

To:  
Europeans Securities and  
Markets Authority (ESMA)

103 Rue de Grenelle  
75007 Paris  
France

Contact: Reinier Waters  
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Phone: +31 6 5569 7813  
Email: [reinier.waters@nuon.com](mailto:reinier.waters@nuon.com)

**Concerns: Vattenfall's response to the ESMA consultation paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories (EMIR)**

Dear, Sir/Madam,

Following the agreement on the European Market Infrastructure Regulation (EMIR), the European Securities and Markets Authority (ESMA) has been asked to draft technical standards for the implementation of EMIR. By means of the *Consultation Paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories* (d.d. 25 June 2012), ESMA is seeking feedback from stakeholders on the proposed way forward for the implementing technical standards.

Vattenfall appreciates that ESMA consults market parties on the Draft Technical Standards for EMIR (hereafter DTS). Compared to ESMA's consultation of February 2012, Vattenfall appreciates that specific market characteristic are taken into account in the DTS. The definition of hedging for example now also includes proxy hedging. Nevertheless, still some issues remain. Therefore, next to the consultative responses from EFET and Eurelectric, Vattenfall would like to share our opinion on the issues which are the most relevant to us.

An efficient and effective implementation is important for Vattenfall. Vattenfall is an integrated European energy company which is active in all parts of the value chain: generation, distribution, trading and sales. In order to be able to manage the risks that stem from our asset- and sales portfolio, Vattenfall is highly dependent on well functioning and liquid wholesale energy markets. Therefore we closely follow the implementation of EMIR, which could have substantial implications on Europe's wholesale energy markets.

***The level of the clearing threshold should be clearly linked to systemic relevance***

As stated in article 5, 4 of EMIR, the clearing threshold has to be set at such a level that systemic risk will be reduced. In our opinion energy companies do not create systemic risk; at least energy utilities companies which produce and sell energy to end consumers as primary business goal do not create systemic risk when managing and mitigating their embedded market risks. The risk of

contagion and propagation of financial shocks on this market is not comparable to the situation in financial markets. Although energy companies are very important to the economy and society, no “systemic risk” results from the activities undertaken by energy companies to manage the market risk inherent in their business. Hence, mandatory clearing of energy derivatives should not be applicable to utilities like Vattenfall.

In our view ESMA has not justified the proposed level of the clearing threshold. Vattenfall would like to understand the basis upon which the proposed level has been derived and why “all” companies above a gross notional level of €3 billion -disregarding their company profile, asset and equity base- shall be considered as systemically important. As long as that threshold is not based on systemic risk importance there is a danger that also non-systemically important market parties will be captured unnecessarily. The additional cost and liquidity constraints that are triggered by mandatory clearing could result in less market liquidity on traded markets, less competition and less room for investments in new generation capacity, potentially leading to higher end-consumer prices. In addition the obligation to clear will increase the dependence of energy companies on financial institutions, actually increasing the systemic risk of that sector.

Vattenfall is of opinion that ESMA should determine that threshold level based upon reasonable and understandable calculations. The real transaction data that will be gathered under the EMIR reporting requirements are a good starting point for those analyses. Vattenfall supports the proposal that the level of the threshold should be regularly reviewed in the coming years.<sup>1</sup>

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

Vattenfall 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, Vattenfall thinks it is not appropriate that this would automatically trigger the obligation to clear all non-speculative (treasury) trades on a group level.

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

In our consultative response to the DTS from March 2012, Vattenfall stresses the importance of allowing non-financial companies to use commercial bank guarantees as collateral at clearing houses. We are disappointed that so many restrictions were imposed on bank guarantees used by non-financials. Most importantly, 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) severely restricts 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, Vattenfall 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.

Please note that currently bank guarantees are accepted in the Nordic markets where non-financial contracts are cleared and margined successfully. Changing the requirement is not necessary but would have unnecessary practical implications for the Nordic market.

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<sup>1</sup> Paragraph 66 iii. V) of the DTS.



***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 effectively facilitate the implementation of the risk mitigation requirements, as market parties would know they fulfil the requirements if they trade under these agreements.

***The exact scope of EMIR should be clear***

In order to adequately assess the impact of EMIR it is crucial for market parties to know which derivative contracts are in/out of scope of EMIR. Although we understand that the definitive scope of EMIR - depending on the definition of financial instrument - will be clear when the MiFID review has concluded, it is important that ESMA works with clear working definitions for a financial instrument in the interim period when MiFID is still under review and EMIR is already applicable.

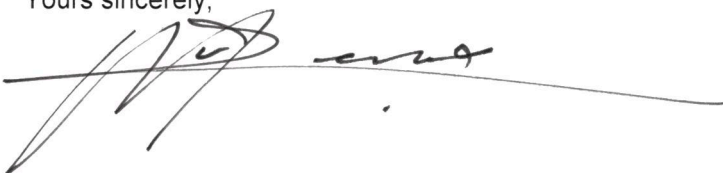
Referring to that interim period Vattenfall would appreciate that ESMA explicitly confirms that physical forwards are out of scope of EMIR. The same would apply to contracts that are traded over regulated markets or those contracts that are already cleared and margined under existing ISDA arrangements.

***The implementation timing for EMIR should be clarified***

Finally, Vattenfall hopes that ESMA informs market parties as soon as possible on when (it is expected that) the EMIR obligations will enter into force. As the EMIR requirements can have substantial impact on non-financial companies dealing in financial derivatives, transparent and reasonable implementation timelines are very helpful, avoiding unnecessary regulatory risks.

Vattenfall hopes that its 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,



Martijn van Gemert  
Manager Regulatory Affairs