

To: European Securities and Markets Authority (ESMA)
103, rue de Grenelle
75007 Paris
France

Brussels, 19 March 2012

Subject: EURELECTRIC's Response to the ESMA discussion paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories (EMIR) (16 February 2012 – ESMA/2012/95)

Dear Madam, Sir,

At the trilogue meeting of 9 February 2012 the EU Commission, Parliament and Council reached an agreement on the European Market Infrastructure Regulation (EMIR). Following this agreement the European Securities and Markets Authority (ESMA) has been asked to draft technical standards for the implementation of EMIR. By means of the Discussion Paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories (16 February 2012 – ESMA/2012/95), ESMA is seeking feedback from stakeholders on the proposed way forward for the implementing technical standards.

The Union of the Electricity Industry–EURELECTRIC is the sector association representing the common interests of the electricity industry at pan-European level, plus its affiliates and associates on several other continents. In order to be able to manage the risks that stem from their asset- and sales portfolio, EURELECTRIC's members are highly dependent on well-functioning and liquid wholesale energy markets. We therefore also closely follow the implementation of EMIR. We believe that this Regulation should recognise the specific hedging needs of electricity companies by imposing proportionate measures, without affecting the overall aim of reducing systemic risk and increasing transparency in financial markets.

We appreciate the opportunity given by ESMA to give input to the technical standards for EMIR and agree with several of the choices that ESMA has made. We do however also have some serious concerns which are highlighted directly below and further substantiated in the answers to the attached questions.

Main comments:

- **EURELECTRIC believes that ESMA has proposed a suitable definition of OTC derivatives that are objectively measurable as reducing risks' although some improvements are necessary,** in order to make clear that the definition covers anticipatory mitigating measures of future risk and commercial activities (i.e. it is not related to risks that have already crystallised). We believe that the proposed definition includes all OTC derivatives that are entered into by a non-financial counterparty in the normal conduct and management of the commercial business and that are economically appropriate. We also appreciate that it gives some flexibility on how the definition can be implemented.
- **EURELECTRIC does not consider adequate to put the clearing threshold at a "low" level,** as proposed by ESMA in their discussion paper. Rather we believe that the systemic relevance needs to be a key criterion. As also explicitly stated in article 5. 4 (b) of EMIR « the value of the clearing threshold should be set at such a level that systemically relevant parties are captured. **If the threshold is not set at a systemic level this might indeed result that market participants - that are not of systemic important - are covered. In turn this would ultimately decrease market liquidity,** as players may be forced out of the market, because of the additional cost and liquidity constraints that are triggered by mandatory clearing. Moreover further thought is needed on whether the threshold should be assessed at a group level, entity level or both.
- **EURELECTRIC believes that it is of crucial importance to identify accurately which type of contracts will be considered in the scope of the regulation.** This is essential to assess the overall impact of EMIR and the proposed Regulatory Standards. In particular we believe that physically settled forward products that do not meet the characteristics of other derivative financial instruments defined in MiFID shall not be considered in the scope of EMIR. We urge therefore ESMA to integrate the discussion paper with views on this topic accordingly to the mandate foreseen in article 1b in EMIR and not to wait until the definition of draft technical standards to be published for consultation during next summer.
- **Because the implementation of EMIR will cause a significant share of credit risk in the market to shift to clearing platforms, we feel that it is of utmost important that the stability of these CCP's is guaranteed.** In this light we argue that the collateral that is held by any CCPs should be adjusted and reviewed on a continuous basis to the volume of the trades that are executed on the platform, and not only on a monthly basis. Regarding the asset classes that can be held as collateral by CCP's, we feel that concentration limits should not only apply to the use of commercial banks, but that bonds and government guarantees should be subject to similar concentration limits. In this way not a single asset class will dominate, so that the stability of CCP's is better ensured.
- **For non-financials it is extremely important that bank guarantees can continue to be used as collateral to cover initial and variation margin at exchanges.** This is for instance common practice in the Nordic market. ESMA should propose rules sufficiently attractive for non-financials to clear. If not, energy companies will have to face a tradeoff between posting or reserving significant amounts of cash for margining requirements, thereby substantially limiting their ability to invest in generation assets, or to trade less.
- **Alignment on trade reporting regimes between especially EMIR and REMIT is urgently needed.** Because of the enormous complexity of implementing the different reporting requirements in a consistent and efficient way, we argue strongly that data reporting (for non-standard contracts) should be postponed.

e look forward to comment on the consultation paper on draft technical standards you will publish in summer 2012, we are at your disposal for any further information or clarification you may need.

