



## ADVICE TO ESMA

### Securities and Markets Stakeholder Group –

### **Advice on Consultation Paper – Draft Regulatory Technical Standards on contracts having a direct, substantial and foreseeable effect within the Union and non-evasion of provisions of EMIR**

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#### **I. Executive summary**

The objective of this paper is to provide advice to ESMA on the Consultation Paper – Draft Regulatory Technical Standards on contracts having a direct, substantial and foreseeable effect within the Union and non-evasion of provisions of EMIR - ESMA is required to draft under Regulation (EU) No 648/ 2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (EMIR).

The SMSG very much appreciates the opportunity to comment on this consultation paper. The SMSG would like to stress that the task given to ESMA is very challenging.

The key messages the SMSG would like to provide towards ESMA for consideration in their work going forward regarding finalizing regulatory technical standards on contracts having a direct, substantial and foreseeable effect within the Union and non-evasion of provisions of EMIR are [for comments]:

- The SMSG supports the chosen aim of ESMA to develop a framework that determines clear and detailed conditions in order for counterparties to derive certainty from it.
  - For cases where it is necessary or appropriate to prevent the evasion of any provision of Regulation (EU) No 648 / 2012 ESMA sets certain parameters to judge the potential evasion. Those parameters are very comprehensible and detailed. However, it is not entirely clear how those parameters will be applied in practice.
  - Additionally, any proposed new criteria should not place European Union in a non-competitiveness position vis-à-vis other countries or regulators.
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## **II. Introduction**

1. On 17 July 2013 ESMA has published a discussion paper in order to seek stakeholders' views on the preparation of the regulatory technical standards ESMA is required to draft under Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (EMIR).
2. The input from stakeholders will help ESMA in the development of the relevant technical standards to be drafted and submitted to the European Commission for endorsement. ESMA invited for comments on the consultation paper until 16 September 2013.
3. The consultation paper summarizes the conditions under which ESMA considers contracts to have a direct, substantial and foreseeable effect within the Union and the prevention of evasion. ESMA also stresses the need to ensure certainty for market participants when such contracts are deemed affected.

## **III. General remarks**

4. The SMSG appreciates the opportunity to provide comments based on the consultation paper published for consultation on 17 July 2013.
5. The SMSG welcomes the summary of detailed conditions under which ESMA considers contracts to have a direct, substantial and foreseeable effect within the Union as well as the prevention of evasion of the EMIR Regulation and the transition into draft regulatory technical standards.
6. The draft technical standards on contracts to have a direct, substantial and foreseeable effect within the Union outline the conditions in clear way.
7. The draft regulatory technical standards on the provisions to prevent the evasion of the EMIR Regulation seem to be very detailed. On the other hand the given terminology is not quite clear. There seems to be some inconsistencies such as "primary purpose" and "essential purpose" which are used alternatively, although they are not equivalent.
8. The parameters in Article 3, although very comprehensible and detailed, lack somehow to a certain extent the details on how those parameters will be applied in practice.
9. In addition, in one specific case it is not clear what is meant by Article 3 (2) (b) (p. 24)  
(b) the abuse of the application of any provision of Regulation (EU) N.648/2012.

It would be beneficial to clarify the meaning of "abuse" in this context and if this is related to tax.

Adopted on 26 September 2013

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