

Van: [REDACTED]
Aan: [REDACTED]@exxonmobil.com"
Cc: [REDACTED]
Onderwerp: RE: Amendement aangaande MIFID II
Datum: donderdag 30 augustus 2012 13:19:00

Geachte heer [REDACTED]

Via mijn collega [REDACTED] ontving ik onderstaand e-mailbericht waarin u aandacht vraagt voor het amendement om "physically settled forward transactions" onder de reikwijdte van het begrip financieel instrument in MiFID/R te brengen. Indien u mij terzake nog enige aanvullende informatie – waarnaar in de Engelse tekst/toelichting in uw e-mailbericht wordt verwezen - zou kunnen doen toekomen, zou ik dat zeer op prijs stellen.
Hiervoor reeds bij voorbaat dank.

Met vriendelijke groet,

[REDACTED]

[REDACTED]

Van: [REDACTED]
Verzonden: donderdag 30 augustus 2012 11:51
Aan: [REDACTED]@exxonmobil.com'; [REDACTED]
Onderwerp: Re: Amendement aangaande MIFID II

Beste [REDACTED]

Ik ben momenteel niet actief op het MIFID-dossier. Ik zet je mail door naar [REDACTED] die dat wel is.

Groet,

[REDACTED]

Van: [REDACTED]@exxonmobil.com]
Verzonden: Thursday, August 30, 2012 11:46 AM
Aan: [REDACTED]
Onderwerp: Amendement aangaande MIFID II

Beste Meneer [REDACTED]

Van mijn contact bij het Ministerie van EL&I begrijp ik dat u het MiFID dossier behandelt. Op verzoek van OGP, de internationale associatie van olie- en gasproducenten, wil ik graag bijgaand aangepast amendement onder uw aandacht brengen. Kort gezegd wil OGP voorkomen dat 'physically settled forward transactions' onder de MiFID definitie van 'financial instruments' komen te vallen. Met het oog op de vergadering van de council werkgroep die op 6 september zal worden gehouden wil OGP dit punt onder de aandacht van de vertegenwoordigers van de lidstaten brengen om hiervoor steun te krijgen. Onderstaande tekst is bedoeld als toelichting. Mocht u vragen hebben dan kunt u altijd contact met me opnemen, of met de OGP vertegenwoordiging in Brussel, [REDACTED]

[REDACTED]

Met vriendelijke groet,

[REDACTED]

Dear Sir/Madam,

The international Association of Oil and Gas Producers (OGP) has been monitoring developments with the MiFID II legislation and have been engaging with MEP's through the process to try ensure the issue that is of key interest to its members (the exclusion of physically settled forward transactions from the definition of a financial instrument) is addressed in the MiFID II text. Whilst we understand the debate is on-going in the European Parliament ECON committee, largely over concerns relating to potential loopholes, we have had broad support from MEP's on this matter and the commission (DGMARKT) who have publically already confirmed it is not the intention to capture physically settled forward transactions. DGENER are also aware of the potential unintended consequences on EU Energy market liberalisation should physically settled forward transactions not be excluded from the legislation. We understand updates to the council text are being worked as we speak and will be further discussed on September 6th. We would appreciate your support in pushing forward the attached suggested simple amendments to help improve the clarity of MiFID II without generating legislative loopholes, we have also attached supporting material and rationale for your information and convenience.

Many thanks.

[REDACTED]

Esso Nederland B.V., Graaf Engelbertlaan 75, 4837 DS Breda, The Netherlands, Registered Office: Breda, Trade Register Number: 27004771

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Amendment 1314

Proposal for a directive
Annex 1 – Section C – point 11 a (new)

Text proposed by the Commission

Amendment

(11 a) For the avoidance of doubts, physical forward contracts relating to commodities that are

a.) ~~which are intended to be~~ physically settled; or

b.) identified as wholesale energy products under REMIT.

~~are not defined as a derivative financial instruments.~~

Annex I Section C

6) Options, futures, swaps, and any other derivative contract relating to commodities that ~~can~~ are not intended to be physically settled provided that they are traded on a regulated market, OTF and/or an MTF except where:-

a.) they are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity; or

b.) they are identified as wholesale energy products under REMIT.

7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that ~~can~~ are not intended to be physically settled not otherwise mentioned in C.6, including those traded on an OTF, and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls.



International
Association
of Oil & Gas
Producers

3 May 2012

Re: MIFID II - OGP proposal of amendment

Dear Sir

The International Association of Oil & Gas Producers (OGP) welcomes your ITRE report on MIFID II¹ and would like to propose a minor amendment, to ensure clarity of the legislation and the avoidance of significant unintended consequences to energy market liberalisation and the smooth functioning of physical markets.

OGP represents the interests of companies engaged in the exploration and extraction of oil and natural gas, as well as national and other related industry associations.

The issue that is of key importance to OGP members is the definition of a Financial Instrument. OGP do not believe the European Commission intended physically settled forward transactions to be considered as Financial Instruments. Representatives from DG Markt have stated so in public fora.

