EMIR Refit proposals' impacts on corporate end-users

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The above organisations represent over 8,000 companies across Europe. The comments below respond to the Commission's EMIR Refit proposals published on 4 May 2017[1].

We **welcome the Commission's EMIR Refit proposals** which contribute to relieving burdens for **businesses** using derivatives to reduce their commercial and financing risks.

Corporate end-users' **commercial hedging activities are key to supporting Europe's real economy** by bringing greater certainty to business decisions and **are not a source of systemic risk**. Undue burdens on such activities can reduce hedging by end-users leading to higher levels of business risk.

The Commission's proposals are an important simplification of existing EMIR requirements for corporates and would bring Europe closer to international practice.

In this paper we highlight a number of **areas which are key for corporate end-users**:

- **Relieving EMIR's reporting burden for real economy activity, including upholding the Commission's proposed intragroup reporting exemption[2] and ensuring a fully functioning single-sided reporting framework for non-financial counterparties (NFCs) in Europe**
- **Maintaining the commercial hedging exemption as proposed, while streamlining its calculation**

In order to achieve these objectives, we propose the following to build on the Commission's proposals:

(A) A FULLY FUNCTIONING SINGLE-SIDED REPORTING REGIME FOR CORPORATE END-USERS

To **enhance Europe's data quality** and to **align Europe with other major international jurisdictions**, a further step is needed to establish **a fully functioning single-sided reporting framework for commercial hedging corporates (NFC-s) in Europe**.

The current proposals have made important moves in this direction, but under the current proposals financial counterparties (FCs) must still report **an identical duplicate dataset to supervisors** – generating noise and inefficiency in the system.

[1] https://ec.europa.eu/info/law/better-regulation/initiative/25623/attachment/090166e5b21c0862_en
[2] While clarifying it applies for all intra-group transactions in the same NFC group.

Under a single-sided regime this would be resolved – **FCs would report a single data set and would remain solely responsible for the reporting process and content of what is reported concerning derivatives transactions with NFC-s**.

Further clarifications to the reporting framework are required in the following areas:

(1) Consistency between Articles and Recitals - **FCs are the sole counterparties responsible and liable** for timeliness and accuracy of reporting transactions between the FC and the NFC-s, and should report a single data stream to repositories.

(2) Clarification that **responsibility for non-duplicate reporting** lies only with the reporting counterparty.

(3) Clarification that the **exemption for intra-group transactions** does apply for <u>all,</u> rather than a subset, of intra-group transactions within the same NFC group.

(4) 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.

(5) Elaborating **how NFC- to NFC- transactions are reported** – the counterparties must assign responsibility for reporting to one of the NFC-s prior to transacting.

(B) COMMERCIAL HEDGING EXEMPTION AND CLARIFYING NFC CLEARING THRESHOLD ASSESSMENT

EMIR's existing exemptions for hedging activities are critical to corporate risk management, bringing certainty to business decisions and supporting industrial activity in Europe.

The commitment to upholding the existing regime and introducing a simplified asset class-by-asset class assessment for the exemption are both highly welcome.

- The current exemptions for hedging activities from the clearing threshold calculations enable real economy companies to manage their risks responsibly without being subject to EMIR's clearing and margining requirements.
- Clearing/margining has the potential to create short-term liquidity risks which ultimately create direct insolvency risks for corporate end-users.
- Requiring corporates to post margin and clear their OTC derivatives would reduce capital spending and adversely impact business investment, research & development and job creation – hence the importance of the exemption for hedging activities.

However, the **proposed asset class-by-asset class assessment of the clearing obligation** for NFCs, **needs to be extended to the requirement to post bilateral margin with respect of uncleared derivatives transactions** in order to achieve the intended relief for NFCs.

By addressing these issues, the EMIR Refit proposals will have delivered meaningful relief to companies and support the economic activity which these NFCs represent.

FURTHER BACKGROUND

REPORTING BURDEN RELIEF FOR REAL ECONOMY ACTIVITY

EMIR's current dual-sided reporting regime has led to significant unforeseen costs for corporate end-users – with ongoing annual reporting burdens for European companies estimated at €2.4bn-€4.6bn[3].

This reporting regime needs enhancing to deliver on its original objectives:

- **The current delegated-reporting model has not been able to alleviate EMIR's burdens on corporates** – this is because an NFC that delegates its reporting obligations to an FC remains legally responsible for the data, leaving corporate end-users with legal risks through lack of control over the data reported and the timing of such reporting.
- The current reporting **regime has also led to substantial data quality issues** – impairing systemic risk oversight by supervisors – as real economy companies' core business does not involve the same straight-through-processing systems as FCs.

The Commission's EMIR Refit amendments propose two important principles which move to address these issues (see Art 1.7b creating new Art 9.1a in EMIR)**:**

1. **Legal responsibility for the content and timeliness of OTC derivatives trade reporting to be placed on the FCs** transacting with NFC- companies.
2. **NFCs' intragroup transactions are exempted from reporting to repositories.**
   - These intragroup transactions are used by NFCs' centralized corporate treasury units (or other dedicated units) to mirror external transactions and to assign them to the appropriate part of the group.
   - These are not systemically relevant and support the risk management function of the company.