Should you have any questions on this document, please do not hesitate to contact Anne-Malorie Geron (amgeron@eurelectric.org), Head of EURELECTRIC's Markets Unit, or Charlotte Renaud (crenaud@eurelectric.org), Policy Officer.

Yours sincerely,



Juan Jose Alba Rios

WG Wholesale Markets & Trading Chairman



Bernhard Walter

SG Financial Regulation & Market Integrity
Chairman

Section 1: Requirements for (non) cleared OTC derivatives (Q1 - Q22)

Contracts having a direct, substantial and foreseeable effect within the EU

Q1	In your views, how should ESMA specify contracts that are considered to have a direct, substantial and foreseeable effect within the EU?
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We believe that OTC derivative contracts that are traded in large volumes by financial institutions only, should be considered to have a direct substantial and foreseeable effect, as other contracts have no substantial and foreseeable effect within the EU and therefore no impact on systemic risk. ESMA should specify these contracts in order to ensure legal certainty when establishing the clearing obligation.

Q3	In your views, what should be the characteristics of these indirect contractual arrangements?
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We believe that being a client of a General Clearing Member should be sufficient to be considered an 'indirect contractual arrangement' and therefore to assess compliance with the clearing obligation. Additionally, arrangements agreed between counterparties to use clearing services offered by central counterparties, after the conclusion of an OTC transaction, should be considered contractual arrangements sufficient to meet the clearing obligation..

Notification from the competent authority to ESMA

Q4	What are your views on the required information? Do you have specific recommendations of specific information useful for any of the criteria? Would you recommend considering other information?
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Regarding the information needed to assess whether a class OTC derivatives should be subject to the clearing obligation, we would recommend checking also whether the contract is predominately traded by financial or non-financial / commercial actors qualifying for the MiFID exemptions. Therefore we suggest an additional criterion in your point 15 on p. 7 of the discussion paper.

15. For the purpose of assessing whether a class of OTC derivatives should be subject to the clearing obligation, ESMA considers at this time that the notification should include at least:

- a. A clear identification of the OTC derivative contracts and of the relevant class of OTC derivatives they belong to i.e. the characteristics and the range of derivative contracts within the class of derivative contracts, as well as all the elements to be included in the ESMA register and any further characteristics necessary to distinguish the OTC derivative contracts within the relevant class from derivative contracts outside of the relevant class of assets;*
- b. Evidence of the degree of standardisation of the relevant class of OTC derivatives "contractual terms and operational processes;*
- c. Data on the volume of the relevant class of OTC derivatives;*
- d. Data on the liquidity of the relevant class of OTC derivatives; and*
- e. Data on the type and number of counterparties active and expected to be active within the market for the relevant class of OTC derivatives; and***
- f. Evidence of availability to market participants of fair, reliable, and generally accepted pricing information in the relevant class of OTC derivatives and any available evidence of the impact of the clearing obligation on availability to market participants of pricing information.*

Criteria to be assessed by ESMA under the clearing obligation procedure

Q7	What are your views regarding the specifications for assessing standardisation, volume and liquidity, and availability of pricing information?
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We generally support the ESMA proposal on the elements to be considered when assessing the criteria. We believe however that concerning the 'availability of price information' it is necessary referring also to the availability of pricing models and to the extent that standard models (or market best practice approaches) are

available. A further element is that prices do not need only to be easily accessible, but prices need to be proven “traded”/ “executable”.

