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EFET response to the ESAs Second Consultation Paper on the draft Regulatory Technical Standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) of Regulation (EU) No 648/2012

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The European Federation of Energy Traders (EFET)[1] welcomes the ESAs Second Consultation paper on the draft Regulatory Technical Standards (RTS) on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) or Regulation (EU) No 648/2012. We support the alignment of the RTS with international standards and the clear specification of the scope of application for counterparties subject to initial margin requirements.

We are pleased to see that the RTS recognise that the exchange of collateral for minor movements in valuation may lead to an overly onerous exchange of collateral and that initial margin requirements will have a measurable impact. Therefore, the RTS include a threshold to limit the operational burden and a threshold for managing the liquidity impact associated with initial margin requirements. Both thresholds are fully consistent with international standards.

General comments:

- Netting has only partial offset potential. The RTS should be revised according to the latest Basel proposal on Counterparty Credit Risk.
- With respect to the calculation of a counterparty's position towards the 8 billion threshold on notional amount (in order to determine the applicability of mandatory exchange of initial margin and the start date to exchange variation margin), intragroup trades in non-centrally cleared derivatives should be excluded, as they relate to the same credit risk and do not change the overall group's risk position.

Question 1. Respondents are invited to comment on the proposal in this section concerning the treatment of non-financial counterparties domiciled outside the EU.

We support the revised wording on the treatment of non-EU non-financial counterparties. Non-financial counterparties located in or outside the EU should not be treated differently.

[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.

Question 2. Respondents are invited to comment on the proposal in this section concerning the timing of calculation, call and delivery of initial and variation margins.

We support the revised wording. It allows the collection of variation margin within 3 business days from the calculation date, which is much more closely aligned with market standards. It is also sufficient for non-financial counterparties to fulfil their obligations, given their limited access to money markets.

Question 4. Respondents are invited to comment on whether the requirements of this section concerning the concentration limits address the concerns expressed on the previous proposal.

In relation to Section 5 (Eligibility and treatment of collateral), the eligible collateral for initial and variation margins should not be limited to those included in Art 1 LEC. Other types of collateral should be allowed. More specifically, it is of utmost importance that non-financial counterparties maintain the possibility to use non-fully liquid-asset backed (commercial) bank guarantees as collateral.

Moreover, the eligible collateral should be agreed between the parties according to their internal risk management procedures. Art 11.3 of EMIR states only that financial counterparties shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after 16 August 2012. Non-financial counterparties referred to in Article 10 shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after the clearing threshold is exceeded. Moreover, Art. 11.4 of EMIR allows the counterparty to have the risk just partially covered by the said collateral.

Question 5. Respondent to this consultation are invited to highlight their concerns on the requirements on trading relationship documentation.

In our view, further clarification is needed to confirm that trading documentation between CTPs in case of a one-off OTC trade may take the form of a trade confirmation only.