UK Financial Services Authority response to ACER's Public Consultation Document

Recommendations to the Commission as regards the records of wholesale energy market transactions, including orders to trade, and as regards the implementing acts according to Article 8 of Regulation (EU) No 1227/2011

Introduction

The UK FSA appreciates the opportunity to comment on ACER's public consultation as regards the record of wholesale energy market transactions including orders to trade and look forward to the continuing cooperation with ACER.

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

The UK FSA believes that the definition of energy commodity proposed by ACER is long and complicated and could be misunderstood by market participants. We recommend that this be shortened by defining an energy commodity contract as any wholesale energy product that is not a financial instrument. This definition would ensure there was no overlap between MiFID and REMIT transactions in the most simple way, and would utilise an existing assessment process i.e. participants in the energy markets are already well familiar with assessing whether they are trading a financial instrument or not.

Question 2:
What are your views regarding the details to be included in the records of transactions as foreseen in Annex II? Do you agree that a distinction should be made between standardised and non-standardised contracts? Do you agree with the proposal on the unique identifier for market participants?

To facilitate the exchange and analysis of the information collected under REMIT and the information collected under other European legislations, namely MiFID and EMIR, it is desirable that the reporting requirements are consistent in terms of terminology and the standards used.

In transaction reporting, every party involved in the transaction with reporting obligations has to submit a transaction report. Consequently, for a single trade there might be two or more transaction reports. The consultation paper does not explain which parties to a trade have reporting obligations.

Derivatives contracts traded in trading venues are generally identified using an identification code – the ISO 6166 standard International Securities Identification Number (ISIN) or the Alternative Instrument Identifier (Aii). The use of these codes ensures that instruments are uniformly identified by the reporting entities reducing data quality errors and facilitating data analysis. The regulators are able to 'read' those codes through the reference data made available by the trading venues which contains information characterising those financial instruments. As such, some of the fields in AnnexII.1 could be replaced by a single identification code field.

On the other hand, bilateral derivatives contracts traded over-the-counter (OTC) do not have universal codes and the reporting of those contracts requires additional fields relevant for the contract.

Proposed data fields – General comments

There are different fields for different market participants, but, as stated above, it is unclear which market participant has to report. Moreover, while the meaning of initiator trader is clearly understood from the description field, the meaning of the term 'aggressor trader' is less clear, and further clarification could be provided.

The fields 'ID of market participant reporting the transaction' and 'ID of the reporting party' seem to refer to the same entity although the intention is to capture the party to the trade on one side and the party that delivers the report on the other. Again, the aim should be to ensure consistency with the reporting requirements in MiFID and EMIR.

It is not easy to understand how the various entities identified in the consultation paper correspond to the entities identified for instance in the context of MiFID transaction reporting. All or some of the following seem to be required in each report under REMIT:

- Market Participant
- Other Market Participant
- Broker (in case the Market Participant uses a broker to execute the transaction)
- Reporting Entity (if none of the two Market Participants reports directly)
- Beneficiary (if not a counterparty)

Without a clear definition of each of these parties to the contract and how they interact with the 'trading capacity' and the 'buy/sell indicator', it is likely to be difficult to understand the precise structure of a transaction from what is in the report. Moreover, if all these fields are populated in a report, how will the five fields be matched to the three fields currently used in MiFID transaction reporting?

In addition, the use of the buy/sell indicator field needs careful consideration. It needs to be used in conjunction with the trading capacity field. The proposed definition for the 'buy/sell indicator' field seems to be misleading: where a transaction is undertaken on an agency capacity, that is, undertaken for the account of and on behalf of a client, the buy/sell indicator should identify whether it is the beneficiary of the transaction that has bought or sold and not the reporting market participant.

The 'transaction capture time of the reporting party' field records when the reporting party received the transaction from the source, but no definition for 'source' is proposed in the CP. We are also unsure about the usefulness of this particular field.

Data fields – Standardised contracts

Any standards used under REMIT should be consistent with standards under other regulatory reporting requirements. As such, the codes used to identify standardised contracts should not be established unilaterally by ACER. Instead it would be preferable if these codes could be universally agreed, so as to allow the exchange of information generated by requirements across different pieces of legislation.