[Public register available on ESMA website](#)

Q9	Do you consider that the data above sufficiently identify a class of derivatives subject to the clearing obligation and the CCPs authorised or recognised to clear the classes of derivatives subject to the clearing obligation?
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We believe that OTC contracts traded predominantly by non-financial actors should not be subject to the clearing obligation and would therefore add an additional criterion in the list of data ESMA should consider to identify a class of derivatives subject to the clearing obligation and the CCPs authorised. Please see our comments below on points 21 and 22 on p.9 of the discussion paper.

*21. In developing the draft technical standards related to the class of derivatives that should be subject to the clearing obligation, ESMA shall take into consideration criteria defined in EMIR, i.e. the degree of standardisation of the relevant class of OTC derivatives “contractual terms and operational processes, the volume and the liquidity of the relevant contracts within the relevant class of derivatives and the availability of pricing information **and the type of counterparties active in the market.***

22. In assessing these criteria ESMA should consider:

a. That the contractual terms standardisation refers to the use of common legal documentation, including master netting agreements, definitions and confirmations which set forth contract specifications commonly used by counterparties and operational processes standardisation refers to the extent to which product trade processing and lifecycle events are managed in a common manner to a widely agreed-upon timetable;

b. Whether the margins would be proportionate to the risk that the clearing obligation intends to mitigate and the historical stability of the liquidity through time, the likelihood that liquidity would remain sufficient in case of default of a clearing member;

c. Whether the relevant information to correctly price the contracts within the relevant class of derivatives is easily accessible to counterparties on a reasonable commercial basis including once the obligation to clear is in force.

d) Whether the respective class of derivatives is predominately traded by financial or by commercial / non-financial actors i.e. the type of counterparties active in this market.

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

Q10	In your view, does the above definition appropriately capture the derivative contracts that are objectively measurable as reducing risk directly related to the commercial or treasury financing activity?
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We believe that the definition proposed by ESMA in section 29 is suitable as it adequately captures the derivative contracts that are objectively measurable as reducing risks directly related to the commercial- or treasury financing activity of a non-financial counterparty. We believe that this definition should clearly include all OTC derivatives that are entered into by a non-financial counterparty in the normal conduct and management of the commercial business and that are economically appropriate.

Electricity companies indeed specifically rely also on derivative contracts to manage the risks that stem from potential changes in the value of their (power generation) assets and sales portfolio due to fluctuations in commodity prices. Therefore we suggest that in the section 29b. explicit reference is made to “The potential changes in value of assets (...) resulting from fluctuation of interest rates, inflation rates, **commodity prices** or foreign exchange rates. This would be consistent with the normal conduct of business of non-financial exposed to the risk of fluctuation of commodity prices. Additionally this would be consistent with EMIR (recitals 16a).

While we welcome the confirmation that commercial and treasury hedging activities will be exempt from clearing requirements, we believe that the above definition could be wider as to include potential change for

certain types of financial instruments, e.g. equity derivatives could legitimately (i.e. for risk mitigation purposes) be used by a non-financial counterparty to hedge risk in relation to employee share schemes.

Also it should be made clear that the conditions in section 29 and in section 30 are not cumulative, but optional conditions.

Furthermore, we would suggest the following small changes in the definition proposed by ESMA to increase the precision of the text:

*29. By reference to European accounting rules, ESMA 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, **at the time of entering into the contract**, 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, **exposures**, 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, **exposures**, service, inputs, products, commodities, liabilities referred to in letter a, resulting from fluctuation of interest rates, inflation rates, **commodity prices** or foreign exchange rates.*

*31. Nevertheless, ESMA considers that an OTC derivative which is used for a purpose in the nature of speculation **or 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.*

Regarding section 31 above, we would suggest to remove the word “trading”. Trading means “buying and selling” and does not prejudge anything regarding the intention of the party like “speculating” and “investing” do..

