FNB Gas Opinion

on the European Commission's proposal for amendment of the Regulations (EU) No 1227/2011 and 2019/942

Berlin – 9 May 2023

About FNB Gas:

The Berlin-based association Vereinigung der FernleitungsnetzbetreiberGas e.V. (FNB Gas) was founded in 2012 by the German gas transmission system operators (TSOs), i.e. the network companies operating the major supra-regional and cross-border gas transportation pipelines. One key focus of the association's activities is the Gas Network Development Plan, which has been drawn up annually by the TSOs since 2012. The association also acts as a central point of contact for policymakers, the media and the general public on behalf of its members.

The members of the association are: *bayernets GmbH, Fluxys TENP GmbH, Ferngas Netzgesellschaft mbH, GASCADE Gastransport GmbH, Gastransport Nord GmbH, Gasunie Deutschland Transport Services GmbH, GRTgaz Deutschland GmbH, Nowega GmbH, ONTRAS Gastransport GmbH, Open Grid Europe GmbH, terranets bw GmbH and Thyssengas GmbH. Between them, they operate a pipeline network totalling some 40,000 kilometres in length.*

On 14 March 2023 the European Commission published a proposal amending Regulations (EU) No 1227/2011 and (EU) 2019/942 to improve the Union's protection against market manipulation in the wholesale energy market. On 16 March 2023 the European Commission started a public consultation. We are glad to comment on the proposed amendment of the Regulations (EU) No 1227/2011 and 2019/942 as follows:

I. To Article 2 *Definitions* (Regulation (EU) No 1227/2011)

Article 2 Paragraph 1 lit. e) of the Draft Regulation provides for a detailed definition of inside information. According to this definition, information about client's pending orders in wholesale energy products would be considered as inside information. FNB Gas assesses this level of detailing as critical because, among other things, information about the future booking behaviour of the customer is required to determine a possible security deposit. Due to Article 2 Paragraph 1 lit. e) this information could constitute an inside information, which has to be published in accordance with Article 4. Since this information shall be published in connection with Article 4 in a level of detail that would endanger the business secrets of the customer, the FNB Gas argues for the deletion of Article 2 Paragraph 1 lit. e).

II. To Article 4a *Authorisation and supervision of IIPs*, Art. 7c *Provision of LNG market data to ACER*, Article 8 *Data collection* and Article 9a *Authorisation and supervision of the Registered Reporting Mechanisms* (Regulation (EU) No 1227/2011)

Articles 4a, 7c, 8 and 9a currently provide for that the European Commission could determine requirements by means of implementing acts and that these implementing acts shall be adopted in accordance with the examination procedure referred to Article 21 Section 2. The determination of such requirements should be discussed with the market participants in a public consultation because it has to be objectively possible for the market partners to be able to operationally implement the adjustment of an implementing act. Therefore, FNB Gas encourages to adapt the content of Article 4a Paragraph 6 Sentence 2, Article 7c Paragraph 2 Sentence 2, Article 8 Paragraph 2 Sentence 2, Article 8 Paragraph 6 Sentence 2 and Article 9a Paragraph 5 Sentence 2 as follows:

After a public consultation with the market participants has been conducted, those ~~Those~~ implementing acts shall be adopted in accordance with the examination procedure referred to in Article 21(2).

III. To Article 9a *Authorisation and supervision of the Registered Reporting Mechanisms*, Article 13 *Implementation of prohibitions against market abuse* and Article 13d *Mutual assistance* (Regulation (EU) No 1227/2011)

The new Article 9a sets further requirements for market participants with regard to the authorisation and supervision of an RRM. Each TSO is regularly a market participant as well as a RRM. According to Article 9a Paragraph 1, the operation of an RRM would be subject to prior authorisation by ACER. Therefore, every transmission system operator that is already registered as a market participant with the national regulatory authority (cf. Article 9 Paragraph 1) would also have to apply to ACER for authorisation as an RRM. We do not consider this to be expedient. FNB Gas comes to the conclusion that this is not necessary from a regulatory point of view and is not appropriate for reasons of cost efficiency. Furthermore, we see the risk of different authorisation requirements that can lead to legal uncertainties for the market participants. The requirements contained in Article 9a Paragraph 1 and in Article 9a Paragraph 2 Sentence 1 should be transferred to Article 9 for enforcement by the national regulatory authority.

Article 9a Paragraph 2 Sentence 1 stipulates that ACER shall regularly review the RRMs` compliance with this regulation. Compliance with the prohibitions laid down in Articles 3 and 5 and the obligations laid down

in Articles 4, 8, 9 and 15 can be ensured through the supervision by the national regulatory authority as required in the amended Paragraph 1 of Article 13. Furthermore, in the amended Paragraph 1 of Article 13 is regulated that national regulatory authorities shall investigate all the acts carried out on their national wholesale energy markets and enforce this regulation thereto.

