Adopt the EMIR 3.0 proposal to enhance security of supply
30 January 2023

- **Open, robust, liquid and transparent EU energy markets are key to ensuring a secure, sustainable, affordable and competitive energy supply to end consumers.**

- **The EMIR 3.0 proposal supports the energy market participants' efforts to achieve these aims and helps them to manage the challenges of the current energy crisis, whilst safeguarding transparent and safe financial markets.**

- **Furthermore, EMIR 3.0 is well-suited for facilitating the European energy transition and achieving the climate targets of the European Green Deal.**

The signing European and national associations of the Joint Energy Associations' Group – "JEAG" (Bdew, EFET, EnergyUK, eurelectric, Eurogas, IOGP, VKU), support the European Commission's proposal to amend the Regulation (EU) No 648/2012 ("EMIR 3.0"), as part of the larger EU's Capital Markets Union (CMU) package adopted on 7 December 2022.

The EMIR 3.0 proposal supports the energy market participants' efforts to achieve the aims of the EU internal energy market and helps them to manage the challenges of the current energy crisis, whilst safeguarding transparent and safe financial markets.

The main aim of the EU internal energy market is to guarantee open, robust, liquid and transparent EU energy markets to ensure a secure, sustainable, affordable and competitive energy supply to end consumers. The energy market participants such as power and gas producers, suppliers and energy trading firms are expected to deliver on these goals.

In this context, the energy market participants currently face numerous challenges caused by the energy crisis in the EU. These include unprecedented and continuous energy market volatility and energy price increases, fundamental shortage in gas and power supplies, poor market liquidity in energy markets as well as increased collateral and margin requirements and the consequential liquidity stress for energy firms.

The EMIR 3.0 proposal draws the right lessons from these recent developments in energy markets as in particular the following proposed changes to the EMIR framework will help energy market participants to maintain and develop liquid, competitive and well-functioning EU energy markets and to secure the energy supply:

- The **amendments to the clearing thresholds calculation and review** under Article 10;
- the **improvement of transparency and predictability of margin calls** under the new Art. 38 (7); and
- the **extension of eligible collateral to (uncollateralised) commercial bank guarantees** under the new Art. 46 (1).

However, we **oppose the proposal to delete the exemption from intra-group reporting (amended Art. 9 (1)) and believe that it will have unintended adverse consequences**, such as burdensome and costly reporting requirements for firms.

Here is our detailed explanation of JEAG's assessment of the EMIR 3.0 proposal:

General background:
Energy market participants are predominately active in the (physical and derivatives) energy markets to cover their needs for commodity supply and demand and to execute transactions to mitigate the market risk of their own or their counterparties' commercial activities (hedging). For example, the operator of a gas fired power plant can hedge its commercial risk (market risk) which consists of the constant change in value of the gas procurement and of the produced power. These firms also provide liquidity in particular to exchange traded markets which facilitates the aforementioned hedging activities of energy market participants and the wider real economy. For these purposes, it is important to promote a regulatory framework for energy derivatives trading in the EU that supports energy firms' ability to trade on liquid and well-functioning EU wholesale energy markets via bilateral transactions (carried out over the counter, "OTC") and/or via centrally cleared, regulated markets.

Furthermore, it is important to note that EMIR 3.0 is well-suited for facilitating the European energy transition and achieving the climate targets of the European Green Deal. The European Green Deal requires hundreds of billions of euros' worth of investments in the energy sector in the current decade. Private investments in renewable energy installation will a play a key role in this regard. As government support phases out, the availability of market-based opportunities for reducing commercial risks, such as OTC derivative trading, becomes increasingly important to make new renewable investments financeable. For example, operators of a large-scale offshore wind park will only invest in the construction and operation if they can ensure stable revenues in today's highly volatile energy markets. Only a liquid OTC derivatives market enable them to hedge their (long term and non-standardised) market price risks with OTC derivative transactions, so-called financial Power Purchase Agreements.

JEAG short supportive comments on the specific EMIR 3.0 proposals with relevance for energy market participants:

Amended EMIR Clearing Threshold calculation and review - new Art. 10 para. 2a to 5

The proposed changes reflect the above-mentioned developments of energy markets, foster the liquidity and competitiveness of EU marketplaces and support the European Green Deal and investments in renewable energy sources.

We support the change to the methodology for the calculation of the clearing threshold. This proposal moves away from the current approach consisting in assessing whether a derivative is OTC or not, to considering whether a derivative is cleared or not. This change in approach correctly addresses the credit risks associated with OTC derivative contracts. Considering the purpose of EMIR, which is to reduce systemic credit risk in the financial system by central clearing, it appears logical to exclude those instruments which do not pose such a risk because they are centrally cleared already.

