programming Document (the 2020 edition) explicitly states that *"any REMIT IT budget covered by REMIT fees as of 2021 should be increased."*[6] It also already foresees an increase in the fees for 2022[7] and repeatedly notes an "*expected*" growth

[5] The above mentioned "*REMIT market surveillance and conduct*" activities and the *"REMIT fees management"* that are referred to in the Consultation Paper appear to be outside of the scope of Article 32(1)(b) of the ACER Regulation (recast).
[6] Please see "*European Union Agency for the Cooperation of Energy Regulators Programming Document 2020 – 2022*", December 2019, p.51.
[7] The Programming Document foresees an increase of the budget to be covered by the fees for 2022 from EUR 8.8 million to EUR 9.2 million EUR (or 4.5%), p. 158.

in the costs and expenditure stemming from other REMIT-related activities that would fall under the definition of Article 32(1)(b) of the ACER Regulation, and would thus be covered by REMIT fees.[8]

An alternative multiannual approach would help mitigate the risks associated with the uncertainty of an unpredictable annual fee. The process should define the overall amount to be covered by REMIT fees for several years in advance (e.g. three to seven years – eventually aligned with the general EU Multiannual Financial Framework). This will in turn ensure that the estimations for each annual budget respects the overall budget established for the relevant multiannual period. The initial multiannual budget could be largely based on the actual incurred costs by ACER in REMIT activities throughout 2019 and 2020 in line with the scope of activities as outlined above. As there had been a significant increase in the ACER REMIT budget from 2018 to 2019, we consider that the current funding level for ACER activities is appropriate. An annual actualisation factor (e.g. mainly based on average inflation rates) may be considered.

According to the proposed methodology, the total amount to be covered by REMIT fees should be based on ACER's overall REMIT budget. The ACER Programming Document currently calculates the overall budget for both the Market Integrity and Transparency (operational) activities and the Market Conduct and Surveillance (operational) activities. As already pointed out, there are activities within these departments that fall outside of the legal scope of the activities outlined in Article 32(1)(b) of the ACER Regulation and should thus not be covered by the REMIT fees. We therefore recommend that the Programming Document dedicates an additional section specific to the part of the ACER budget to be covered by REMIT fees.

Furthermore, the final Commission Decision should expressly address possible situations of fee surpluses or fee insufficiencies. Any surplus generated by the fees beyond the defined needs should be carried over into the next budgeting phase and be taken into account when calculating the fee level of the next budgeting period. As for possible income deficits, there should be a clear top-up mechanism by the European Commission to cover a lower than expected fee income. As the cost of the risk and risk management are not in the scope to be covered by REMIT fees, addressing any deficits as compared to the defined needs should be the liability of the European Commission and/or ACER.

The final framework must be transparent, impartial and subject to adequate monitoring and oversight. Transparency is one of the key *raisons d'être* of REMIT. The same high standard should apply to the ACER fee determination process. Pursuant to Article 33 of the ACER Regulation, the Agency provides an initial estimation of the amount to be covered by REMIT fees. As the beneficiary of the fee, ACER should not be in a position to freely auto-determine the final fee level. A consistent and comprehensive examination must be conducted that involves the European Commission and the co-legislators as well as all relevant market stakeholders in a consultative role. This avoids potential criticism of the process as a 'black box' and increases the acceptance of the fee in the market.

Finally, the creation of a dedicated Stakeholder Expert Group on REMIT fees should be considered. This would help to involve stakeholders more directly and would allow them to provide feedback on the functioning of the REMIT fee system. In addition, such a group could provide information on expected future market developments with a likely impact on fee revenues. Involving the most important stakeholders will ensure transparency and predictability of the process.

[8] Ibid, pp. 25, 49-52, 158.

4.3 Who should pay the REMIT fees each year?

Q.2. Do you agree that reporting parties registered with ACER should be charged with paying the fees? If not, from whom and how should the fees be collected?