The set of fields proposed seems to omit information about balancing which is useful for monitoring purposes. Moreover, the underlying to the contract should have a unique standardised identification code or otherwise the information could be meaningless for monitoring purposes.

It is anticipated that a transaction ID uniquely identifies the trade and is assigned by the trading platform of execution or by the market participants. Data mapping problems could arise when trying to match the information collected under the requirements proposed by this consultation paper and that contained in transaction reports (MiFID).

The UK FSA supports the intention of capturing lifecycle information which is useful for monitoring purposes. However, the events to be included should be carefully considered so that only the relevant ones are reported. Moreover, we suggest once again that the treatment of changes to the price or quantities of transactions is coherent across all three pieces of legislation (MiFID, EMIR and REMIT).

We would appreciate additional clarification on whether the transaction type would include short sales.

Proposed data fields – Non-Standardised contracts

Most of the comments made above for standardised contracts are valid for the set of fields to be populated in non-standardised contracts.

Additionally, the linked transaction ID seems to be missing for non-standardised contracts where lifecycle events could also occur. The 'price elements' field aims to capture the price of the non-standardised contract but it is unclear to what elements it is referring to.

The UK FSA is concerned that the process for amending non-standardised contracts is not consistent with EMIR. ACER should be careful to ensure that the existence of non-mandatory data fields does not preclude effective data aggregation and ACER should also have systems in place to ensure that firms report non-mandatory data fields when they are able to do so.

Unique Identifier for market participants

ACER is proposing to achieve a unique identifier for market participants through the use of: the "ACER code" for registration; one of the codes already available for trading (EIC, BIC, GS1/GLN); or through the new international code currently under discussion (the Legal Entity Identifier - LEI), provided that the market participant has communicated at the time of registration (at least) one of these codes.

The UK FSA agrees that to achieve greater efficiency in market surveillance and in the detection of market abuse it is crucial for market participants to be identified by a unique code. However, we are concerned that ACER proposal allows market participants to be identified by several codes i.e. ACER codes, EIC, BIC, LEI etc.

This means that a market participant could be identified by different ID codes. For example, one market participant could use the BIC code to identify their counterparty and another market participant could use the ACER code to identify that same counterparty. In order for ACER to have an accurate picture, it will have to maintain a mapping or correspondence table, which will link the ACER code of that counterparty to all the other possible codes for that same counterparty i.e. EIC, BIC, GS1/GLN, LEI etc.

The UK experience[*] in this area shows that the ongoing maintenance and management of the mapping table can be challenging and extremely burdensome. Also, from a surveillance point of view this may add a layer of complexity to the alerting process.

In addition, this recommendation seems to be inconsistent with the development of other European legislation, particularly MIFIR and EMIR, where it is anticipated that the LEI code will be used. We believe the alignment and the harmonisation of the reporting requirements across MiFIR, EMIR and REMIT is crucial in this area.

In that respect we urge ACER to limit the number of codes which can be allocated to one market participant.

[*] The UK FSA transaction reporting regime currently allows the counterparty field and the client field to be populated with either the FSA Reference Number (FRN) or the Swift BIC. The UK FSA therefore maintains a mapping table.

The UK FSA's preferred option would be to use the LEI code for the identification of market participants as it will allow a better comparison between different data sets. Should the LEI code not be available in time for the REMIT implementation we would encourage ACER to use the BIC code. ACER should note that firms can apply for a BIC code free of charge by contacting Swift.

It may be the case that a market participant does not have a LEI code (for example if there are an individual who does not have an LEI code assigned to him). We would urge the European Commission to consider this matter further to ensure full compatibility of the client ID data collection between MiFIR/EMIR and REMIT.

Question 4

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

Please refer to question 2 above.

Question 6:

What are your views on the above-mentioned list of contracts according to Article 8(2) (a) of the Regulation (Annex III)? Which further wholesale energy products should be covered? Do you agree that the list of contracts in Annex III should be kept rather general? Do you agree that the Agency should establish and maintain an updated list of wholesale energy contracts admitted to trading on organised market places similar to ESMA's MiFID database? What are your views on the idea of developing a product taxonomy and make the reporting obligation of standardised contracts dependent from the recording in the Agency's list of specified wholesale energy contracts?

