

EFET response to the European Commission consultation on a review of EMIR

The European Market Infrastructure Regulation (EMIR) has formed a key part of the legislative measures adopted in response to the banking and financial crisis of 2008-9. In our recent [response](#) to the European Commission, the European Federation of Energy Traders (EFET)¹ recommends re-calibrating the various provisions affecting non-financial counterparties to derivative transactions, so that they operate in a consistent and harmonised way. Regulators and policy-makers need to ensure a balance between four essential considerations:

- The integrity, liquidity and efficiency of derivative markets;
- The regulation of key aspects of financial market infrastructure;
- The need for flexibility and efficient access to derivative markets for hedging activity; and
- The obligations and costs faced by users of derivative markets.

Overall, in our view, EMIR remains fit for purpose in achieving such a balance. However, the prospective impact of the envisaged commodity licence exemption framework and the commodity position limit regime of the recast Markets in Financial Instruments Directive (MiFID II) has given energy traders reason to ponder the application of EMIR outside the banking sector.

There are some areas of the Regulation, which should be reconsidered, including:

- The compulsory clearing threshold applying to non-financial counterparties to commodity derivative transactions, where we question both its current relevance and its level;
- The transaction reporting obligations, which could be overhauled so as to ensure regulators have access to information about all derivative transactions, while reducing the burden and complexity of the reporting obligations as they affect end-users;
- Regulatory oversight of trade repositories, which need tightening up, in order to underpin robust transaction reporting and enhance market transparency;
- The architecture and hierarchy of content of the EMIR legislative text and the ESMA Q&A relating to it, so that they display an appropriate balance between regulatory certainty and flexibility;
- The credit risk management provisions, so as to ensure commodity firms can carry on efficient collateral management services, specifically allowing the continued use of bank guarantees.

In particular, **EFET disagrees with [ESMA's most recently submitted view](#) that the approach to classifying hedging activities is unworkable and that the distinction between hedging and non-hedging activities should be removed for the purpose of**

¹ The European Federation of Energy Traders (EFET) promotes and facilitates European energy trading in open, transparent, sustainable and liquid wholesale markets, unhindered by national borders or other undue obstacles. We currently represent more than 100 energy trading companies, active in over 28 European countries. For more information, visit our website at www.efet.org.

the compulsory clearing threshold. Commodity firms are capable of classifying their hedging activity. Although there is a need for further detailed guidance and better consistency of application across the EU (including oversight by national Regulators), these are clearly issues where the responsibility for action lies with ESMA.

ESMA has a crucial role to play in ensuring that EMIR works effectively and that it is implemented consistently. In proposing to remove the hedging exemption, in reality, ESMA is suggesting that it may be absolved of this responsibility. The impact of removing the hedging exemption would be to penalise those firms, which are most actively trying to hedge their risks. This will not reduce the overall levels of risk in the market – but rather lead to less liquid, more volatile and more risky markets.

EFET understood the original desire of policy-makers post-2008 to introduce a comprehensive financial markets regulation reform package, covering all derivative products and all users of derivative products. This was the right response following the global financial crisis. In undertaking its current review, we recommend that the Commission consider whether the comprehensive approach taken in 2008 remains appropriate in respect of all the transaction reporting and credit risk management provisions contained in EMIR. What the Commission must *not* do on the occasion of this review is embark upon any tightening of the regulatory regime, which might create disincentives for derivatives trading activity undertaken for legitimate commercial and industrial hedging purposes.

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