

Memorandum of Understanding concerning the consultation and cooperation regarding their statutory responsibilities in relation to EU wholesale energy markets



European Securities and Markets Authority



European Union Agency for the Cooperation
of Energy Regulators

European Union Agency for the Cooperation of Energy Regulators

MEMORANDUM OF UNDERSTANDING BETWEEN THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS AND THE EUROPEAN SECURITIES AND MARKETS AUTHORITY,

Considering the respective mandates of the European Union Agency for the Cooperation of Energy Regulators (ACER), founded by Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing an European Union 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, Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (MAR)⁵, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU(MiFID II)⁶, Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR)⁷ and further Union law in the energy and the financial field, stating that the

¹ OJ L 158, 14.6.2019, p. 22–53.

² OJ L 331, 15.12.2010, p. 84 –119.

³ OJ L 326, 8.12.2011, p. 1–16.

⁴ OJ L 201, 27.7.2012, p. 1-59.

⁵ OJ L 173, 12.6.2014, p. 1.

⁶ OJ L 173, 12.6.2014, p. 349.

⁷ OJL 173, 12.6.2014, p. 84.

closest co-operation should take place between ACER and ESMA (hereinafter referred to as the parties) for the purpose of carrying out their duties;

Considering the increasing internationalisation, harmonisation and interdependence of European Wholesale Energy Markets due e.g. to 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;

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

Considering that commodity 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 dealing, unlawful disclosure of inside information, market manipulation and attempted market manipulation, which constitute market abuse, be compatible between commodity derivative and commodity markets;

Considering that ACER and ESMA have signed a Memorandum of Understanding on 18 July 2013 under the previous legal framework applicable to ESMA and ACER and the need to enhance the cooperation already established between the two Parties taking into account the new legal framework and the developments on European Wholesale Energy Markets;

Considering that ACER and ESMA should further 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 MiFIR, REMIT and EMIR;

Considering that ESMA and ACER should, where relevant, consult each other in preparing guidelines and 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 ESMA's and ACER's mandates, including in relation to energy benchmarks;

Considering that the most expedient way to define the scope and practical terms of implementing the enhanced cooperation between ACER and ESMA is a Memorandum of Understanding (MoU) which will replace the existing 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 law, 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 statutory responsibilities.

Article 2

Scope

This MoU is a statement of intent to consult, cooperate and exchange information in connection with the statutory responsibilities of ACER and ESMA in relation to wholesale energy markets, which encompass both commodity and derivative 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 energy regulatory authorities, ESMA and national competent financial authorities or ACER, ESMA and any other competent authority.

Chapter 2

Cooperation and coordination

Article 3

Cooperation

In addition to the cases where consultation is required under Union law, ACER and ESMA recognise the importance of close communication concerning wholesale energy markets, and intend to consult regularly at staff level.

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

- a. With regard to market abuse under MAR and REMIT, product intervention measures and position management powers under MiFIR related to wholesale energy products and on data collection under MiFIR, 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 law;
- 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);
- c. The information technology (IT) governance of ACER and ESMA for data collection.

- d. The operation of the market correction mechanism under Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices⁸;
- e. The LNG price assessments and benchmark in the scope of Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks⁹; and
- f. Other energy benchmarks in the scope of Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.¹⁰

Article 4

Communication of information to facilitate a coordinated and consistent approach to market abuse

ACER and ESMA will cooperate with the aim of ensuring a coordinated and consistent approach to market abuse on wholesale energy markets, particularly in the context of Article 16(3)(b) of REMIT and Article 25(3) of MAR.

For the purpose of cooperation under Article 25(3) of MAR, the exchange of information between ESMA and ACER will be subject to the requirements and procedures, including the use of templates, laid down in Implementing Regulation (EU) 2020/1406¹¹.

⁸ OJL 335, 29.12.2022, p. 45

⁹ OJ L 335, 29.12.2022, p. 1.

¹⁰ OJ L 171, 29.6.2016, p.1

¹¹ Commission Implementing Regulation (EU) 2020/1406 of 2 October 2020 laying down implementing technical standards with regard to procedures and forms for exchange of information and cooperation between competent authorities, ESMA, the Commission and other entities under Articles 24(2) and 25 of Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse, OJ L 325, 7.10.2020, p. 7–21.