However, while these EMIR Refit proposals deliver important burden relief for companies, moving to a **fully functioning single-sided reporting framework is still necessary as it would**:

- Be the **most effective and efficient route** to **enhancing Europe's data quality** – data reported by a single FC entity leverages the FC's straight-through processing and under EMIR's internal controls remains subject to confirmation and reconciliation between counterparties
- **Support an international level playing-field for EU-based NFCs** – major jurisdictions around the world such as the US, Canada, Japan and Switzerland already apply an entity-based model for their non-financial end-users
- Maintain the Commission's proposal that **FCs are responsible for the timeliness and content of reporting transactions with NFCs**; and
- Ensure in addition that FCs **would report only a single dataset** to supervisors, rather than two identical datasets, thereby minimizing noise and duplication in the system and enhancing data quality.

As stated above, we wish to stress that NFCs do not want to engage in the costly and burdensome reporting of derivatives contracts when, as the Commission highlights, the corporate's counterparty can provide regulators with the same information while reducing the burdens on the companies. There may be circumstances (such as due to transacting with FCs in non-equivalent third countries) in which an NFC- may determine however that it needs to be able to report data to trade repositories on its own, and it should remain open for companies to do so. Every effort however should be made in the current revisions to establish a functioning and clear new single-sided reporting regime, as proposed in this paper, to minimise the risk of companies ever having to resort to such measures.

[3] Industry study based on ISDA survey estimates and available information in July 2016.

CORPORATE END-USER SUMMARY PROPOSALS

Topic	Issue	Recommendation
Properly functioning single-sided reporting regime	Art 9 maintains FCs must still report a duplicate identical dataset to supervisors when reporting transactions with NFC-s	Establish a properly functioning single-sided reporting regime – with FCs reporting a single data set for transactions between FCs and NFC-s
Consistency between Art's and Rec's on FC responsibility for timeliness + accuracy of reporting	Recital 14 confirms the FC should be responsible and liable for timeliness and accuracy of reporting but the Art 9.1a needs to be fully aligned	Art 9.1a (b) needs to clarify that the FCs are the *sole* counterparties responsible and liable for timeliness and accuracy of reporting transactions between the FC and an NFC-
Clarifying responsibilities over duplicate reporting	Art 9.1a (e) includes a legacy reference to the counterparties needing to ensure details of contracts are reported without duplication	Art 9.1a (e) needs to be clarified that the responsibility for non-duplicate reporting lies only with the counterparty that is reporting to the trade repository and not the NFC- that does not report
Definition of intragroup transactions	The intra-group exemption applies for intragroup transactions by EU subsidiaries and subsidiaries in third countries deemed equivalent for reporting (see Art. 3.1)	Art. 3.1 must clarify that the exemption for intra-group transactions applies worldwide for all intra-group transactions within the same NFC group
Framework for reporting transactions between NFC- to third country FC	The current framework does not address how reporting of NFC- and third country FCs would be ensured	Introduce additional provisions stating: • Third country FC remains responsible if third country deemed equivalent for reporting purposes; or • Possibility for third country FC to register in EU for reporting only; or • Option for NFC- self-reporting
Framework for reporting transactions between NFC- to NFC-	The current framework does not address how reporting of NFC- to NFC- transactions would be ensured	Introduce additional provisions stating NFC-s must assign responsibility for reporting to one of the counterparties prior to transacting
Clarifying NFC margining obligations	The proposed asset class-by-asset class assessment of clearing thresholds is welcomed but needs clarifying such that the assessment applies both to the clearing obligation and to the requirement to post bilateral margin	Amend Recital (7) and clarify Article 1(8)(b)by adding that the asset class-by-asset class assessment applies both to the central clearing obligation and the obligation to post bilateral margin

About the signatories

EACT is a grouping of national associations representing treasury professionals in 18 countries of the European Union. We bring together about 13,000 members representing 6,500 groups/companies.
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EuropeanIssuers is a pan-European organisation representing the interests of publicly quoted companies across Europe to the EU Institutions. 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.
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Deutsches Aktieninstitut represents the entire German economy interested in the capital markets. Its approx. 200 members are listed corporations, banks, stock exchanges, investors and other important market participants. Deutsches Aktieninstitut has offices in Frankfurt am Main, Brussels and Berlin.
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ASSONIME is the Association of the Italian Joint Stock Companies representing around 450 companies from all sectors, including more than 100 listed companies. Established in 1910, its goal is the creation of a healthy macroeconomic and regulatory environment with a strong commitment to opening markets and promoting European integration.
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AFEP represents 120 of the largest companies operating in France. It takes part in public discussions by providing pragmatic solutions to foster the development of a competitive French and European economy.
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Coalition for Derivatives End-Users represents end-user companies that employ derivatives to manage risks. Approximately 300 international companies and business associations are active in the Coalition to promote economic stability and transparency without imposing undue burdens on derivatives end-users, who are the engines of the economy.
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IGTA is a forum for approximately 28 national treasury associations to share views and information on issues that impact the treasury and financial profession, and for the associations' management to agree on priorities, and to coordinate their resources on projects that advance the profession.
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