



## Commodity Markets Council Europe – Response to the Discussion Paper on the Clearing Obligation under EMIR

### A. Respondent

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Name: Commodity Markets Council Europe

Country: N/A

Category: please use the table below

Category	Please select
Audit/Legal/Individual	
Banking sector	
Central Counterparty	
Commodity trading	✓
Government, Regulatory and Enforcement	
Insurance and Pension	
Investment Services	
Non-financial counterparty subject to EMIR	✓
Regulated markets/Exchanges/Trading Systems	✓
Other Financial service providers	

### B. Introduction – General comments

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The Commodity Markets Council Europe (CMC Europe) welcomes the opportunity to provide comments to ESMA's discussion paper on the clearing obligation under EMIR (Regulation No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1). CMC Europe is an industry association bringing together major agriculture, energy and other commodity market participants, including commodity producers, traders and end-users, as well as leading trading venues for commodity derivatives. Our members trade large volumes of agricultural and energy commodity derivative contracts on European, US and other trading venues every day predominantly to hedge risks related to their commercial activities. CMC Europe members are therefore directly impacted by EMIR provisions on non-financial counterparties generally and on commodity derivatives in particular. Some of its members may breach EMIR clearing thresholds and may be obliged to clear certain OTC derivative contracts. The majority of members will be obliged to report derivative contracts to a trade repository and apply other risk mitigation techniques to OTC derivative contracts.

## C. Comments on the discussion paper and answers to questions

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### 2.5. Commodity derivatives

#### Comments on paragraphs 79 to 84:

CMC Europe does not believe that the definition of a “class of OTC derivatives” in Article 2(6) EMIR will permit a sufficient distinction between very different contracts that may fall within a given class for the purpose of determining the contracts that will be subject to clearing. We understand that ESMA must reflect the primary legislation in its proposals, but we would urge ESMA to adopt an approach that makes a sufficient distinction between contracts to be cleared and those not to be cleared.

CMC Europe believes that the two-level classification into product and sub-product does not provide an adequate basis for distinguishing between OTC commodity derivative contracts that should or should not be cleared. The two-level classification can only be indicative. Contracts within categories of sub-products identified by ESMA on the basis of preliminary notifications (table 16) may seem similar; however, in reality substantial differences exist between them and become apparent once additional characteristics are looked at – to the extent that some contracts should be cleared but others should not. It is therefore important that the approach adopted allows for more specific criteria to be considered when determining whether it is adequate to make contracts related to the same sub-product subject to clearing.

CMC Europe believes that additional characteristics, such as those mentioned by ESMA (settlement currency, transaction type, settlement type and maturity), must also be taken into account when making this assessment. ESMA’s approach to applying the clearing obligation should make clear that all (key and additional) characteristics will be considered on an equal basis when deciding the contracts that will have to be cleared. In order to classify contracts as being subject to the clearing obligation, a full and fair assessment against the criteria provided in Article 5(4) EMIR and specified in Article 7 of the Commission delegated regulation No 149/2013 must be made on a contract by contract basis. This assessment must also specify the contracts that will be excluded from the clearing obligation.

With regards to transaction types (paragraph 84), the terminology used to describe different types of OTC derivatives under EMIR is not in itself a concern for CMC Europe. However, an issue of concern to CMC Europe’s membership is with regards to the scope of EMIR and the confusion over the treatment of exchange-traded derivatives (ETDs) traded on third country venues. ESMA’s Questions and Answers on EMIR notes that pending the Commission’s publication of a list of equivalent third country markets as per Article 19(6) MiFID, all derivative contracts executed on non-EU exchanges should be counted for the purpose of the determination of the clearing threshold.<sup>1</sup> CMC Europe believes that this conflicts with the objective of EMIR to address the lack of transparency for OTC derivatives, not ETDs; as well as creating confusion over how ETDs should fit within the gross notional calculation related to the OTC thresholds.

#### Question 16 (Commodity derivatives):

What is in your view the best approach to specify the underlying assets within each OTC Commodity class?

**Answer 16:** We believe that taxonomies such as ISDA’s provide the best approach to specifying underlying assets within OTC commodity derivative classes.

#### Question 17 (Commodity derivatives):

Do you consider that the main characteristics of the Commodity derivatives are adequately captured by the proposed structure? Are there any other variables which you consider as relevant in the context of the clearing obligation?

**Answer 17:** Please see comments above on paragraphs 79 to 84 regarding the need to consider all (both key and additional) characteristics to assess whether a contract should be subject to the clearing obligation.

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<sup>1</sup> ESMA Questions and Answers: Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), 5 August 2013 [ESMA/1080] [[link](#)].

Moreover, we believe that the following additional variables should be considered in the context of the clearing obligation:

- Where OTC commodity derivatives are based on a **reference price or benchmark**, changes to these or to underlying rules should be taken into consideration. In this respect, the expected publication of a Commission proposal for a regulation on benchmarks is of particular relevance.
- The **nature of counterparties** predominantly trading the contract should be taken into account, i.e. whether counterparties are predominantly non-financial or financial counterparties. The focus should be on financial counterparties given that they are the primary players in OTC derivative markets.
- Due consideration must be given to the **liquidity and level of standardisation** of an OTC commodity derivative contract, as per Article 5(4) EMIR. Many OTC commodity derivative contracts are tailored to meet the specific needs of end-users and are illiquid and custom-made which makes them unsuitable for central clearing.

As regards the **settlement type** of OTC commodity derivative contracts, it should be noted that in most cases it is necessary to include the option of cash settlement in a contract due to force majeure or other unforeseen circumstances. It is therefore unlikely for contracts to have the sole option of being physically settled.

**Question 18 (Commodity derivatives):**

Do you have preliminary views on the specific items within those classes which would be the best candidates for the clearing obligation, taking into consideration the overarching aim of reducing systemic risk and the criteria defined in Article 5(4) of EMIR?

**Answer 18:** CMC Europe believes that the best candidates for the clearing obligation are contracts which are (1) the most liquid, (2) the most standardised and (3) those which are currently the most cleared. Overall, we believe that commodity OTC derivatives should be one of the last asset classes to be put forward for the clearing obligation given that due to the extensive range of market participants and instruments involved, it would be the most difficult asset class for which to roll this out.

**4. Determination of the phase in, and the categories of counterparties to which the CO would apply**

**4.1. Dates, phase in, categories of counterparties**

**Question 25 (categories of counterparties):**

Please indicate your preference between the options presented. Would you rather use an option that is not detailed here? Under Options B and C, do you agree to base the clearing access approach on the asset class to which the counterparties have access? What should be the date on which clearing access/threshold calculation should be assessed?

**Answer 25:** CMC Europe considers Options A and B the most appropriate for the purpose of categorising counterparties to allow for different time constraints. CMC Europe would not support categorising counterparties in accordance with Option C, as this approach would place an unnecessary additional compliance burden on counterparties and would also be much more onerous to put in practice than options A or B.

**5.4. How to withdraw a clearing obligation on a class or subset of it?**

**Comments on paragraphs 142 to 148:** A clear, efficient and timely process should be put in place to respond to significant changes in commodities markets and to dis-apply the clearing obligation where pertinent. CMC Europe believes that in the case of a Class+ or subset of Class+ that no longer respects the criteria to be assessed by ESMA to apply the clearing obligation, counterparties should be allowed to cease clearing the contracts in question on an interim basis before the review of regulatory technical standards (RTS) submitted by ESMA is completed. ‘Backloading’ could be applied to these contracts so that

counterparties could be required to clear contracts retrospectively should the final RTS maintain the clearing obligation for the asset class or subset in question.