Clearing Threshold

Q11	In your views, 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?
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We do not consider it adequate to simply set the clearing threshold at a “low” level. As is explicitly stated in the article 5, 4 (b) of EMIR, “the value of the clearing threshold shall be determined taking into account the *systemic relevance* of the sum of net positions”. The clearing threshold should therefore be based on an assessment of what are systemically relevant positions that could endanger the financial system and the economy. A methodology which looks at average daily (non-collateralized) market-to-mark exposures could be used as a starting point. Under these calculations positions that reduce risks should be excluded and netting according to the terms of master netting agreements should be applied.

If the threshold is not set at systemic level this might decrease market liquidity, as players that become subject to mandatory clearing may be forced out of the market because additional cost of doing business and the additional costs and liquidity constraints that are triggered by mandatory clearing.

ESMA proposes to refer to the notional value of OTC derivatives. The notional value is easier to implement but it cannot be deemed as a useful measure of risks. If for the benefit of simplicity it will be applied, then this will need to be duly reflected in the proposal concerning the *level* of the threshold as the notional value of most of standardized commodity derivative contracts can be very large due to the nature of the contract/underlying physical commodity, whilst the market risk is very low in comparison.

Furthermore ESMA should confirm that collateralized OTC derivatives will not be taken into account for the purposes of calculating OTC derivatives subject to the clearing threshold. Indeed, methods of risk mitigation used by non-financial counterparties in the context of the normal business activity, like OTC central-clearing services (i.e. trades that are cleared voluntarily with a CCP after being concluded OTC) and bilateral margining agreements should be explicitly recognized and excluded.

Finally we would like to stress that the clearing threshold should not be defined in absolute levels, but rather it should be set on relative terms. While it should be a simple approach leading to straight forwards guidance for market participants, it should also take certain specifics into account. For example it should take into account the size of the relevant non-financial counterparty and the size of its group. Therefore the threshold should also consider the relation of the other activities within the group allowing e.g. a company with a large asset base to use OTC transactions for risk management needs without fully consuming the threshold the detriment of other group companies.

Timely confirmation

- Q12** What are your views regarding the timing for the confirmation and the differentiating criteria? Is a transaction that is electronically executed, electronically processed or electronically confirmed generally able to be confirmed more quickly than one that is not?
- Q13** What period of time should we consider for reporting unconfirmed OTC derivatives to the competent authorities?

Counterparties of an OTC derivative transaction have a primary interest in ensuring consistency of data entered into their trading systems, therefore ESMA proposals should be ambitious, but should remain feasible. Hence we believe that the proposed timings for confirmation for non-centrally cleared contracts are much too strict and actually penalize smaller non-financial companies, which have not enough resources to guarantee such immediate confirmation. Moreover, these requirements would require a global revision of common practices in commodity markets. Finally, we believe that the margin for error for unconfirmed trades is generally significantly bigger, which defeats the purpose of reporting those trades.

More in general it should be taken into account that the confirmation process involves two counterparties' systems/persons interacting. Therefore the appropriateness of the proposals should be evaluated on the basis of the consequences of this interaction, in particular when at least one of the counterparties is non-financial: Indeed in the energy market there are a wide range of practices depending on:

- National markets (e.g. usually in illiquid and scarcely integrated markets confirmation processes are done manually),
- Type of counterparties (e.g. the smaller a counterparty is, the more difficult it is to finalize the confirmation process within in short timeframe)
- Availability and diffusion of industry standard arrangements or third party services offered for instance when the transaction is concluded via a broker platform.

The status of the confirmation process of every transaction is included in the details required in transaction reporting under the current proposal in the discussion paper. Therefore we believe that authorities would have easily access to unconfirmed trades. If unconfirmed transactions would need to be reported separately, we believe that it would be reasonable having a quarterly (or less frequent) reporting obligation for non-financial firms.

Marking-to-market and marking-to-model

- Q14** In your views, is the definition of market conditions preventing marking-to market complete? How European accounting rules should be used for this purpose?
- Q15** Do you think additional criteria for marking-to-model should be added?