We disagree that RRPs should be charged with paying the fees. The most appropriate, proportionate and efficient approach is to levy the fees directly on Market Participants as they bear the "overall responsibility" for reporting according to Article 8 of REMIT. We recommend that this is done via a transparent, clear and easy-to-understand formula enabling the fee calculation for each Market Participant. RRPs can assist in collecting the fees to reduce the implementation and handling costs.

First, as it is frequently used in the present Consultation Paper, we would like to share our understanding of the term 'Registered Reporting Party' (RRP) for the purpose of REMIT fees as we are not aware of a legally established definition or a comprehensive list of RRPs. In the spirit of the Consultation Paper and REMIT, we consider that RRPs include all directly reporting Market Participants, Registered Reporting Mechanisms (RRMs), including Organised Marketplaces (OMPs), as well as Trade Repositories (TRs), TSOs and the ENTSOs for the reporting of fundamental data. Should it be taken up in the upcoming Commission Decision, we recommend that the term be properly defined and this distinction clarified for the sake of legal certainty.

The responsibility for paying the fees and the mechanism for collecting the fees must be considered separately. Article 32(2)(b) of the revised ACER Regulation establishes the link between the fees and the obligation to report consistent with Article 8 of REMIT. Article 8 of REMIT is clear that the 'overall responsibility' for reporting lies with Market Participants, while RRMs (may) act on their behalf to ensure timely and correct submission. It follows that RRMs can act in their role as intermediaries between ACER and Market Participants to collect the fee, but that the responsibility for paying the fee should lie with the Market Participants, in line with the overall reporting responsibility.

Furthermore, in our understanding, there is no legal basis for charging the fee to RRMs purely for the purpose of simplifying the mechanism for collection (i.e. to reduce implementation costs), which is the reasoning given in the Consultation Paper. The ultimate fee design should only reflect the provisions in Article 32 of the ACER Regulation:

"The fees shall be proportionate to the costs of the relevant services as provided in a cost-effective way and shall be sufficient to cover those costs. Those fees shall be set at such a level as to ensure that they are non-discriminatory and that they avoid placing an undue financial or administrative burden on market participants or entities acting on their behalf."

While the fee should be directly charged to Market Participants, it seems rational that RRMs assist with the fee *collection*, thus ensuring cost-effective implementation of the scheme.

Furthermore, we strongly disagree with the claim that data collection is a service in itself and that RRPs are the 'exclusive beneficiaries of the service' given that ACER only collects data from these entities. Data collection merely contributes to the fundamental service provided under REMIT, namely to ensure the transparency and integrity of European wholesale energy markets. It is the final energy consumers and society at large, rather than the RRPs, who are the ultimate beneficiaries of these important

services and transparent and integer energy markets rendered by REMIT. Addressing the burden of a fee to RRMs is too narrow and does not reflect the above benefits.

Registered Reporting Mechanisms (RRMs) merely act as aggregators and facilitators of ACER's data collection. RRMs only act on behalf of Market Participants for whom they report. Hence, while they serve, facilitate and empower the system, RRMs should not be considered as a cost driver. On the contrary, RRMs directly contribute to the reduction of administrative costs for ACER by streamlining both the actual reporting of trades and contributing to market integrity. Any fee imposed on RRMs would *de facto* put an undue financial and administrative burden on them, which goes against the provisions in Article 32 of the ACER Regulation.

Charging fees to RRMs would lead to a problematic discrimination between OMPs and other RRMs and would distort competition between them. There are at least two types of RRMs: a) those who decided to offer the respective services deliberately; and b) those who are obliged to offer their services by law in accordance with Article 6.1 of the REMIT Implementing Regulation, i.e. Organised Marketplaces ("OMPs"). The latter constitute a distinct group and a list of OMPs is published on the ACER REMIT Portal. Should the fees be directly imposed on RRMs, structural and legal differences between the RRMs will become evident and will lead to fundamental differences in the way that RRMs can compete in the market. For example, OMPs would be obliged to continue their reporting services while other RRMs would have the option to discontinue their activity. Charging the fees directly to MPs will avoid this.

