



Mr Michael Hager,
DG Energy,
The European Commission,
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23 November 2012

RE: Follow-up on the 31 October 2012 letter regarding cross-asset class applicability of clearing obligation on Non-financial Counterparties by virtue of exceeding a clearing threshold in a single class of OTC derivatives

Dear Mr Hager,

On 31 October 2012, all of the signatory trade and professional associations sent you and your colleagues at the European Commission and ESMA a letter highlighting our concern that under the draft technical standards proposed by ESMA and submitted to the Commission for consideration in their Final Report dated 27 September 2012 (the "**Final Report**"), a breach of a clearing threshold in one class of OTC derivative instruments would bring all OTC derivatives in all classes into scope of the EMIR clearing obligation and risk mitigation (collateralisation) requirements with regard to uncleared trades (Recital 24 on page 73 of the Final Report)¹.

As a follow-up to this letter, the signatory trade and professional associations would like to submit to your attention an amendment proposal to the draft technical standards under EMIR. Our proposal to counteract the negative effect of a clearing obligation applicable to all asset classes in the event of a threshold breach in one of the five asset classes reads as follows:

- (i) either delete Recital 24 on page 73 of ESMA's Final Report in its entirety; or
- (ii) amend Recital 24 on page 73 of ESMA's Final Report to add two words, so that it reads:
*"... ; the excess of one of the values set for a class of OTC derivatives should **not automatically** trigger the excess of the clearing threshold for all classes".*

¹ See attached letter signed by EACT, EFET, Eurogas, FOA and OGP, dated 31 October 2012.

This minor change to the drafting of the RTS would leave the door open for regulators to have the flexibility to grant an end user exemption to NFC entities that provide purely hedging or treasury financing services to their own group (also end user) companies and which are only customers/ end users in the relevant OTC derivatives market, whilst still ensuring that activities of a group in a class of OTC derivatives where they are not purely an end user would be brought within the scope of appropriate regulation.

In circumstances where FCs (with whom such end user entities would have to deal in order to access the external market) hold regulatory capital (or collateral) in respect of such trades, it should be possible for this risk to be covered in a way that is not disproportionate and does not automatically class every single entity within a corporate group as a NFC+ if it does even a single intra-group OTC derivative trade in any class for purely hedging or treasury financing purposes, whilst at the same time ensuring that a group cannot escape appropriate regulation by splitting out trades in a class of OTC derivatives where, considered on an aggregate group basis, the NFCs within the group are over the relevant clearing threshold. This would allow corporate treasury functions (as anticipated by the intra-group exemption to the licensing requirement under MiFID) to continue to function from within the EU.

Without this flexibility, many corporate groups with an EU ultimate parent could find it extremely costly and difficult to continue to provide treasury financing services to their own group companies, especially from corporate treasury entities based in the EU to those outside of the EU. This could lead to a migration of corporate treasury functions (and possibly associated external funding and investment in the wider economy in activities that require provision of working capital and hedging) to jurisdictions outside the EU with less punitive regulatory regimes that take account of their end user status in terms of external market-facing activity in certain classes of OTC derivatives.

We hope that our amendment proposal can add value in the internal debate currently held at the European Commission on the draft technical standards under EMIR, and would be happy to discuss it with you further.

Yours sincerely,



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Chairman
European Association of Corporate Treasurers (EACT)



Margot A. Loudon
Deputy Secretary General
Eurogas



Anthony Belchambers
Chief Executive Officer
The Futures and Options Association (FOA)



Rachel Bonfante
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International Association of Oil & Gas Producers
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