The proposed standards for using marking-to-model seem pragmatic and workable, but some improvements are necessary. In particular we believe that specific consideration should be given to the extent to which models based on market best practice are applied; the availability of public information about the applied models (e.g. scientific papers); the easy availability in the market of the input parameters for the models or whether they need to be derived from others. We would suggest, moreover, that paragraph 45e should be amended to require the marking-to-model models to be approved by the board or delegated committee. As derivative valuation models are generally highly technical and specialized the board of a company is probably not the most suitable body to approve them. Normally this approval is delegated by the board to the Risk Management Committee of a company.

45. Where market conditions prevent marking-to-market, financials and non-financials exceeding the clearing threshold shall use reliable and prudent marking-to-model. ESMA considers that the marking-to-model valuation technique should:

- a. incorporate all factors that counterparties would consider in setting a price,
- b. be consistent with accepted economic methodologies for pricing financial instruments,
- c. be calibrated and tested for validity using prices from any observable current market transactions in the same financial instrument or based on any available observable market data,
- d. be validated and monitored by a unit independent from the risk taking unit, and
- e. be duly documented and approved by the board **or delegated committee** as frequently as necessary and at least annually.

Reconciliation of non-cleared OTC derivatives contracts

Q16 What are your views regarding the frequency of the reconciliation? What should be the size of the portfolio for each reconciliation frequency?

We do not understand the rationale of ESMA to require reconciliation of non-cleared OTC derivatives contracts. Regarding paragraph 48a large market participants are proposed to be reconciling every day which would be a substantial additional administrative burden for market parties – so we do not agree with ESMA proposal. At the same time, it is important to see that many market parties already have netting agreements and Credit Support Annexes in place, which makes the need for reconciliation obsolete.

Portfolio compression

Q17 What are your views regarding the threshold to mandate portfolio compression and the frequency for performing portfolio compression?

We believe that portfolio compression is not a familiar concept for many non-financial counterparties. If this is a service to be provided by external service providers, making this mandatory sounds like a trigger for the providers to charge considerable fees for this service.

We do not support including the risk reducing transactions of non-financial counterparties in this obligation. The threshold of 500 transactions should include only transactions that are not done to reduce the risk of the commercial or treasury financing risk of the counterparty. Also, any intra-group transactions should be excluded from this obligation. It was not clear from the discussion paper, whether the threshold of 500 transactions is on group or counterparty level, but it should be only on counterparty level in our view.

For some electricity companies, it will be important to have the possibility to exempt certain trades from the portfolio compression exercise, such as trades which form part of a hedge relationship for IFRS accounting purposes. These trades are specifically linked to a hedged item, and cannot be closed out early because they are part of an accounting relation. If these trades would not be exempted from portfolio compression and are closed out early then it would not be possible to perform the hedge effectiveness test.

Dispute resolution

Q18 What are your views regarding the procedure counterparties shall have in place for resolving disputes?

Q19 Do you consider that legal settlement, third party arbitration and/or a market polling mechanism are sufficient to manage disputes?

Q20 What are your views regarding the thresholds to report a dispute to the competent authority?

In general, we find that making sure that dispute resolution is something that is agreed upon with counterparties is in the interest of every counterparty, and we do not see the reason for including very detailed rules on this in a regulation.

Market participants in the energy sector generally rely on master netting agreements that also have dispute resolution clauses in place. According to those master agreements, the dispute resolution mechanisms are usually available when a dispute arises. It should then be up to the counterparties when they choose to make use of the mechanisms, i.e. when it becomes apparent that an amicable solution is no longer probable. In some situations 5 days can be too long and in some situations it can be way too short for any negotiations.

The proposals from ESMA defined in sections 54 and 55 would duplicate and potentially conflict with existing market practice for conflict resolution. Associations such as EFET and ISDA have been actively developing

market standards and their documentation is widely used in the industry. We therefore feel that ESMA should align their proposals with existing standards in widely used EFET and ISDA master agreements.

Intra-Group exemptions

EMIR clearly stipulates that intragroup transactions shall be exempted from the clearing obligation. Hence ESMA should provide in due time all the procedures necessary to apply for exemptions and therefore to avoid costly and unnecessary obligations to collateralize intragroup deals until conditions to apply for an exemption will be made available.