In addition to the distinctive legal status of OMP- and non-OMP-RRMs, there are more generally different types of RRMs leading to inevitable disparities in their ability to absorb fees, should a fee be charged to them rather than to Market Participants directly. While some RRMs (e.g. TSOs) have an opportunity to cross-subsidise the REMIT fees (e.g. through grid tariffs), competitive RRMs do not have such an opportunity and will pass on the fees to Market Participants and/or incur an economic loss through cross-subsidisation. In addition, the fee-absorption capability may differ between competitive RRMs. Since the REMIT reporting structure is fixed, competition in this area would imply that RRMs who offer other services outside of reporting may choose to cross-subsidise the reporting service, especially if they can recover the costs for their other services elsewhere. Incentivising a race to the bottom, i.e. creating a strong incentive for cross-subsidisation would clearly put an undue financial burden on RRMs and the related companies while indirectly distorting their ability to compete on service quality, trading fee levels and product innovation.

The most efficient and non-discriminatory method is therefore to charge the REMIT fees directly to Market Participants and not to RRPs/RRMs. However, should RRMs be expected to collect the fees, ACER should provide invoicing data directly to RRMs. Importantly, the fee formula should determine the fee to be paid by each Market Participant in a transparent, efficient and easy-to-understand manner. This will help to ensure a level playing field and avoid the risk of double-counting or cross-subsidisation, which in turn will contribute to increased predictability of REMIT fees for Market Participants. Since ACER has an overview of all records submitted per Market Participant it is well placed to calculate the fee or at least provide the relevant information.

RRMs could act as intermediaries between ACER and MPs. However, they have no role in storing or analysing the reported data. Since the direct relationship of the reporting *obligation* is between ACER and the MPs, the data should come from ACER – with RRMs only acting as intermediaries.

In addition, should ACER not provide the relevant data and RRMs were required to invoice fees to Market Participants, coordination problems would arise from the fact that RRMs do not and cannot know if Market Participants are reporting through several RRMs. As a matter of principle, coordination or cooperation between RRMs would be in breach of competition rules. This is particularly true for Nominated Electricity Market Operators (NEMOs) who are explicitly barred from exchanging information on any such aspects as stipulated in the Congestion Allocation and Congestion Management (CACM) Framework Guideline.

Furthermore, clearing/exchange brokers trading through a Direct Market Access (DMA) trading model will need transparency on the calculation to set up a reconciliation and billing process to pass the costs on to the beneficiaries of the trade. Otherwise, the client may not have the transparency to reconcile the increase in cost of trading.

While RRMs can assist in collecting the fees, the financial liability for payment should remain with Market Participants in line with their overall responsibility for reporting. throughout the entire invoicing process until full payment of the fee. For this, a mechanism should be put in place to ensure that RRMs can impose financial liability on Market Participants on behalf of ACER. Currently, RRMs do not request collaterals from Market Participants. Therefore, if ACER were to request collaterals from RRMs, this would create an undue burden on RRMs. Should ACER consider collaterals necessary, they should be directly addressed to Market Participants. RRMs must not bear the risk of non-payment, partial payment or default, but should be tasked only for transferring received payments to ACER.

According to REMIT, a 'Market Participant' means "*any person, including transmission system operators, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets*."[9] In turn, REMIT monitors both commodities trading activities (Supply Contracts reported through REMIT Table 1 and 2) and the transportation of those commodities (Transportation Contracts reportable through REMIT Table 3 and 4) conducted by Market Participants. Consequently, **all Market Participants who enter into and report contracts should be paying the fees. Excluding certain actors or certain types of contracts would be discriminatory. For this, we would like to reiterate the importance of including, e.g. the 2.5 million records of fundamental data as well as supply transport contracts in the final fee design.**

Furthermore, the rules should take note of major political events that impact how the ACER Regulation is being applied, the most recent case being the exit of the United Kingdom from the EU. ACER for example has not indicated yet whether Market Participants that trade exclusively UK gas and/or GB power will be excluded from the fee. The same uncertainty applies to Market Participants in the Single Electricity Market (SEM) on the Island of Ireland. We suggest that the final Commission Decision expressly clarifies this point.

