

## POSITION ON THE COMMISSION'S EMIR REFIT PROPOSALS

6 OCTOBER 2017

### SUMMARY

EuropeanIssuers welcomes Commission's EMIR Refit proposals and appreciates efforts aimed at alleviating burdens on corporates using derivatives for hedging purposes, meaning to manage and mitigate real business risks, without affecting the content and the quality of regulatory reporting.

#### 1. Hedging exemption

EuropeanIssuers welcomes Commission's proposal aimed at preserving hedging for real economy companies:

- maintaining the commercial hedging exemption from EMIR clearing threshold;
- simplifying clearing threshold calculation mechanism and its recalculation frequency;
- applying selectively the cash collateralization obligation only to the asset class that exceeded clearing threshold, rather than extending it to all asset classes.

#### 2. Cost and burden relief for the real economy

EuropeanIssuers welcomes the following Commission's proposals in EMIR Refit, as they aim at cost and burden relief for real economy companies:

- shifting reporting obligation to Central Counterparties (CCPs) for Exchange Traded Derivatives (ETDs) and to Financial Counterparties (FCs) for Over the Counter derivatives (OTCs), representing the sell side of derivative markets;
- eliminating reporting obligation of intra-group transactions for NFCs;
- abandoning back-loading of very old transactions.

To help the Commission achieve its objectives of streamlining the reporting, improving quality of data while reducing regulatory burdens on corporates, **we propose some adjustments to the Commission EMIR REFIT proposal to:**

- ensure consistency between Articles and Recitals: Article 9 should clearly refer to a single-sided reporting with full transfer of responsibility and legal liability onto CCPs for ETDs and onto FCs for OTCs;
- clarify that the exemption for intra-group transactions does apply for all, rather than a subset, of intra-group transactions within the same NFC group;
- elaborating provisions for reporting transactions between an NFC- and a third country FC:

- third country FC remains responsible if the third country is deemed equivalent for reporting purposes; or
- possibility for third country FC to register in EU for reporting only; or
- option for NFC- self-reporting transactions.
- elaborate provisions for reporting transactions between two NFC- : the counterparties must assign responsibility for reporting to one of the NFC-s prior to transacting.

### 3. Regulatory consistency

#### *Consistency with MiFIR/MiFID II*

With MiFIR/MiFID II entering into application on 3 January 2018, we believe it is important to ensure consistency between EMIR and MiFIR / MiFID II regarding new transaction reporting required on financial instruments and new definitions for financial derivatives, Trading Venues (TVs) and ancillary tests contained in MiFIR/MiFID II.

Under MiFIR/MiFID II:

- **Transaction reporting** on financial instruments, including financial derivatives, and **position reporting** on commodity derivatives will be required;
- the current list of CCPs will be enlarged by a wide range of new **TVs**, that **should perform the same EMIR single-sided reporting obligation** on derivatives traded on their platform, as **CCPs** for ETDs;
- **TRs will have to report to ACER a range of commodity contracts** currently not included in financial derivatives definition and therefore directly reported to ACER by NFCs or by Organized Markets (OM).

#### *Consistency of EMIR rules*

The simplification of reporting rules resulting from EMIR REFIT will become applicable only after application of Commission Implementing Regulation (EU) 2017/105<sup>1</sup> and Commission Delegated Regulation (EU) 2017/104<sup>2</sup> foreseen on 1 November 2017. Compliance with the latter regulation will considerably increase the amount, detail and complexity of information to be reported per transaction, resulting in increased companies' effort to comply new rules. Therefore, we suggest suspending the application of this regulation until the current review process is finalized.

We are strongly convinced that by addressing these issues, the EMIR Refit proposal will have delivered a truly streamlined regime ensuring a meaningful relief to Non-Financial Companies (NFCs) combined with a more reliable regulatory reporting.

For more details and explanations of our proposals, please see the full position.

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<sup>1</sup> Amending format and frequency of trade reports to trade repositories in line with art. 9 para 6 of EMIR

<sup>2</sup> Revised EMIR standards on the reporting to trade repositories in line with art. 9 para 5 of EMIR

## POSITION

### 1. HEDGING EXEMPTION

Hedging is a legitimate activity carried on by corporates to manage and mitigate their risks and therefore it should not be limited nor discouraged by imposing compulsory cash collateralization, that would result for corporates in an increase of short term liquidity risk and in an inefficient use of capital, as it could be used for infrastructural investments instead.