- Q21** In your views, what are the details of the intragroup transactions that should be included in the notifications to the competent authority?
- Q22** In your views what details of the intragroup transactions should be included in the information to be publicly disclosed by counterparty of exempted intragroup transactions?

We do not consider it necessary that non-financial entities report separately their intra-group transactions.

Not only would this be a logistical and administrative nightmare, but we are also convinced that intra-group transactions of non-financial companies do not affect the market. There are currently already accounting rules that ensure that legal entities are sufficiently capitalized and for the remainder regulators should mainly be interested in reporting/ exposures on a group basis.

Section 2: CCP requirements (Q23 – Q68)

Default Waterfall (Article 42)

Q42 What is your preferred option for the determination of the quantum of dedicated own resources of CCPs in the default waterfall? What is the appropriate percentage for the chosen option? Should in option a, the margins or the default fund have a different weight, if so how? Should different criteria or a combination of the above criteria be considered?

In our opinion the preferred option would be option a) (i.e. percentage of the average amount of the margins and default fund contributions collected by the CCP over a one year period (excluding margins posted by interoperable CCPs)).

We also believe that the so called "skin in the game" should be calculated based on the default contributions collected by the CCP only, i.e. not based on the margins. It is in all parties' interest that the margins should be large enough to withstand a party's default, and the default fund should only be as a backup. Therefore, the incentive referred to in 115 of the CCP to increase the other measure to lower their contribution to the default waterfall would not be problematic in case the "skin in the game" was to be calculated based on the default fund contributions. Higher margins would only mean less probability of a default's consequences ever reaching the default fund contributions of non-defaulting clearing members.

Regarding section 117, where it says that the CCP should replenish within one month, we would like to suggest an amendment that the CCP should replenish within the same timeframe as it requires replenishments from its Clearing Members, but at the latest within one month.

Q43 What should be the appropriate frequency of calculation and adaptation of the skin in the game?

The frequency should be the same as the frequency that Clearing Members' contributions are recalculated and collected.

Collateral Requirements (Article 43)

Q44 Do you consider that financial instruments which are highly liquid have been rightly identified? Should ESMA consider other elements in defining highly liquid collateral in respect of cash of financial instruments? Do you consider that the bank guarantees or gold which is highly liquid has been rightly identified? Should ESMA consider other elements in defining highly liquid collateral in respect of bank guarantees or gold?

The criteria to define commercial bank guarantees (CBG) as highly liquid collateral proposed by ESMA are too restrictive. ESMA should acknowledge the different nature of financial counterparties compared with non-financials, in particular in regard to access to cash collateral. Bank guarantees are a very important tool for non-financial companies to manage liquidity requirements. The use of bank guarantees in the energy clearing space is mainly related to the characteristics of end user participating in these markets. Electricity producers, energy exploration and energy distribution companies do not possess the same levels of readily pledgeable liquid assets as do the main users of a financial derivatives clearinghouse which tend to exhibit a member base more heavily weighted towards financial institutions. Consequently, bank guarantees have become normally used as collateral for the energy markets. They allow energy companies to manage their working capital in a more efficient manner and avoid that cash is tied up at CCPs for margining requirements.

We strongly believe that ESMA should propose rules to incentivize non financials to make more use of clearing services. Indeed, if collateral requirements are reasonable – and CBG can be accepted – non-financial counterparties will decide to clear to a larger extent and this would reduce counterparty risks.

If energy companies would be forced to cover the margining requirements at CCPs with cash and no bank guarantees would be allowed anymore:

1. It would mean that significant amounts of cash would need to be reserved to cover companies' exposure at CCPs. Consequently the capital available for investments in (highly needed) generation capacity would be seriously constrained.

2. Indeed, large utility companies from the Nordic market (i.e. one of Europe's most liquid power market), are using bank guarantees as collateral, and given the large size of their commercial hedging activities, provide vital liquidity to the overall market.