However, the inclusion of "OTFs" within C.1.6 could lead to their inclusion. As a consequence, OGP propose an additional clause in Annex 1 of MIFID II:

"C.1.12 For the avoidance of doubt, physically settled forward transactions are excluded as Financial Instruments under this legislation"

The simple justifications for this are:

- a) It is an unintended consequence that physically settled forward trades are potentially considered a Financial Instrument under MIFID II (due to trades being conducted on OTF).
- b) This is consistent with the treatment of physically settled forward transactions in non-financial commodities in US markets under the Dodd-Frank Act (CEA section 1a(47)(B)(ii), and also 17 CFR 32) and it is important to prevent situations of regulatory arbitrage.
- c) Physically settled forward transactions in power and gas wholesale markets are already within the scope of REMIT (Regulation for Energy Market Integrity and Transparency (EC1227/2011)), and subject to comprehensive transparency and reporting requirements aimed at ensuring market integrity and preventing abusive behavior.



OGP trust that this amendment is relatively uncontentious and easy to adopt in the legislative process.

In the event that further justification is required, OGP would draw your attention to the attached appendix 1 and 2 explaining the adverse consequences on market liberalisation and security of supply.

For further clarification don't hesitate to contact me.



Appendix 1 Paper explaining why physical forward trades are NOT Financial Instruments

Appendix 2 Slide showing that most trades are OTC Physical Forward and governed by REMIT

More about OGP: Our membership spans the globe and accounts for more than half of the world's oil output and about one third of global gas production. From our London office, we foster cooperation in the area of health, safety and the environment, operations and engineering, and represent the industry before international organisations, such as the UN, IMO and the World Bank, as well as regional seas conventions, such as OSPAR, where we have observer status. OGP Europe in Brussels represents before the EU OGP members who are active in Europe.

¹ European Commission, Proposal for a Directive of the European Parliament and the Council on Markets in Financial Instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (COM(2011)656/4)

Appendix 1

Physically settled Forward trades are NOT Financial Instruments

Financial Instruments are within the scope of MIFID (and EMIR) legislation. Financial instruments are defined in MIFID Annex 1 and have the characteristics of being standardised, traded on an exchange or regulated market and subject to clearing or cash margining.

The gas and power markets trade financial instruments on exchanges, but the majority of transactions in the EU are classified as physical trades and are traded "over the counter" (OTC), mainly on broker screens which will be classified as Organised Trade Facilities (OTFs) or Multilateral Trade Facilities (MTFs) under MIFID II.



These Physical trades are then either "Spot" (for delivery within day or day ahead) or "Forward" (for production and delivery at some point in the future). In both cases, the transactions are physically delivered, do not involve cash settlement and are not to be considered as derivative transactions. Physically settled means that firms actually deliver the physical commodity involving scheduling of the physical delivery to the designated delivery point (e.g. gas hub or price area). They are therefore fundamentally different to cash settled instruments and do not as such pose any risk to the financial markets. Indeed being segregated from financial markets ensures these transactions are not subject to the risks within financial markets and that is why there was no knock on systemic impacts to the gas markets during the global financial crisis. Linking these markets, for example through mandatory clearing obligations, would result in greater interlinks with the financial markets and arguably greater risk of systemic impacts should there be a reoccurrence of a financial market crisis.

The crucial underlying physical nature of the products mean they should be regulated by energy regulators under the auspices of the dedicated sectoral regulation of REMIT and other existing legislative tools including security of supply standards, licensing etc....There is no justification for treating physically traded commodity products as financial instruments. However, the consequences of doing so will have significant implications for the new REMIT regulation, the structure and liquidity of the market and the effective regulation of the market.

It is important to note that the US Dodd-Frank Act explicitly excludes Physical Forward transactions from the legislation and we believe that maintaining this treatment in EU legislation is appropriate. Incorporating appropriate and clear wording within the legislation, is the simplest mechanism for maintaining a clear delineation between physical and financial instruments. At EMART (23/11/11), Valerie Ledure stated that it was not the intent for physical forward transactions to be caught by MIFID legislation. Other EC officials have reiterated this position, but we want to ensure that the MIFID legislation is clear on that intent.

It is important for market participant compliance certainty and the continuing development of the EU Internal Energy Market that this situation remains and that Physical Forward transactions are kept outside of MIFID / EMIR. They are subject to regulation under REMIT (EC/1227/2011) which is effectively the extension of Market Abuse Directive to gas and power commodities.

The consequences of Physical Forward transactions being considered financial instruments include:

- These transactions would be subject to margining. This will increase transaction costs and require significant sums of money to be tied up in margining accounts rather than being used by the producers and generators for investment in projects. That situation is unlikely to be economic, with the consequence that physical market participants may reduce volume, duration and time horizon of trades. This in turn is likely to reduce market liquidity.
- Such reduction in market liquidity is also likely to undermine the desire for trading hubs to develop to underpin the European Commission's Third Energy Package objectives.
- REMIT would only cover within day and day ahead transactions ("spot"). The remaining transactions would be covered by MIFID / EMIR /MAR, creating overlaps and regulatory burden. Moving the boundaries of regulation for physical transactions to financial regulators will undermine the effective regulation that exists and it needs to be recognised that the competency and relevance for Financial Regulators in this space does not exist.

Appendix 2 shows the proportion of transactions in the EU gas and power markets that are subject to clearing and subject to OTC bilateral arrangements. This data is collated by Trayport who provide the software behind many of the trading platforms, and who have accessed the levels of market activity and categories of transactions. It clearly shows the very significant proportion of transactions that are not currently cleared in EU energy markets, and this paper provides the argumentation around the consequences if they were.

The choice of access across the electronic energy futures markets, through one screen

Information as at: 30 March 2012
 Estimates based on Trayport analysis and market research