In fulfilment of Article 4(4) of Implementing Regulation (EU) 2020/1406, ESMA and ACER agree that the electronic system for communications between ESMA and ACER will be the Case Management Tool of ACER, or, in the absence of ESMA's access to this tool, the following functional email addresses with appropriate security measures applied: ACER - market.conduct@acer.europa.eu ; ESMA - market-integrity@esma.europa.eu.

As part of its coordination role, ESMA will facilitate the sharing of information between ACER and the national financial competent authorities as necessary.

Article 5

Coordination at Union level and establishment of a joint ACER-ESMA Task Force

To further enhance the coordination under this MoU, ACER and ESMA agree to make all reasonable efforts to provide the other party, without prior request and in advance to the extent practicable, with any information likely to be of assistance to the other party for the purposes of carrying out its statutory responsibilities under REMIT, MiFID II/MiFIR, MAR and EMIR, including information concerning any pending major change in their regulatory or supervisory systems or any major change to REMIT, MiFID II/MiFIR, MAR or EMIR which is likely to have a significant impact on the operations, activities, or reputation of the parties, National Competent Authorities or National Regulatory Authorities. For this purpose, ACER and ESMA agree to establish a joint Task Force (AETF) with the following tasks:

- a) to facilitate technical cooperation between ACER and ESMA on data and knowledge with respect to the functioning of energy and energy derivative markets;
- b) to promote and develop cooperation on market monitoring and investigation where appropriate for the benefit of enhancing market integrity in energy and energy derivative markets;
- c) to contribute to recommendations that ACER and ESMA issue to the European Commission as regards market rules, standards, and procedures which could improve market integrity and the functioning of energy and energy derivatives markets; and
- d) to contribute to the consistent application of the prohibition of market abuse, of the obligation of transaction reporting and of related requirements for market participants in wholesale energy and energy derivative markets.

Article 6

Governance of the AETF

The AETF will be co-chaired by one member of staff from ACER and one from ESMA.

The AETF will meet at least twice a year.

Article 7

General procedures for the cooperation and coordination

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

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

Without prejudice to any applicable procedure under Implementing Regulation (EU) 2020/1406, each party will provide the other within two-weeks of the entry into effect of this MoU with a list containing the details of one or more liaison officer(s) designated by that body for the purposes of cooperation and exchange of information under this MoU.

ACER and ESMA will keep up-to date the lists of liaison officer(s).

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 8

Request for assistance

Without prejudice to any applicable procedure under Implementing Regulation (EU) 2020/1406, 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 9

Execution of requests for assistance

Without prejudice to any applicable procedure under Implementing Regulation (EU) 2020/1406 and to the extent permitted by Union law, the requested party will take all reasonable steps to obtain and provide the assistance sought.

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

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

Article 10

Permissible uses of information

Subject to any restrictions in Union law, ACER and ESMA, may use non-public information obtained from each other under this MoU for the purpose of their statutory responsibilities under applicable Union law.

Without prejudice to any applicable requirements under Union law, 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 law. 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 11

Data protection

ACER and ESMA may share personal data subject to the provisions of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the

protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.¹²

Article 12

Professional secrecy

Any confidential information received, exchanged or transmitted will be subject to the conditions of professional secrecy laid down in Article 17 of REMIT, Article 76 of MiFID II, Article 27 of MAR, Article 83 of EMIR and applicable Union law.

Chapter 4

Final provisions

Article 13

Publication

ACER and ESMA agree to publish this MoU.

Article 14

Amendments to the MoU

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.

ACER and ESMA may by consent make amendments and/or add Annexes to the MoU as necessary.

¹² OJ L 295, 21.11.2018, p. 39–98.

Article 15

Entry into effect and termination

This MoU will enter into effect on the date of its signing by ACER and ESMA and will replace the MoU signed by ACER and ESMA on 18 July 2013.

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

In the event of termination of this MoU, the information obtained under this MoU will continue to be treated in accordance with Article 10.

Signatures

Date:

European Securities and Markets Authority [signed] Verena Ross Chair	European Union Agency for the Cooperation of Energy Regulators [signed] Christian Zinglersen Director
---	--