We also welcome the proposal to count only the OTC derivate transactions entered into by EU established counterparties against the clearing thresholds as this will ensure the competitiveness of EU energy markets and participants. The current EMIR – unlike international financial regulation in other G20 countries – has a global reach without any restriction as it extends the clearing threshold calculations to the non-EU activities of international subsidiaries of EU companies. This puts European groups at a competitive disadvantage when compared to firms that are bound by less restrictive national financial regulation in the home jurisdiction.

The more dynamic, regular review of the clearing thresholds is helpful as it will allow ESMA to consult, understand and take account of market developments in a timely manner, such as in the case of the recent increase of prices and volatility in energy markets.

Finally, we appreciate the statement in Recital 16 that ESMA shall consult with energy market participants when it reviews the clearing thresholds and hedging definition.

NFCs can continue to act as direct clearing member at CCPs – new Art. 37(1a)

We fully support maintaining robust CCP membership requirements. In this context, we welcome that NFCs can continue to act as direct clearing members, which is relevant especially in the Nordic energy markets. The robustness and resilience of the central clearing structure is guaranteed where they meet the required participation criteria as proposed, in particular if they are able to fulfill the margin requirements and default fund contributions, and only keep accounts at the CCP for assets and positions held for their own account.

Improvement of Transparency and Predictability of Margin Calls – new Art. 38 (7)

We welcome that the clearing members (clearing banks) shall inform their clients (energy market participants) in a clear and transparent manner of the way the margin models of the CCP work, including in stress situations, and provide them with a simulation of the margin requirements they may be subject to under different (stress) scenarios. We would like to emphasise that the transparency and predictability of margin calls needs to be improved throughout the clearing chain, including appropriate obligations for clearing members and CCPs, so that energy market participants are put in a better position to predict and prepare themselves for collateral requests.

Extension of eligible collateral to (uncollateralised) commercial bank guarantees – new Art. 46 (1)

We support that public bank guarantees, commercial bank guarantees or public guarantees are considered eligible as highly liquid collateral under certain conditions. We request in this context that the reference to “commercial bank guarantees” be clarified to also include uncollateralised commercial bank guarantees issued to energy market participants. The recognition of uncollateralised commercial bank guarantees will facilitate and encourage central clearing of derivatives by energy market participants. Those entities usually have constrained access to sufficient amounts of highly liquid assets (cash), which can lead to substantial liquidity stress of those firms in times of very volatile energy markets. Enabling energy market participants acting as indirect or direct clearing members to post non-cash collateral to cover at least an appropriate portion of the margin requirements will provide relief from that liquidity stress.

Changes regarding to the implementation of an NFC+ status

Finally, we welcome the helpful changes introduced for NFC+. The proposed additional phase-in of mark-to-market and margining obligation for NFCs+ (amended Art. 11 (2) and (3)) helps them with the orderly implementation of an NFC+ status when they exceed the clearing threshold(s). The amended definition of intragroup transactions facilitates the exemption for NFCs+ from the intragroup clearing and margining obligation (new Article 3).

Deletion of the exemption from intra-group reporting is not required and overly burdensome

However, we oppose the deletion of the exemption from intra-group reporting (amended Art. 9 (1)) and believe that it will have unintended adverse consequences, such as burdensome, disproportionate and costly reporting requirements.

In practice, energy firms make wide use of the possibilities available in EMIR to simplify their derivatives reporting obligations:

- Exchange traded derivatives are all reported by their clearing banks (clearing members);
- OTC derivatives are reported by their financial or/and non-financial counterparties (applying the single sided reporting obligation in Art. 9.1(a) or a delegated reporting agreement);
- Intragroup derivative transactions (IGT), mainly entered into for risk reducing purposes, benefit from the reporting exemption introduced by EMIR Refit in 2019.

This means that concerned energy firms, including those of small and medium size, making use of the combination of these alternatives have stopped operating an own reporting infrastructure. Additionally, larger corporate energy groups have made use of these alternatives not only for their energy derivatives business. They have usually one group entity (Treasury Function) – often the group parent company entering into IGTs with the group entities – dealing in interest rate and foreign exchange derivatives transactions – for the purpose of reducing related risks of its wider group – with external financial counterparties to which this entity has delegated the reporting of those transactions. Reintroducing IGT reporting would imply for all those firms the need to reinvest in a reporting infrastructure, which is becoming even more complex with the introduction of the changes to the reporting rules as of 29th April 2024 (CDR (EU) 2022/1855). This proposal contradicts the purpose of the previous reform of EMIR (Refit) to lower operational efforts by adding burdensome, disproportionate and costly requirements on energy firms.

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