[9] Article 2(7) 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.

4.4 How should REMIT fees be calculated?

Q.3. Do you agree that these are the key considerations for defining the methodology for calculating REMIT fees? Are there additional elements? How should the different cost drivers be weighted in the methodology? Do you have preferences or specific proposals as regards the methodology? Please provide explanations.

We agree with the principle that REMIT fee-setting should be simple, easy to execute and transparent. However, the model as currently proposed by the Commission and ACER bears multiple flaws. Importantly, the proposed fee design would discourage trading on regulated and transparent trading venues. To this end, in principle, we see value in an approach entailing both a fixed and a variable component as long as the overall complexity remains manageable. We therefore propose that the variable fee component is largely based the number of executed trades (excluding orders and lifecycle events). Managing REMIT information is a key asset for the promotion of market integrity and transparency. The generation of transparent data flows as such should not be discouraged as this is indispensable to monitor and tackle abusive market behaviour.

The variable fee component charged should reflect the level of activity of Market Participants to minimise market impact. Article 32(2) of the ACER Regulation stipulates that the REMIT fees shall be non-discriminatory and avoid placing an undue financial or administrative burden on Market Participants or entities acting on their behalf.

More concretely, Figure 4 in the Consultation Paper shows that 5,709 Market Participants were reporting between 1-50 records in 2019. If the methodology is not carefully designed, a fee which places a disproportionate burden on smaller Market Participants will change their behaviour, eventually leading to lower market liquidity or a discontinuation of trading by small Market Participants who may either stop trading or sign an agreement with a large Market Participant who can trade and report on their behalf. Developments in the financial markets provide evidence for this: a study by the European Association of CCP Clearing Houses (EACH)[10] shows that increased costs of trading can have a significant impact and result in the shrinking of a market. A similar situation may occur if REMIT fees become a significant additional trading cost. Unfortunately, no impact assessment of the effect the suggested measures will have on the market has been conducted so far. However, we believe it is crucial to carry out a full impact assessment of several fee design models, to evaluate and take into consideration how such measures may affect market behaviour to ensure that the market impact is minimised.

The fees should also be predictable to prevent unnecessary financial burdens for RRMs and to minimise planning and budgeting risks. For transparency reasons, Market Participants should be able to review what they are charged for.

The fee model as presented at the public DG ENER-ACER workshop on 15 July 2020 includes several flaws. Most importantly, the fee design must not discourage trading on regulated and transparent trading venues. Organised trading venues differ substantially from other marketplaces or instruments to enter into wholesale energy transactions. Some of the main advantages of trading on

[10] Link to the paper: http://www.eachccp.eu/wp-content/uploads/2015/07/EACH-paper-Extension-of-the-use-of-bank-guarantees-in-the-context-of-EMIR.pdf

organised marketplaces (i.e. exchange-based trading) are as follows: a) by publishing market prices and volumes, they are more transparent than other markets, b) by ensuring anonymity among market participants, they limit the risk of market power abuse, c) by applying the most sophisticated market surveillance techniques and implementing the most refined market rules, they ensure high standards of market integrity, and d) by offering financially secured and cleared products, they limit counterparty risk on the wholesale energy markets. This comes at a cost, which is usually considered a downside of OMP trading and puts them at a commercial disadvantage.