3. some participants could be forced to discontinue their activities on the exchange and pushing trading into physical contracts, thus having negative consequences on market liquidity and transparency. Over-constraining collateral may have the unintended consequence of pushing trading from lit venues such as exchanges and clearing houses into traditional physical supply contracts. Not accepting bank guarantees is likely to dramatically increase the cost of clearing as energy market participants would have to provide other types of collateral not readily available to them.

4. Exchange traded Electricity Forward contracts have different settlement schedules. Forwards typically have up to several months or years until settlement. In case of a bank guarantee bank default, where the bank guarantee is backing a portfolio of Forward contracts, the clearing house does not need the liquidity until settlement, which could be years later. In those circumstances the issue with "bank guarantees not being immediately accessible" compared to other assets such as cash, would be less important because under such circumstances the language of the bank guarantee will require immediate replacement of the failed provider with a new viable (credit worthy) one. The main risk is if the utility company and the bank guarantee bank default simultaneously. However due to the longer settlement cycle, the clearinghouse should have ample time to mitigate such a liability.

5. The liquidity profile of a bank guarantee is quite strong as long as the bank maintains high short-term rating and is subject to rigorous regulatory capital requirements for contingent obligations. Therefore the requirement in section 120(3)(v), that any bank guarantee is fully backed by collateral that is realisable on the same day, should be deleted. The value added of this requirement is not in proportion to its effects on the possibility to use bank guarantees. Moreover, the value of the bank guarantee is stable and doesn't fluctuate with the market volatility from day to day as other securities do. Bank guarantees introduce no more credit or liquidity risk to the clearinghouse than taking pledged cash and sweeping it directly into a bank's demand deposit account or making a direct investment in a bank's short-term commercial paper program.

6. It is important to note that today, most members of clearing houses hold a surplus on their bank guarantees which actually reduces the over-night risk for the clearing house considerably. Not accepting bank guarantees would have the unintended consequence to increase the over-night risk for the clearing house

Q46	Do you consider that the proposed criteria regarding the currency of cash, financial instruments or bank guarantees accepted by a CCP have been rightly identified in the context of defining highly liquid collateral? Should ESMA consider other elements in defining the currency of cash, financial instruments or bank guarantees accepted by a CCP as collateral? Please justify your answer.
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Regarding section 123, we strongly support ESMA's preliminary view that CCP should be allowed to accept collateral issued by other clearing members

Regarding section 125, we do not agree with ESMA that cash, financial instruments or bank guarantees are only highly liquid where they are denominated in the currency of the jurisdiction where the CCP is established. Market parties should be able to post collateral in any of the strong currencies (e.g. Dollar, Euro, Sterling), but preferably in the currency of the product that is being cleared.

Q49	Do you consider that the elements outlined above would rightly outline the framework for determining concentration limits? Should ESMA consider other elements?
Q50	Should a CCP require that a minimum percentage of collateral received from a clearing member is provided in the form of cash? If yes, what factors should ESMA take into account in defining that minimum percentage? What would be the potential costs of that requirement?

From a treasury point of view we consider that the use of cash, bank guarantees or other types of collateral are interchangeable. The choice of collateral is usually dependent on the cash position of a company, and the ease of use of the collateral.

As noted in question 44 we consider it very important for energy companies to be able to use bank guarantees and to have the flexibility to post the collateral they want. As long as the credit rating of the bank one is using is good, this should not be a problem.

Furthermore, if companies must post a minimum percentage of cash, we would like to note that ESMA should be considerate of the fact that corporations may be forced to borrow additional money to handle the margin requirements at a time when bank lending is under difficult market conditions (e.g. market conditions as during the 2008 financial crisis). Even companies that are very profitable will be forced to pay higher costs for borrowing and could result in insolvency problems.

Section 3: Trade repositories (Q69 - Q83)

Reporting obligation (Article 6/7)

Q69: What is your view on the need to ensure consistency between different transaction reporting mechanisms and the best ways to address it, having in mind any specific items to be reported where particular challenges could be anticipated?

