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Consultation Paper: Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories, 25 June 2012
Comments by Oesterreichs Energie (Register ID number: 80966174852-38)

Dear Madam,
Dear Sir,

Oesterreichs Energie, the Association of Austrian Electricity Companies, welcomes the opportunity to comment on the Consultation Paper: Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories, 25 June 2012. Oesterreichs Energie represents more than 130 energy companies active in generation, trading, transmission, distribution and sales which in total cover more than 90 per cent of the Austrian electricity generation and the entire distribution.

Clearing obligation procedure

As regards the criteria to be assessed by ESMA under the clearing obligation procedure, the previous Discussion Paper on the Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories (ESMA/2012/95) did not include a public consultation procedure in its consideration as this is envisaged in Article 5(2) of the Regulation. In the previous consultation, we stated that it would be essential to enable stakeholders to take up a stance in such cases. This position is in line with the IOSCO Report on the Requirements for Mandatory Clearing (OR05/12). Regretfully, the current consultation paper has not adopted its standpoint. ESMA stresses its understanding for the market participants' need to be informed when a bottom-up procedure is initiated. However, the consultation does not specify when and how the public can be involved in the discussion whether a certain derivative class should be subject of the central clearing obligation.

Public register

In our opinion on the previous discussion paper (ESMA/2012/95), we stated that the exact definitions of class and type of derivative contracts cause difficulties. We notice that these difficulties have not been resolved.

The Regulation and the current discussion paper provide the following terms:

- class of derivative (defined in the Regulation (Article 2(6) as subset of derivatives sharing common and essential characteristics including at least the relationship with the underlying asset, the type of underlying asset, and currency of notional amount)
- general class of derivative contracts (no explicit definition provided)
- type of derivative contracts (no explicit definition provided)
- asset class (defined in the discussion paper (recital 65) as credit derivatives, equity derivatives, interest rate, foreign exchange and commodity and other derivatives)

In Annex II, Chapter V, Article 1PR, ESMA outlines that, for each class of derivatives, the general class of derivative contracts and the type of derivative contracts needs to be specified. Therefore, it is concluded that these terms differ in scope.

Now, recital 65 apparently indicates that asset classes are identical to so-called “classes of OTC derivative contracts” although it remains unclear whether this should be linked to any of the terms listed above:

“In this respect, when one of the clearing thresholds for an **asset class** is reached as determined in EMIR, the counterparty is considered as exceeding the clearing thresholds and therefore is subject to the relevant EMIR requirement for all **classes of OTC derivative contracts** and not only for those pertaining to the class of OTC derivatives where the clearing threshold is exceeded.”

In recital 312, asset class and “type of derivative” are declared to be identical. Again, it remains unclear whether the term “type of derivative” can be linked to the other terms.

“ESMA has taken a view that at least the **type of derivative (asset class)** and a breakdown of the aggregate open positions per derivative type should be published in aggregate form.”

ESMA is urged to provide more clarity in this regard.

Non-financial counterparties

Criteria for establishing which derivative contracts are objectively measurable as reducing risk directly related to the commercial activity or treasury financing

We believe that the definition of reducing risk is a suitable one. Replacing the term hedging by reducing risk (i.e. the potential change in a certain value) has provided more clarity. In particular we welcome the statement that a closely correlated instrument may allow achieving the objective of risk reduction as well. Furthermore, it is important to note that the intention of reducing risk has to be seen on a group basis.

We would like to reiterate our statement to the previous discussion paper (ESMA/2012/95) that the concept of the term group needs to be interpreted cautiously. In any way, the term should not be considered as it is stated in the Regulation since this definition is tailor-made for financial counterparties (e.g. references to Directive 2006/48/EC).

Holding shares (although not meeting the requirements of an affiliated company) and exercising common control should be sufficient to meet the requirements of a group in order to create a level playing field. Several non-financial companies having founded a joint trading branch shall not be treated differently from a company which has integrated the trading activities in the main entity as long as both businesses conclude derivative contracts to reduce risk. This approach is currently discussed under MiFID 2/MiFIR and should be incorporated in the technical advice to the European Commission.

Clearing Thresholds

Q11: In your view, do the above considerations allow an appropriate setting of the clearing threshold or should other criteria be considered? In particular, do you agree that the broad definition of the activity directly reducing commercial risks or treasury financing activity balances a clearing threshold set at a low level?

We strongly welcome ESMA's reconsideration against a single threshold across all asset classes as we believe that different thresholds for different asset classes represent a more sophisticated approach that is in line with the central aim of the Regulation to prevent non-financial counterparties from becoming systemically relevant for the respective financial market without being required to abide by the full regulation as provided by the Regulation.

However, we do not share ESMA's position that exceeding the threshold of one asset class should cause the clearing obligation to apply to all OTC derivative contracts (i.e. irrespective of the respective asset class). Especially, this is contrary to the above stated central aim of the Regulation.

Although we still consider the notional value of OTC derivatives an extremely rigid measure that does not make any allowances for the differences of the non-financial market participants, we understand the main argument of ESMA to support this value: its simplicity. However, the notional value will only be appropriate and reasonable as long as the thresholds are chosen accordingly. As ESMA states, the fact that the notional value is taken as reference point, necessarily leads to the requirement of a relatively high value as the respective clearing threshold is concerned. This statement needs to be conserved, especially as ESMA intends to conduct reviews of the thresholds on a regularly basis.

Whereas we do not oppose such review, we need to mention that such review needs to be announced to the public in due time. A public consultation is particularly considered preferable in such situation. Generally, ESMA is asked to provide more details on the process of reviewing a threshold and its implementation. A phase-in approach needs to be taken into consideration. Otherwise, the mere possibility of a review would undermine the market participants' reliance on the existing regulation.

Besides that, we still do not understand why non-financial counterparties would be unable to calculate relative values. Especially the concept of ancillary activity in the recently proposed MiFID 2 serves as evidence that market participants can be considered to be able to calculate relative values. These relative values will offer a less rigid and more individually suitable approach to this central subject.

Thank you for taking our comments into consideration. If you have any further questions, please do not hesitate to contact us.

Yours sincerely,

DI Dr. Peter Layr
President

Dr. Barbara Schmidt
Secretary General