

**Weltwirtschaft, Ökologie & Entwicklung**  
**World Economy, Ecology & Development**



**weed**

**Submission on ESMA Consultation on 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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## About WEED

*WEED – World Economy, Ecology & Development* is a Berlin based specialist think tank and advocacy organization that has worked on the global financial system for about 20 years. WEED regularly testifies to the German parliament on financial market issues and is engaged in dialogue with German civil servants from the finance and other ministries. WEED has been part of several EU funded projects on international financial markets, amongst others dealing with EMIR. For more information please see [www.weed-online.org](http://www.weed-online.org).

## Reply to the Consultation

### General Comment

We generally think that the “direct, substantial and foreseeable effect” should not be narrowly defined. The financial crisis has demonstrated how problems in one market can spread to the world in a way which was not foreseen by many politicians and academics. Thus “foreseeable” should not be understood as almost sure but rather as not totally implausible thus giving the authorities far-reaching precautionary powers. In the same vein, “direct” should not be understood in a restrictive way but should only mean that there needs to be certain causality. Finally, “substantial” should also be understood widely. “Effect” should also be understood as any effect on the Union, not only as effect on financial markets.

### **Q.1 Do you agree that a full or partial guarantee issued to the benefit of a third country counterparty by an EU guarantor, whatever is its form, be considered in order to specify the direct, substantial and foreseeable effect of the contract?**

Yes, we think that such a guarantee should be considered to have a direct, substantial and foreseeable effect.

### **Q.2 Do you agree with the 2 cumulative thresholds proposed in the draft RTS? Do you consider that the proposed value of the thresholds is set at an appropriate level in order to specify the direct, substantial and foreseeable effect of the contract? Please provide relevant data to justify your answer.**

We cannot fully assess the appropriateness but think that the thresholds should not be set too narrowly.

### **Q.3 Do you agree that OTC derivative contracts entered into between two EU branches of third country entities would have direct effect within the Union?**

Yes, we think that it could have an effect in the Union, e.g. if the guarantees of the parent companies are not sufficient, or if the home country of the parent company does not rescue a branch that should be rescued from a Union point of view. As long as the branches are active in the Union, there is a possible effect on the Union’s financial markets as well as for the employees and other stakeholders.

**Q.4 Do you agree that criteria related to the currency or underlying of the OTC derivative contracts should not be used to specify the direct effect of the contract within the Union?**

No, we think that the currency should be used to specify the effect. Currencies are always of important for a country, so is the Euro for the Union.

**Q.5 Do you agree that contracts of third country subsidiaries of EU entities would not have a direct substantial and foreseeable effect within the EU?**

No, we think it could have such an effect. For example, subsidiaries of US entities caused havoc for US parent companies, notably in the case of AIG. As the transatlantic quarrel about derivatives regulation in this summer has shown, the U.S. are very eager to cover the effects of third country subsidiaries from their point of view. The EU should do the same and not stop the U.S. in applying important rules extraterritorial.

**Q.6 Do you believe that in absence of a guarantee, there is limited implicit backing by the EU parent of a third country subsidiary that can result in a direct, substantial and foreseeable effect in the EU?**

No, we think there could still be a danger that a de facto guarantee exists. When the financial crisis began, it also at first sight seemed that there is no guarantee by banks for their special purpose vehicles. However, it finally turned out that they were fully liable. There is no reason to believe that a similar situation could not occur again as the dynamics in (financial) markets always repeat.

**Q.8 Do you agree that the acceleration of the obligation of listed entities resulting from the OTC derivative contract should not be considered to specify the direct, substantial and foreseeable effect of the contract?**

We have no comment on that.

**Q.9 Do you agree with a criteria based approach in order to determine cases where it is necessary or appropriate to prevent the evasion of any of the provisions of EMIR?**

We think that the anti-avoidance rules as they exist in tax policy could serve as an example. However, as we know from tax policy, a comprehensive set of such rules is necessary to cover all possible cases. In this respect we also would like to highlight that derivatives can also be used for tax evasion (see e.g. the case of Glencore and the Zambian Mopani Copper Mine) and EMIR should also prevent such abuse.

**Q.10 Do you agree that artificial arrangements that would have for primary purpose to avoid or abuse of any provision of EMIR should be considered as cases where evasion of provision of EMIR should be prevented?**

Yes, we fully agree with that.