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EnBW Trading GmbH Response to the ESMA consultation paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories (EMIR) (25 June 2012 – ESMA/2012/379)

We welcome the opportunity to respond to the consultation by the European Securities and Markets Authority (ESMA) on its Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories.

We appreciate that several sector-specific issues that are very relevant for the energy industry have been considered by ESMA when drafting the Draft technical Standards (DTS); e.g. the very relevant definition of hedging (e.g. also including proxy hedging) as well as adjusting the relevant clearing threshold to a more acceptable level. Nevertheless, we still see many aspects which need modification or clarification in order to adequately reflect the specifics of non-financial companies such as energy utilities. In order to be able to manage the risks that stem from our asset (e.g. power plants) and sales portfolio (e.g. end customers), we very much rely on liquid and well-functioning energy wholesale markets. Therefore we also need to use the trading instruments in order to manage our commercial risk. It is vital for us that these activities are not unnecessarily hampered by financial regulation aiming to address important issues such as reducing systemic risk and increasing transparency in financial markets; thus we urge for proportionate measures recognizing the specific needs to manage our the commercial risk.

Against this background, we fully support the extensive response of EFET Europe which very well reflects our key concerns while also putting forward adequate proposals. Therefore we reduce our following comments to reiterate our key concerns regarding the Draft Technical Standards.

Scope of EMIR:

For us it is crucial that the scope of EMIR is clearly defined so we can exactly assess the relevance of EMIR and potential impacts on our activities. In other words it must be known which derivative contract is considered to be in the scope of the regulation and which is not. Furthermore it is absolutely important to know and precisely which transactions count towards the clearing threshold and which one are out of scope. We recognise that this will also be dependent on the final outcome of revision of the Markets in Financial Instruments Directive, particularly regarding the definition of financial instruments. However, we strongly believe that physically settled forward products that do not meet the characteristics of other derivative financial instruments should be kept out of the scope of EMIR. Furthermore we support that transactions that are objectively measurable as reducing commercial risk as well as intra-group transactions should also be excluded. Regarding the definition of hedging, we generally support the current proposal, but would like to mention that it should be made clear that the concept of reducing commercial risk should not be applied on an individual transaction level but rather should be judged on an overall portfolio basis; thus we would propose to also include the 'portfolio' concept into the definition. We also support the clarification that regarding risk mitigating OTC derivatives may be defined either by using the general definition provided in the DTS as well as using accounting standards; regarding the latter we would like to point out that it should made clear in the DTS that this should also include the possibility to use local accounting rules.

Consideration regarding the thresholds:

We do not support the current proposal that the threshold should be based on a gross figure. We rather believe that it would be much more appropriate to use a netted figure as basis for the threshold. We think that a gross exposure is not representative of the risk carried by firms as effective risk mitigation techniques i.e. netting agreements are unaccounted for. Particularly we would like to refer to one of the key goals of EMIR to reduce existing systemic risk. Thus we believe that taking the sum of net positions and exposures into account would be much more appropriate to address this (systemic risk). In any case, we do not think that calculating net positions produces any additional efforts vis-à-vis the gross approach.

Again, we would like to mention that we strongly believe that intra-group transactions need to be excluded from the calculation basis to arrive at an entity's position relative to the clearing threshold. In this context we think it is very important that ESMA confirms that when calculating and comparing the exposure of a non-financial company against the threshold it should be done on an entity level.

We are also not convinced of the approach that crossing a threshold in one asset class would trigger clearing in other asset classes and for other entities as well. This could significantly affect e.g. the commercial treasury- and foreign exchange activities. In our view, crossing the threshold in one asset class should only trigger clearing of the transactions relating to that specific asset class.

We generally support the approach of a regular review of the clearing thresholds. This allows for an adaptation of the threshold according to changes in the markets as well as of the regulatory framework.

Portfolio reconciliation / Portfolio compression:

Generally, we do not believe that portfolio reconciliation should be mandatory as market participants will apply it anyways if the potential benefits outweigh the costs. We believe that these approaches should only be introduced after a proper cost-benefit analysis. We fear that this could trigger significant use of additional resources. Thus, if introduced at all, we would strongly propose to develop a light-touch approach (e.g. only have a quarterly reconciliation); in any case the proposed (or any other) threshold should only be per counterparty (e.g. outstanding, not centrally-cleared derivative contracts and derivatives which are not reconciled via eCMS) and not be considered on an overall portfolio basis.

Regarding portfolio compression also believe that there should be no mandatory obligation to be introduce by non-financial firms. Thus we it seems appropriate that ESMA is not considering a hard obligation but rather allows the counterparties the possibility to assess themselves whether to conduct a portfolio compression or not. We also agree this needs no approval or notification process (given that counterparties can explain the reasons upon request of the regulators).

Usage of bank guarantees:

We support the possibility provided in EMIR for non-financial counterparties to use bank guarantees as collaterals. We think this is a common and adequate approach, particularly as non-financial companies do not have the same access to financial resources compared with financial companies. However, we fear that the current DTS proposal would restricts the use of bank guarantees as collateral when asking that they need to be fully backed by collateral that can be realized on a same day. This would significantly increase the need for posting cash collateral thus impacting the liquidity position of non-financial firms.

Risk mitigation of non-cleared contracts:

We think it is important to recognize that non-financial counterparties already use today risk mitigation for un-cleared trades. This includes bilateral margining agreements and other measures according to standard agreements (e.g. CSAs). Thus, we believe that when proposing respective risk mitigation measures in the final Technical Standard, these established and well-functioning approaches need to be taken into account. In fact, we would support an approach where market parties who trade under approved standard trading agreements (e.g. EFET, ISDA) are automatically compliant with regard to the risk mitigation requirements under EMIR.

Reporting requirements:

We strongly ask for a full aalignment of trade reporting under the EMIR and REMIT regime. Therefore, it is absolutely vital that there is a close cooperation between ESMA and ACER on this issue (in this context we would also like to refer to the current consultation by ACER on the transaction of records). In any case any overlapping or double reporting requirements must be absolutely avoided as it would only create additional burden and possibly bears even the danger of misunderstanding and misinterpretation. This includes the set-up of consistency format standardization among the various reporting requirements.

Regarding the proposed reporting obligations in the DTS, we recognise that there are 80 data fields for each single transaction that should be reported; we are of the strong opinion that this will create a massive additional burden for us while we are not convinced that these information is actually all relevant to evaluate the systemic relevance of a non-financial counterparty (e.g. fields 20-36). We do not think that reporting of derivative contracts should be used as a means for monitoring the adoption of risk mitigation techniques.

Regarding intra-group transactions (that are not conducted through the wholesale market but are based on internal transfer price), we are of the opinion that they should not be subject to the reporting requirements. As mentioned before they are not wholesale energy transactions and thus should not fall under the scope of EMIR.

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