The final REMIT fee design must ensure that it does not add disproportionate cost to exchange-based trading as compared to trading OTC or bilaterally, or in any way provide incentives to trade off-exchange. Regulated energy exchanges support reporting and surveillance activities as outlined in the tasks to be funded and this should be taken into account accordingly in the fee design. This is in line with wider EU transparency and market objectives as well as the G-20 Pittsburgh Commitments, i.e. to encourage more trading on transparent and regulated venues. Transparent trading on-exchange often implies the placing of multiple orders to match trades at the best available price. In addition, the number of transaction records are typically far higher on exchanges than via bilateral trading. However, it is important that the REMIT fee design does not penalise transparency (expressed in more information regarding the placement and amendment of orders). In essence, OMP provide already a surveillance service to ACER and shall not be punished by disproportionate fee. The following aspects are important to take into consideration to make sure this does not happen:

a) Including orders in the fee calculation discriminates against the most transparent markets and disincentivises trading therein. Including transactions[11] and orders, and thereby attaching a similar cost to them, would place a disproportionate burden on small-scale transactions and would disincentivise trading on the most transparent markets (i.e. those markets that report orders as well). Discouraging the placing of orders by addressing the same cost-weight as to trades in the final formula, would be contradictory to the promotion of market integrity and transparency. Order behaviour and data have in the past proved indispensable to monitor and address abusive market behaviour.

The reporting of orders placed on OMPs is explicitly required in the REMIT Implementing Regulation. (OTC order information is not required neither under Table 1 nor Table 2.). The fact that orders are not reported consistently across all markets is further complemented in the TRUM[12]. **Including lifecycle events in the calculation of the fees would result in a heterogenous fee application which risks distorting competition between RRMs**. RRMs currently report lifecycle events in different manners. While the last edition of the TRUM[13] did recently introduce criteria for the reporting of lifecycle events, homogenisation efforts are still ongoing and have not been fully achieved. RRMs continue to be in the process of making

[11] According to the Consultation Paper, the concept of records of transactions includes both orders and trades. It is important to make an explicit distinction between orders and trades when referring to transactions for the sake of clarity and legal certainty.
[12] The REMIT Transaction Reporting User Manual (TRUM) Version 4.0 of 30 June 2020 stipulates that: "*[i]n case an auction is not organised on a multilateral system which qualifies to be an organised marketplace as per the definition above (many-to-many trading), the orders placed in that auction should not be reported*." This is complemented by the statement with relevance for continuous market as well stating "*that the reference to orders includes quotations on trading venues such as Indication of Interest (IOI) advertised on the screens of the organised market places, while according to Article 7(3) of the REMIT Implementing Acts, orders placed in brokers' voice operated services are not reportable, unless they appear on electronic screen or other devices used by the trading venue. These orders shall thus only be reported at request of the Agency."*
[13] REMIT Transaction Reporting User Manual Version 4.0, 30 June 2020.

changes to their systems and the full harmonisation of the reporting and interpretation of the TRUM criteria will still require considerable time to implement. For these reasons, lifecycle events should not be considered in the methodology, at least for the first multiannual framework period. Moreover, in cases when orders are reported outside of organised marketplaces, this generally occurs with lower granularity; thus, fewer separate orders are reported through OTC and brokered markets than through the substantially more transparent regulated markets.

A higher burden would thus be placed on OMPs fulfilling their regulatory obligations – at the expense of the overall quality of the European wholesale energy markets. The proposed model would make trading on such venues more expensive than on other markets, i.e. OTC/bilateral trading. If venues try to recover the disproportionate costs from their members, this could disincentivise trading on the most transparent markets which goes against the overarching purpose of REMIT and the general EU market policy objectives.

b) Standardised and non-standardised contracts pose a different marginal workload for ACER when collecting, handling, processing and analysing the reported data. This fact is also addressed in the REMIT Implementing Regulation which asks for standard and non-standard contracts to be distinguished in order to ensure efficient reporting and targeted monitoring.

