

Europeans Securities and
Markets Authority (ESMA)
103 Rue de Grenelle
75007 Paris
FRANCE

Lange Houtstraat 2
2511 CW Den Haag

T. (+31) 70 311 43 50

F. (+31) 70 311 43 51

www.energie-nederland.nl

info@energie-nederland.nl

KvK Den Haag 50816179

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Handled by Nynke Geerts

Dial-direct 070 - 3114373

E-mail ngeerts@energie-nederland.nl

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Subject Consultative response from Energie Nederland to the ESMA consultation paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories (EMIR)

Dear Madam, Sir,

On June 25th 2012 ESMA published the *Consultation Paper on the Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories* (EMIR). The public consultation paper is intended to collect views from all parties interested in the implementation of EMIR.

Energie-Nederland is a federation of market participants, with generation, distribution, trading and sales activities in the Netherlands. In order to be able to manage the risks that stem from our asset- and sales portfolio, we are highly dependent on well functioning and liquid wholesale energy markets. We therefore closely follow the implementation of EMIR, which could have substantial impact on Europe's wholesale energy markets and welcome the opportunity to respond to this consultation.

Energie-Nederland supports the Eurelectric's consultative response but given the importance of the topic for both gas and power markets, Energie-Nederland would like to emphasize some general issues which are of major importance to our members.

The clearing threshold should be clearly linked to systemic relevance

The clearing threshold should be set at such a level that “the systemic relevance of the sum of net positions and exposures per counterparty and asset class of OTCS derivatives is taken into account.”¹ A study from Dutch research institute SEO Economic Research concludes that “... systemic risk does not occur on the energy derivative market; the risk of contagion and propagation of financial shocks on this market is much lower and in fact incomparable to the situation on financial markets”.²

Energie Nederland believes that energy companies primarily trade in financial products to cover and control the risks that stem from the production and supply of energy. Energy companies hedge their natural positions and optimise their assets in the liberalised wholesale markets.

Furthermore, we believe that delivering energy to consumers always decreases risks for energy companies with long-term production commitments. Supplying loans to consumers on the other hand has a fundamental different effect on banks. Therefore, the need for anti systemic risk measures such as mandatory clearing is fundamentally different for energy producing companies than for banks,

In our view ESMA has not succeeded to justify the proposed level of the clearing threshold from a perspective of systemic relevance. At the moment it is not proven - or at least reasonably argued by ESMA - why companies above a level of €3 billion are systemically important and thus should be captured by the clearing threshold. As long as the threshold is not based on systemic importance there is serious risk that also non-systemically important market parties will be captured unnecessarily. The additional cost and liquidity constraints that are triggered by mandatory clearing will result in less market liquidity on traded markets, less competition, less room for investments in new generation capacity, higher dependency on with financial markets and in the end this will lead to higher systemic risk.

Energie-Nederland therefore argues that ESMA should not set a threshold in advance, but base the level of the clearing threshold on real transaction data that will be gathered under the EMIR reporting requirements. This data will allow for solid calculations and analysis that will ensure the threshold is set at a systemic level. The coming years the level of threshold can be regularly reviewed, as ESMA proposes in paragraph 66 iii. V.

Apart from the precise level of the threshold, Energie-Nederland would prefer taking into consideration the net position between counterparties. Only the netted amount reflects the reality of the position to a counterparty and will be the reality of the losses upon default of the counterparty. The gross notional value does not represent a measure of the risks underlying the OTC derivatives entered into. Calculating positions on a net basis would reflect non-financial companies' exposure to counterparties in a more realistic way, and would better represent the actual systemic relevance of a specific counterparty.

¹ As stated in recital 31 of EMIR

² SEO Economic Research, Curtailing Commodity Derivative Markets; what are the consequences for the energy sector? October 2010. Link: <http://www.seo.nl/pagina/article/curtailing-commodity-derivative-markets/>

Non-financial companies should continue to be allowed to use bank guarantees

In our consultative response to the DTS from March 2012, Energie-Nederland stressed the importance of allowing non-financial companies to use commercial bank guarantees as collateral at clearing houses. We noted that ESMA has not taken these comments into account. Especially the requirement that bank guarantees should be fully backed by collateral that can be realised on the same day (see also page 113, Chapter XI, article 1, 3c viii of the DTS) will severely restrict their applicability. Given the fact that non-financials are *not* systemically important to the economy and do not have the same access to financial resources as financial counterparties, Energie-Nederland asks that this requirement is removed from the DTS. If the requirements stay in the DTS, non-financial companies need to back their trades with very liquid collateral, which limits the possibility to invest in the necessary physical assets which are relevant for reason of security of supply and reaching the climate targets.

ESMA should make use of the existing, proven and effective risk mitigation requirements

Instead of drafting extensive risk mitigation requirements for non-cleared contracts, ESMA should make better use of existing ISDA (and possibly also the EFET) arrangements that are proven effective and efficient. The industry standard documentation already covers many concerns that are voiced in the ESMA consultation paper, notably with regard to portfolio reconciliation, dispute resolution and confirmation. In order to avoid that existing mechanisms are duplicated or reinvented, we would therefore like to propose that these ISDA and EFET agreements serve as the basis for the ESMA risk mitigation requirements for non-cleared contracts. Where ESMA feels that the existing documentation is insufficient they can be updated accordingly. This would also strongly facilitate the implementation of the risk mitigation requirements, as market parties would know they fulfil the requirements if they trade under these agreements.

Crossing the clearing threshold in one asset class should not trigger clearing at group level

Energie-Nederland opposes to the idea that crossing the threshold in one of the five asset classes would also trigger the clearing obligation for all trading activities on a group level such as foreign exchange- (FX) and treasury activities. Those non-speculative activities that do not pose any systemic risk to the economy should in any case remain exempted from mandatory clearing. Despite the fact that EMIR requires market parties to clear their financial (commodity) derivative contracts if their trading entity crosses the clearing threshold, Energie-Nederland thinks it is not appropriate that this would automatically trigger the obligation to clear all non-speculative (FX and treasury) trades on a group level.

The implementation timing for EMIR should be clarified

Energie-Nederland calls upon ESMA to inform market parties as soon as possible on when (it is expected that) the EMIR obligations will enter into force. Because the EMIR requirements can have substantial impact on non-financial companies dealing in financial derivatives, transparent and reasonable implementation timelines would be very helpful, to avoid unnecessary regulatory risks.

A final remark from our side concerns the much needed high level coordination between ESMA and ACER to amongst others prevent double reporting and the corresponding additional costs. Energie-Nederland is glad to notice that this is increasingly the case and hopes that this will remain the case in the future.

Energie-Nederland hopes that our comments to the DTS are useful and will help ESMA to further improve the DTS for EMIR. In case you have any questions or comments, please do not hesitate to contact us.

Yours sincerely,



André Jurjus
Director