When used for hedging purposes financial derivatives are merely a good produced by Financial Counterparties (FCs) and consumed by Corporates, that simply buy their insurances against market volatility, as other End Users buy cars, food or electricity. Imposing heavy regulatory burdens on real economy companies using financial derivatives markets solely to hedge their commercial activities, would eventually result in disproportionate cost and burden on the “consumer side”. To efficiently regulate financial derivatives markets, the main regulatory compliances should be imposed on “Producers” (“Sell Side”) of financial derivatives rather than on “End Corporate Users” (“Buy Side”). The “Sell Side” comprises: Financial Counterparties (FCs), Investment Firms and Non-Financial Counterparties Plus (NFC+). The “Buy Side” consists of all Non-Financial Counterparties Minus (NFC-) also known as Corporate End Users of financial derivatives, meaning real economy companies.

### 2. COST AND BURDEN RELIEF FOR THE REAL ECONOMY

In current proposal for amending EMIR Regulation (EU) No 648/2012, the Commission clearly states the costs and burden reduction for NFCs- as one of its main targets, to be achieved mainly by transferring the single-sided reporting responsibility and legal liability onto CCPs for ETDs and onto FCs for OTCs, eliminating the obligation for intra-group transactions’ reporting and abandoning back-loading. Such simplification will not impact current content and quality of regulatory reporting, but is expected to have a positive effect by streamlining information flows.

It is important to notice that while the aim of introducing a single-sided reporting mechanism and transferring full responsibility and legal liability onto CCPs for ETDs and onto FCs for OTCs is clearly stated both in the Impact assessment and in the “Detailed explanation of the specific provisions of the proposal”, the actual text proposed for Article 9 amendments could lead to different interpretations, that could jeopardize the cost and burden relief for NFCs-. It is therefore crucial to clarify said text in order to make it fully consistent with regulatory targets clearly addressed by the Commission.

Under such reporting regime, CCPs and FCs would report only one set of information, integrating their own leg of the transaction with the counterparty specific information, such as counterparty identification information (e.g. LEI) and the purpose of transaction (e.g. risk reducing/non-risk reducing). Said complementing information can be collected by CCPs and FCs via specific fields added to current standardized and bilateral contractual forms, as it was already the case during the first EMIR reporting adoption in 2013. Current standardized and bilateral contractual forms should be updated to include all information requested for EMIR reporting, so that, upon transaction conclusion, CCPs and FCs would effectively be in the position to promptly report closed transaction to Trade Repositories.

We suggest amending the text of Article 9 to align it to the “Impact assessment” and to the “Detailed explanation of the specific provisions of the proposal”. In this way the Commission’s target of cost and

burden reduction would be effectively achieved, without affecting the content and the quality of reported information, while avoiding duplication of information between the buy & sell legs of the transaction.

### ***Regulation for Specific Cases of Transactions***

The current Commission proposal does not clarify how to manage transactions closed by NFCs- with non-EU FCs, with non-EU subsidiaries and with other NFCs- (EU or non-EU). It is important to regulate such cases to ensure effective reduction of cost and burdens for NFCs-. Otherwise, NFCs- would need to keep current processes and IT systems just to manage reporting of marginal categories of transactions. As a result, the alleviation of burdens could be lost.

Therefore, we suggest introducing in the Commission's proposal the following provisions:

- **transactions with non-EU FCs**

If non-EU country is deemed equivalent for reporting purposes, non-EU FC remains responsible for reporting. If non-EU country is not deemed equivalent for reporting purposes, non-EU FC should be given the possibility to register for reporting purposes and/or NFC- should be given the option for self-reporting.

Under certain circumstances, such as when transacting with FCs in non-equivalent third countries, a NFC may determine to self-report data to trade repositories on its own, and it should remain open for companies to do so. However, in the current revision every effort should be made to establish a functioning and clear reporting regime to minimize the risk of companies ever having to resort to such measures.

- **intra-group transactions**

All intra-group transactions should be exempted from the reporting obligation, irrespectively of the country where the subsidiary is established.

- **transaction between 2 NFCs-**

Standardized or bilateral contractual forms should contain a specific provision assigning responsibility for reporting to one of the counterparties prior to transacting.