More generally, the notion of marginal workload has not been addressed so far. According to our understanding, as soon as a standard transaction is set up in the reporting system it causes fewer marginal efforts for ACER than a non-standardised one. Indeed, the concept of standardised transactions renders the whole REMIT system easier and more manageable while OTC and bilateral trading is generally more difficult to be monitored. This fact has not been properly considered neither in the Consultation Paper nor during the joint public DG ENER-ACER workshop.

The variable fee for standardised contracts should be considerably lower than the fees charged for non-standardised contracts in order to reflect the real cost incurred by each kind of contract. This is also important to ensure that the fee design does not discourage trading on transparent, efficient and secure regulated trading venues.

c) The important work and effort of regulated market surveillance bodies in protecting the markets and assisting ACER need to be appropriately reflected. The fact that ACER can build upon the cooperation and assistance of OMP market surveillance bodies has a significant effort-reducing effect on the REMIT activities of the Agency. Pursuant to Article 15 of REMIT, Parties Professionally Arranging Transactions (PPATs) are obliged to cooperate with the regulatory authorities. To comply with this responsibility, they have created market surveillance bodies to perform these tasks. They monitor the market, evaluate the data and report suspicious cases to the authorities. The OMPs have spent considerable time and financial resources to create and develop these bodies and their operation comes at a significant cost. The authorities, and in particular ACER, benefit from this important relationship, which should be adequately reflected in the fee design. Any design features that place higher costs on these regulated markets need to be avoided.

We suggest that the ultimate REMIT fee formula is applied per Market Participant and that it mainly considers the number of transactions. A clear and simple formula is needed, and the calculation should be done by ACER for each MP. Should the latter not be possible, at least the metrics and the data for the per MP calculation must be provided by ACER to all fee-collecting entities. The rationale for potential components for the variable component is explained below:

a) **The fee shall be applied per Market Participant.** Applying a fee that is proportionate to trading activities per Market Participant takes into account the number of Market Participants as a cost-driver. The fee should not penalise Market Participants reporting through several RRMs. Additionally, it should not penalise Market Participants active in multiple bidding zones for electricity or market areas for natural gas. Furthermore, in order to avoid double payment, it must be ensured that inactive Market Participants that report exclusively through representative Market Participants are excluded from paying REMIT fees. Charging the fees directly per Market Participant also means that MPs that enter the market or discontinue their market activity during a financial year can be reflected in the fee calculation (see our response to Question 4 below).

b) **The number of transactions (excluding orders and lifecycle events) should be the main fee component.** The number of transactions directly reflects the extent of trading activities of a Market Participant in all market formats (on-exchange, OTC, bilateral) in a neutral manner and should thus be the main basis for the fee calculation. Placing a fee on orders may also have unintended negative consequences for liquidity as it may affect the order depth in the market as well as the general price formation. This in turn may force Market Participants to enter into bilateral transactions. Another important aspect to consider is that the distribution of order records is non-uniform across the various markets based on their design and reporting schema defined in the REMIT Implementing Regulation. The behaviour of Market Participants will therefore change in the markets most affected by the fees. Considering transactions only will also contribute to the simplicity and transparency of the system and will limit the implementation costs.

Traded volume could be taken into account. The main purpose of the activities defined in Article 8 of REMIT is to allow ACER to perform market surveillance. Therefore, in addition to the cost drivers set out in the Consultation Paper, different markets in terms of market surveillance as an important field of ACER REMIT activity, i.e. an additional cost driver could be relevant. Generally, the significance of a market can be defined by the volumes traded, which is why this component represents could be an additional cost-driver. This component could also contribute to a level playing field between on-exchange trading (continuous trading, auction trading) and OTC/bilateral trading. Against this background, a volume-based component would disincentivise Market Participants from simply adapting their trading behaviour to minimise their fee by merging single trades to a small number of larger transactions, while the impact on the market and its surveillance remains unchanged. However, if this aspect were to be considered, RRMs should not be required to calculate the fee per MP as this would incur significant undue financial burden.