In order to avoid duplicate reporting requirements, we consider consistency between different reporting schemes to be very important. The starting point for transaction data reporting should be that every transaction should be reported to a data repository only once. For energy companies, consistency between reporting requirements under EMIR and REMIT is especially important, in terms of data format, frequency, reporting deadlines, etc. Where both ESMA and ACER need access to the same transaction data, they should retrieve it from the data repository to which it has been reported by the reporting party. It is crucial that the RTS proposed by ESMA will not require energy companies to duplicate their efforts to comply with reporting requirements.

We believe that consistency would be ensured if the existing infrastructures can be used as preferred source for transaction reporting. In particular platform operator should play a primary role in providing information regarding transactions concluded on platforms. This approach is the most reasonable in terms of costs for the society to implement uniform reporting requirements.

Q70 Are the possible fields included in the attached table, under Parties to the Contract, sufficient to accurately identify counterparties for the purposes listed above? What other fields or formats could be considered?

We have concerns about some of the details proposed. In particular, the detail 'directly linked to commercial activity or treasury financing' is not information related to the parties of the contract and might be challenging to be implemented. The requirement that 'changes over the life-time of a contract need to be reported' is not reasonable and would require efforts (i.e. versioning of submitted reports) of different nature compared with the regular daily reporting. Moreover, the detail 'Clearing threshold' does not seem appropriate. Our understanding is that the threshold refers to (an) entity (ies) and not to a contract.

Therefore this kind of detail cannot be reported for each single trade. Furthermore the notification process foreseen in EMIR when non-financial counterparties breach the threshold level should be sufficient to provide information about the status of the counterparty (above/below the threshold).

Q71: How should beneficiaries be identified for the purpose of reporting to a TR, notably in the case of long chains of beneficiaries?

We understand the need for beneficiaries to be identified to the regulator but we recommend that intra-group beneficiaries (e.g. a trading unit executing on behalf of the generation company or sales company) be exempt from this requirement. The regulator will better be able to detect market manipulation and system risk when the reported trades are aggregated at the group level, rather than reported among many companies in the group. Requiring the identification of intra-group beneficiaries at the trade level will lead to unnecessary additional costs and complexity.

Coding

Q74: How complex would be for counterparties to agree on a trade ID to be communicated to the TR for bilaterally executed transactions? If such a procedure is unfeasible, what would the best solution be to generate the trade ID?

It is infeasible to agree on a trade ID at the time of execution for bilaterally executed transactions. Considering especially deals executed over the telephone, this will introduce an unacceptable amount of operational complication. We suggest possibly that the agreement of a trade ID could be a part of the confirmation process with (for example) the selling party proposing a trade ID to the buying party (or otherwise). Note that,

in this case, trade reporting must necessarily follow confirmation, which means that reporting is inevitably slowed down.

Risk mitigation and clearing

Q76: What is your view of the granularity level of the information to be requested under these fields and in particular the format as suggested in the attached table?

The confirmation process is not instantaneous. If EMIR requires “real time” or “near real time” reporting, then the confirmation information must follow later as a “lifecycle event”. As a general rule of thumb, the more information is requested from market parties, the longer the reporting will take. We therefore suggest keeping reporting as simple as possible.

Additional points

Q78: Given that daily mark-to-market valuations are required to be calculated by counterparties under [Article 6/8] of EMIR, how complex would it be to report data on exposures and how could this be made possible, particularly in the case of bilateral trades, and in which implementation timeline? Would the same arguments also apply to the reporting of collateral?
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We question the usefulness of reporting exposures (for non-cleared trades) at the trade level. Most trade agreements take advantage of certain netting provisions, but the exact application of these provisions depends on what has been agreed in the trading agreement. The trade repository or regulator will therefore be unable to construct the actual credit exposure of one party to another. If there is a requirement to analyse credit exposures between parties in the market, then companies should be required to calculate and report these on a portfolio level, taking into consideration the application of exposure netting.

Note that requirements to report valuations or exposures on a daily basis will greatly increase the amount of data flowing to trade repositories, as the number of trades for which a mark-to-market is calculated each day greatly exceeds the number of new trades or trades which have a lifecycle event.