

Paris, March 19th 2012

ESMA
103 rue de Grenelle
75007 Paris
France

Re: The Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade
Repositories

Dear Sir, Dear Madam

The French Association of Corporate Treasurers (AFTE, Association Française des Trésoriers d'Entreprise) is pleased to comment the ESMA draft technical standards for the regulation on OTC derivatives, CCPs and trade repositories.

AFTE is made up of 1,400 members representing the 1,000 largest French firms. It is the oldest association of corporate treasurers in the world, and plays an active role in the works of the European Association of Corporate Treasurers (EACT), which it helped to found.

AFTE represents Industrial and Commercial companies and therefore will only address questions related to the use of derivatives by non-financial.

AFTE recommends ESMA to improve the information and enrollment process on Esma's public hearing, AFTE has not been able to attend the public hearing nor to listen to it by phone call. Several of our members encountered the same difficulties. We hope to get better information and far in advance for the July public hearing.

AFTE highlights that small and medium size companies may not have as sophisticated treasury systems as large companies and may encountered more difficulties to implement the regulation, especially for monitoring the breach of the clearing threshold or providing information to trade repositories.

Q1 – Extra-territoriality –

AFTE asks to clarify the definition.

Is the regulation applicable if a non EU subsidiary of an EU company deals with a non EU bank?

Q9 – Class of derivatives

AFTE asks Esma to clarify the concept of class of derivatives. As this will determine the class of derivatives subject to clearing obligation, we would appreciate to rapidly have a clear understanding of these classes and the granularity level.

Q10 – Definition of derivatives contracts that are objectively measurable as reducing risks directly related to commercial or treasury financing activities

AFTE would like to clarify the wording to avoid misunderstanding that could create divergences with the EMIR's intention to exempt non-financial counterparties. ESMA must provide a broader definition irrespective of the application of hedge accounting rules.

- Paragraph 30 should come before paragraph 29 and be modified as follow :
- *“ESMA ~~also~~ considers that an OTC derivative entered into by a non-financial counterparty is deemed to be objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of that non-financial counterparty or of that group, when, the accounting treatment of the derivative contract is that of a hedging contract pursuant to IFRS principles as referred to in IAS 39 paragraph 71-102 on hedge accounting as endorsed by the European Commission.”*
- Paragraph 29 should be modified as follow :
*“~~By reference to European accounting rules,~~ **Regardless of its accounting qualification**, ESMA **also** considers that an OTC derivative entered into by a non-financial counterparty is deemed to be objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of that non-financial counterparty or of that group, when, whether individually or in combination with other derivative contracts, its objective is to reduce the following risks:*
 - a. The potential change in the value of assets, service, inputs, products, commodities, liabilities that the non-financial counterparty or its group owns, produces, manufactures, processes, provides, purchases, merchandises leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the ordinary course of its business; or*
 - b. The potential change in the value of assets, service, inputs, products, commodities, liabilities referred to in letter a, resulting from fluctuation of interest rates, inflation rates or foreign exchange rates, **commodity prices, equity derivatives, credit spread.***

AFTE asks to extend the definition mentioned in article b, to include the potential change of certain types of financial instruments legitimately used by non-financial counterparties to hedge risks.

- In paragraph 31, the term “investing” should be deleted. AFTE considers that speculation and trading cover all speculative activities. In a non-financial counterparty, the term “investing” does not refer to speculation but can qualify an investment in an industrial activity ; Hedging with equity derivatives investment is not speculation but protection against the change of value of the investment.

*“Nevertheless, ESMA considers that an OTC derivative which is used for a purpose in the nature of speculation, **investing**, or trading should not be an OTC derivative objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of a non-financial counterparty or of a group as provided above.*

Q11 - The clearing threshold

First of all, we wonder if the threshold will be measured based on the traded volume for a certain period or based on the outstanding amounts at a specific date. It is unrealistic for non-financial companies, and especially for groups, to check the threshold on an ongoing basis.

AFTE disagrees with the ESMA proposal to set the threshold at a low level (§ 33) as the regulation at first was supposed to address the systemic risk (significance). Non-financial counterparties cannot be considered having systemic risk significance: in other words, even if an industrial company files for bankruptcy, it is not a systemic risk for the financial environment.

AFTE considers that the level of the threshold should be defined in relation with systemic risk and not with an absolute level. The level could be set as a percentage of financial indicators (equity, assets...) and should also be simple to implement.

AFTE considers that the threshold should be set for each group. Each group should be responsible to allocate it between its subsidiaries. AFTE find it relevant to define the threshold per asset class.

AFTE asks to clarify the term “referring” to notional value. A grid should be defined with a weighting of notional value per assets class. For example, notional value of a 30 year interest rate swap does not reflect the same risk as the same value 1 year swap.

AFTE strongly disagrees with paragraph 27 that specified that all OTC transactions should be cleared once the clearing threshold is breached. *“At the point where the clearing threshold would be exceeded, the clearing obligation would apply to all OTC derivative contracts the non-financial counterparty will enter into after the time that the firm has exceeded the threshold”.*

AFTE strongly supports that the clearing obligation must apply only to speculative transactions. Even if the threshold is exceeded, a non-financial counterparty should not clear its hedging activities. The impact on liquidity for a non-financial counterparty exceeding the threshold can lead to a clearing shock and generate a cash trap for them. To address this point, AFTE suggests allowing non-financial counterparties to voluntary clear with a CCP all derivatives over the threshold.

In addition, AFTE suggests allowing non-financial counterparties to segregate trading activities: for example concentrate all trading activities in one entity (activities subject to clearing and collateral) in order to exempt other entities using OTC derivatives related to commercial or treasury financing activities

It should also be clearly specified that the clearing obligation would cease when a non-financial company fell under it again.

Q12 and Q13 – Timely confirmation

AFTE highlights that electronically processed transactions are confirmed more quickly than phone transactions that can take up to 1 week to confirm, depending upon their complexity. These ranges should be taken into consideration for reporting unconfirmed OTC derivatives to the competent authorities.

AFTE wants ESMA to take into account that non-financial counterparties are not equipped like financial counterparties.

Q17 – Compression

AFTE is opposed to a mandatory compression. Such a decision should be in the hand of each non-financial counterparty. Moreover AFTE questions on consequences if such a compression generates an IFRS disqualification.

Q21 and 22 - Intra group exemption

AFTE considers that intra group transactions related to hedging activities must be exempted to the exchange of collateral.

AFTE doesn't understand why the Intra group transactions should be submitted to an authorization to be exempted from clearing. Intra group exemption should refer to the general definition of exemption for hedging of commercial and treasury activities.

AFTE suggests exempting intra group transactions from collateral and also reporting, or at least being less demanding on the time frame and format.

Questions related to Trade repositories

It is unclear who will be responsible to report trades. Non-financial counterparties worry about the reporting delegation to a third party. AFTE considers that it is more appropriate to ask the company itself to provide an accurate view of all its operations. It should be left to the responsibility of a company to delegate this reporting duty.

AFTE is in favor of transparency and agrees with reporting obligations but highlights the cost and administrative charges that will be needed to adapt treasury systems to these regulation requirements. In addition, AFTE highlights the confidentiality of the information reported to the trade repository. We consider that information should be disclosed only to ESMA. This information must not be disclosed wider, in particular to competitors and other market participants.

Yours sincerely,

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