The UK FSA supports ACER's recommendation to establish and maintain an updated list of wholesale energy contracts admitted to trading on organised market places. The reporting scope should be clearly defined to provide greater legal clarity to market participants.

However, the UK FSA is concerned about ACER's recommendation on the development of a product taxonomy. The UK FSA considers that, for financial instruments admitted to trading, ACER should use the same taxonomy as the one used under MiFID/EMIR.

As mentioned above, under MiFID, instruments which are admitted to trading on a regulated market are either identified by an ISIN or by an Alternative Instrument Identifier (Aii).

With regards to spot commodities contracts, we believe it would be reasonable for ACER to develop its own product taxonomy given that these products do not overlap with MiFID/ EMIR, as long as this is consistent with other EU legislation.

Question 9

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

The UK FSA agrees that the reporting of transactions and orders to trade should be made through Registered Reporting Mechanisms (RRM). As stated in the ACER consultation paper, the UK implemented such a concept through the so called Approved Reporting Mechanisms (ARMs). The European Commission is also contemplating the introduction of an ARMs regime in the revised MiFID which is currently under discussion.

ACER proposed approach is similar to the UK one. Given the size of the UK financial market and the large number of firms required to report to the UK FSA under MiFID (approximately 1,030 firms in 2010), the UK implemented a reporting structure where transaction reports are submitted to the UK FSA via ARMs. This means that instead of firms reporting directly to the UK FSA system, they send the reports to reporting channels (ARMs) which then route them to the regulator. The UK FSA experience with ARMs has been extremely favourable. It has allowed a reduction in the number of direct bilateral connections and meant that less pressure is put on our transaction reporting system.

Given that ACER will be collecting transactions (as well as order book data) from market participants in the entire European Union (EU) (and from all EU Regulated Markets) we believe such an approach would also be the optimal solution for ACER. ACER may also wish to consider establishing strict technical standards/specifications and testing phases for the firms wishing to become RRMs.

The UK FSA would also like to seek clarifications from ACER as to whether OTC derivatives (financial bespoke contracts) are considered standardised or non-standardise contracts. Based on the ACER definition on page 7 of the consultation paper, OTC derivatives might be considered as non-standardised contracts. If this is the case, we believe ACER should also consider the reporting of non-standardised financial contracts through RRMs.

Question 11

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

Yes, we believe market participants should be eligible to become RRMs as long as they comply with ACER organisational requirements. In some instances, major market participants might find it more efficient to register directly as an RRM. As long as the firm successfully complies with the technical standards and the testing phases imposed by ACER there should not be any restrictions on market participants becoming RRMs.

In the UK, for example, we have seven ARMs registered with the FSA, one of which is an investment firm and another is a market maker.

Question 12

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

As explained in question 9 above, it is unclear whether OTC derivatives contracts are considered non-standardised contracts. If they are, we do not support the proposal that they should be reported on a monthly basis. It is our understanding that all financial instruments (covered by REMIT) should be reported to ACER as quickly as possible and no later than the close of the following working day (for consistency with MiFID).

The UK FSA would also request that ACER gives careful consideration to the timing of the reporting obligations. In order to efficiently monitor transactions for market abuse purposes, the entire picture of the transactions is needed (underlying commodities vs financial derivatives and standardised vs non-standardised contracts) to be able to detect suspicious patterns of trading.

ACER needs to keep in mind that a transaction that does not look suspicious at first instance might start to look suspicious once all the information is gathered (in this case once the non-standardised contracts are collected). As a result, ACER investigations could be delayed given that some contracts will only be reported on a monthly basis.

Question 13

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

The UK FSA supports in principle the proposed approach for the avoidance of double reporting.

The current MiFID/MiFIR review is also contemplating the possibility for Trade Repositories (TR) to send transaction reports under MiFID to the competent authorities. However, this will only be possible if the TRs comply with the transaction reporting requirements as defined in the ESMA Regulatory Technical Standards. We would suggest that ACER follows the same logic in order to avoid confusion given that the data set reported under EMIR and REMIT will serve different purposes (one for the detection of systematic risk and the other for monitoring of market abuse).