4.5 When and how should the REMIT fees be paid?

Q.4. Do you agree with the proposed way when and how REMIT fees should be charged? If not, what process would you propose? Please provide explanations.

The proposed ex-ante approach, whereby costs are estimated and charged annually in anticipation of the following financial year is inappropriate. It exposes RRMs to a high financial risk and fails to provide necessary predictability for RRMs and Market Participants, e.g. in case the fee amount does not reflect the actual costs of the services provided or levels of trading activity. At least the variable fee should be calculated and collected on an ex-post basis, while the annual fixed fee could be charged upfront. This would ensure necessary cash inflows to cover ACER correspondent expenditures throughout the year.

Market Participants should be invoiced based on their actual trading activity. Predictability and consistency of the fees are vital for Market Participants and contribute towards preserving high levels of liquidity. Charging the variable fees ex-ante would be neither transparent nor fair and could undermine the Market Participants' confidence in the system. To this end, the debit notes should be issued by ACER to Market Participants based on their actual trading activity, using a transparent calculation formula. (Please see our response to Question 3 for further details.) Since the Agency is in possession of the necessary data to make the appropriate calculations, it is logical for ACER to determine the fee per Market Participant and communicate that to both the relevant RRP and the Market Participant itself. Moreover, it must be ensured that inactive Market Participants that report exclusively through representative Market Participants are excluded from paying REMIT fees.

Imposing an upfront fee is inappropriate and would oblige RRMs to take on undue financial cost and risk. RRMs should not be responsible for pre-financing this part of ACER's annual budget or be liable when collecting fees on behalf of ACER. Should the RRMs be charged themselves, or if financial liability is not adequately transferred to the MPs in the collection mechanism, this would essentially obligate the RRMs to provide a credit line for ACER and take on substantial financial risk in case of non- or partial payment. Besides the need for additional significant own capital for the upfront payment, RRMs would also face uncertainty in whether the fee recovery income collected later in the year will be sufficient to cover the upfront payment. Any shortfall or non-payment by MPs would require RRMs to use their own capital to cover for the intermediate period or the ultimate loss. This puts a disproportionate and unjustified financial burden on RRMs.

The variable REMIT fee thus should be calculated ex-post and must clearly reflect the exact costs of the services covered. The fee should be invoiced based on the actual number of transactions (excluding orders and life-cycle events) and related activities from the previous year. This approach would ensure that the budgeting for relevant ACER services and invoicing of the REMIT fees is objective, proportionate, justified and non-discriminatory consistent with Article 32(2) of the ACER Regulation.

As mentioned in our response to Question 2, the financial liability for payment should remain with Market Participants in line with their 'overall responsibility' for reporting. This also encompasses the risk associated with non-payment or partial payment by Market Participants. RRMs should not bear the cost of this risk, therefore an appropriate financial enforcement mechanism should be defined.

Importantly, it must be considered that Market Participants may switch to another RRM within a given fee period or cease trading altogether. Hence, there should be a mechanism for situations where Market Participants no longer have a contractual relationship for data reporting with the RRM. One solution could foresee that the RRM collects the fees from Market Participants during the process of ceasing contractual obligations. These fees will then be forwarded to ACER within the fixed settlement period.

Sufficient implementation time is important, especially when RRMs are subject to national regulatory approval processes. Adequate time is needed to establish the necessary legal, financial and operational mechanisms and amend the relevant contractual obligations to ensure smooth implementation of the REMIT fees. Notification and implementation periods on contractual obligations must be thoroughly applied and respected. This is particularly relevant for the first year of implementation, i.e. 2021. Implementing a fee that does not respect such notification and implementation periods would otherwise directly conflict with the principle of *"avoiding placing an undue financial or administrative burden"* as set out in Article 32(2) of the ACER Regulation (recast).