### **3. REGULATORY CONSISTENCY**

#### ***Consistency with MiFIR/MiFID II***

In line with the para1.2 of the proposal concerning "Consistency with existing policy provisions in the policy area", it is worth considering the effect on the future implementation of the EMIR Refit proposal of new transaction reporting on financial instruments and new definitions for financial derivatives, trading venues and ancillary tests contained in MiFIR/MiFID II.

At the time of EMIR 1 implementation, the world of financial derivatives was divided into 2 categories:

- financial derivatives traded on Regulated Markets (RMs), also called Exchange Traded Derivatives (ETDs), which were already subject to clearing obligation via a CCP;

- financial derivatives traded Over the Counter (OTCs) either bilaterally or via not regulated trading platforms/venues (including Multilateral Trading Facilities MTFs), which normally were not cleared.

With the new definitions for financial derivatives, which include a list of contracts currently not falling in financial derivatives perimeter, and for Trading Venues (TVs), which shrink the bilateral OTC space by introducing a wide range of new regulated marketplaces, it should be considered to:

- **extend the single-sided reporting obligation, as specified by EMIR Refit for CCPs, to future TVs in line with the definition in MiFIR/MiFID II;**

With the introduction of Trading Venues (TVs) definition, including new vast categories of Organised Trading Facilities (OTF), Multilateral Trading Facilities (MTF) and Systemic Internalizers (SI), the list of financial marketplaces subject to regulation will be enlarged well beyond the previous list of RMs. All above categories of TVs, operated by their respective regulated market operators, will be added to the current list of CCPs operating RMs. As currently recognized for CCPs, also said TVs will be in the best position to gather and channel all information on derivative contracts traded on their respective market facilities and to be responsible of EMIR single-sided reporting obligations. Therefore, we recommend extending the same single-sided reporting obligation specified by EMIR Refit for CCPs also to future TVs in line with the definition in MiFIR/MiFID II;

- **ensure that TRs comply with the REMIT Implementing Acts regarding derivative contracts under REMIT that will become subject to EMIR compliance**

The definition of derivative will be enlarged and a vast category of contracts currently classified as wholesale energy physical contracts will become financial derivatives and, as a consequence, subject to EMIR reporting obligation. While, such contracts - whenever having power and gas as underlying - are already subject to regulatory reporting to ACER under REMIT compliance. Therefore, it is advisable that once such contracts become financial derivatives, and therefore will need to be reported to TRs, it would be up to TR to report the information to ACER, complying with the REMIT Implementing Acts, including the new enlarged category of derivative contracts. We would appreciate a clarification from ESMA or the European Commission in that respect.

Besides, under MiFIR/MiFID II all financial instruments, including financial derivatives, will be subject to transaction reporting and, limited to financial derivatives on commodity, position reporting: with respect to financial derivatives, MiFIR/MiFID II and EMIR reporting regimes should be analyzed in order to find opportunities for mutual synergies.

### ***Consistency of EMIR rules***

The simplification of reporting rules resulting from EMIR REFIT will become applicable only after application of Commission Implementing Regulation (EU) 2017/105<sup>3</sup> and Commission Delegated Regulation (EU) 2017/104<sup>4</sup> foreseen on 1 November 2017. Compliance with the latter regulation will

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<sup>3</sup> Amending format and frequency of trade reports to trade repositories in line with art. 9 para 6 of EMIR

<sup>4</sup> Revised EMIR standards on the reporting to trade repositories in line with art. 9 para 5 of EMIR

considerably increase the amount, detail and complexity of information to be reported per transaction, resulting in increased companies' effort to comply new rules. Therefore, we suggest suspending the application of this regulation until the current review process is finalized.

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***EuropeanIssuers** is a pan-European organisation representing the interests of publicly quoted companies across Europe to the EU Institutions. As at 31 December 2014, there were 13 225 such companies on both the main regulated markets and the alternative exchange-regulated markets. Our members include both national associations and companies from all sectors in 14 European countries, covering markets worth € 7.6 trillion market capitalisation with approximately 8000 companies.*

*We aim to ensure that EU policy creates an environment in which companies can raise capital through the public markets and can deliver growth over the longer-term. We seek capital markets that serve the interests of their end users, including issuers.*

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