For the above reason, ACER should make clear in its recommendation that if trade reports are sent by market participants to TRs under EMIR, then the transaction reporting obligation on market participants would be considered to be complied with **only** if the TRs are approved as RRMs and transmit the necessary information to ACER in accordance with REMIT requirements.

From a supervisory perspective, it is essential for TRs to comply with REMIT requirements and, as a consequence, to be recognised as RRMs and be compliant with the technical specifications established by ACER.

Concerning the data exchange with financial market authorities, the UK FSA is happy to collaborate with ACER and use the Transaction Reporting Exchange Mechanism (TREM) to route the relevant data information to ACER based on the current existing TREM process.

With regards to financial competent authorities becoming receiver of information from the Agency, the UK FSA looks forward to discuss this with ESMA, ACER and the national energy authorities in more detail.

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

The UK FSA supports the proposed approach concerning reporting channels, and the proposal seems to be consistent with the current UK/ARMs model.

Should such a framework be developed, ACER may wish to consider for all reporting channels to register as RRMs on a mandatory basis. This will give ACER greater certainty that all reporting channels comply with the same regime (i.e. the RRM regime) and have the adequate policies and arrangements in place to report the information in accordance with the REMIT requirements.

Question 16
Do you agree with this approach of reporting inside and transparency information?

The UK FSA generally agrees with the proposals, however, clarification is needed on the timing of disclosure and on the ways in which disclosure is made. More comments on these aspects are included in responses to later questions (17-20).

An overall comment concerns the timing of disclosures. Information (such as described in section 4) is most valuable if it is known in a timely manner and is accurate. Information that is required to be submitted and that is regarding unplanned outages may be less valuable if it is received too far away from the event, so ACER may wish to clarify the timing of disclosure of this information. For example, information about an unplanned outage received two weeks after the outage occurs may not be very valuable information unless the information is being used by ACER to determine whether market abuse may have occurred.

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

ACER may wish to make a distinction between the information disclosed to regulators (ACER and the NRAs) and the information disclosed to the market. Disclosure to regulators should be done privately, and it will be necessary to keep, for example, delayed inside information from becoming prematurely publicly available. In all cases (both public and private) the UK FSA believes that disclosed information should follow a specific format that is approved by ACER. This will result in market participants and other users of the information getting used to seeing information disclosed in a certain way, which will make it easier to digest. Disclosure should also be made as soon as the information becomes discloseable. Further details are provided in responses to later questions (18-20).

Question 18

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

The UK FSA generally agrees with the proposals, however, clarification is needed on some aspects. For example, ACER may wish to consider allowing only one reporting channel to be used for the disclosure of information to regulators (ACER and the NRAs). This should use a standard format and disclosures should be made as soon as the information becomes discloseable. Disclosures should be made electronically, because paper disclosures are unwieldy and difficult to send in a timely manner.

In addition, ACER may wish to consider whether public disclosures should be made via Regulatory Information Services (RIS) that are approved by ACER. If other means of disclosure are allowed, then one could end up with non-standard information being disclosed, which could in turn confuse, rather than inform, the market. Information users (including regulators) will need uniform information so the most efficient way of disclosing it would be through an RIS. The RIS will charge a fee, but this fee is negotiable and we understand that they are competitive.

Please note that RIS have a specific status in the UK as the entities authorised to release regulated information required under different legislation on behalf of issuers. The UK FSA understands that ACER would like to follow a model conceptually similar to the UK RIS system subject to different requirements defined by ACER.

Question 19

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

ACER may wish to consider that the use of thresholds reduces the amount of useful information to the market place and therefore market participants do not have the "full

picture", which they need in order to make decisions. If information meets the definition of being discloseable (to regulators, the public, or both) then it should be disclosed.

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

ACER may wish to consider that electronic disclosure should be the only acceptable way of disclosing information. All entities that are participants in these markets have access to electronic information and in order to keep the information in a consistent format, the use of electronic distribution channels should be the normal method of disclosure. Non-electronic disclosure could cause unnecessary delays in the information getting to the correct recipients, which in turn could create confusion or even a false market.