The requirements contained in Article 9a Paragraph 2 Sentence 2 and in Article 9a Paragraph 3 should be specified with regard to the data responsibility (market participants should remain responsible for their data) and also be transferred in Article 9 for monitoring by the national regulatory authority. The determination of such requirements should be subject to a prior public consultation with the market participants. The reason for this is that it must be objectively possible for the market participants to be able to operationally implement the requirements of an implementing act (cf. Chapter II. in this statement).

In Article 13, the new Paragraph 3 provides for that the Agency may carry out investigations by exercising the powers conferred onto it by and in accordance with Articles 13a, 13b and 13c. In Article 13, the two existing Paragraphs 1 and 2 provide for investigative and enforcement powers of the national regulatory authorities. Due to the new Paragraph 3 in Article 13, ACER would be given investigative and enforcement powers alongside the respective national regulatory authority. The paragraphs 3 to 7 of Article 13 do not clearly regulate which regulatory authority would be responsible in each individual case that could lead to legal uncertainties for the market participants and that would be questionable in accordance with the rule of law. Therefore, we propose to delete Article 13 Paragraphs 3 to 7, Article 13a, Article 13b and Article 13c without replacement.

IV. To Article 16b *Guidelines and recommendations* (Regulation (EU) 1227/2011)

The new Article 16b provides for the Agency to issue guidelines and recommendations addressed to all national regulatory authorities or all market participants.

Paragraph 1 states as a principle that the guidelines and recommendations are issued in order "to establish consistent, efficient and effective supervisory practices within the Union" and "to ensure the common, uniform and consistent application of Union law". The possibility provided for in paragraphs 4 to 6 that a national regulatory authority does not comply with these guidelines and recommendations contradicts this principle. Furthermore, if a national regulatory authority deviates from these guidelines and recommendations, this will lead to legal uncertainties for the market participants in the concerned EU member state – particularly in the case of cross-border matters. Provisions in guidelines and recommendations should be necessary, suitable, and appropriate because it must be objectively possible for market participants to operationally implement the requirements of guidelines and recommendations. Therefore, a part of Paragraph 1 and the Paragraphs 4 to 6 should be deleted without replacement. Our text proposal for Article 16b Paragraph 1:

The Agency shall, with a view to establish consistent, efficient and effective supervisory practices within the Union, and to ensure the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to all national regulatory authorities or all market participants ~~and issue recommendations to one or more national regulatory authorities or to one or more market participants on the application of Articles 4a, 8 and 9a~~. All specifications in guidelines and recommendations must be justified with regard to necessity, suitability and appropriateness.

Paragraph 2 provides for that public consultations on the guidelines and recommendations can be conducted where appropriate. We see the necessity for public consultation of such requirements with the market participants as necessary so that market participants can assess whether the requirements of a guideline or a recommendation can be operationally implemented. For this reason, we propose to adjust Paragraph 2 as follows:

The Agency shall~~, where appropriate,~~ conduct public consultations regarding the guidelines and recommendations which it issues and analyse the related potential costs and benefits of issuing such guidelines and recommendations. Those consultations and analyses shall be proportionate to the scope, nature and impact of the guidelines or recommendations. The findings from the public consultations must be taken into account in the guidelines and recommendations.

V. To Article 18 *Penalties* (Regulation (EU) 1227/2011)

According to Article 18 the Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented.

Paragraph 2 defines the administrative penalties and administrative measures which the national regulatory authorities have the power to impose. Lit. e) in Paragraph 2 contains the administrative pecuniary sanctions for breaches of Articles 3, 4, 5, 8, 9 and 15. Administrative pecuniary sanctions for breaches of Articles 8 and 9 are only slightly lower than administrative pecuniary sanctions for breaches of Articles 3, 4, 5 and 15 are defined. A breach of the prohibition of insider trading or a breach of the obligation to publish inside information have more serious consequences on the wholesale energy market than a breach of the data reporting obligation. This circumstance should be appropriately considered when determining the amount of the financial sanctions. In our view, for repeated and deliberate breaches of Articles 8 and 9 a maximum administrative pecuniary sanction of EUR 100 000 each for legal and natural persons would be appropriate.

VI. To Article 32 *Fees* (Regulation (EU) 2019/942)

We do not consider the payment of fees for the collection, handling, processing and analysis of information and data as provided for in Article 32 to be appropriate. The essential task of a transmission system operator in the gas sector is to provide a secure network based on non-discriminatory principles. In Germany, certain tasks regarding the provision of a secure network are performed by the market area manager. The transmission system operators and the market area manager have only limited influence on the amount of the capacity fees and the charges for system services due to legal and regulatory requirements. Due to their special and supporting role on the gas market and in order to avoid further burdens on the customers, the transmission system operators as well as the market area manager should be exempted from any REMIT fees. At least no fees should be charged for the disclosure of inside information (Articles 4 and 4a of Regulation (EU) 2019/942) and the reporting of fundamental data. Additional expenses for new tasks of the agency should not be financed by charging fees.