Commodity Markets Council - Europe

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To: Mr Ugo Bassi, Director for Financial Markets, and Mr Patrick Pearson, Head of Unit for Financial Markets Infrastructure, DG FISMA, European Commission; and
Mr Fabrizio Planta, Head of Markets & Data Reporting Department, and Ms Olga Petrenko, Head of Market Data Policy Unit, ESMA

Transmitted via electronic mail

Re: EMIR intragroup transaction reporting exemption

Dear Mr. Bassi, Mr. Planta, Mr. Pearson and Ms. Petrenko,

I am writing to express the concerns of the Commodity Markets Council Europe (CMCE) in relation to a proposal that we understand is being discussed to adopt ESMA Q&A on the application of the exemption from intragroup transaction reporting - as enabled by Article 9(1) of Regulation (EU) 2019/834 (EMIR Refit), which would interpret the exemption as applying only to groups in which the "ultimate parent undertaking" is established in the EU.

CMCE is an industry association comprised of agriculture, energy, metals and other commodity market participants, price reporting agencies and commodity exchanges.

A number of CMCE Members – several of which qualify as predominantly commercial groups with a parent undertaking located in a non-EU jurisdiction with affiliates established in the EU – have been told by national competent authorities (NCAs) when notifying them of their exemption from intragroup reporting that ESMA is considering introducing such an interpretation and that, on that basis, the intragroup reporting exemption would not be available to them.

CMCE would like to express its concern over the proposed interpretation for two reasons.

First, it would be directly contrary to clear provisions, not only in EMIR and EMIR Refit, but also in the Consolidated Accounts Directive (2013/34/EU) (the "**Consolidated Accounts Directive**") and would run counter to long-established interpretations of the definitions of "group" and "parent undertaking" in them.

Secondly, we are concerned that this interpretation, if accepted and applied, would give rise to a series of consequences for other areas of EU financial regulation in which the same definitions of "group" and "parent undertaking" are used, including other aspects of EMIR and under MiFID 2, as well as for the interpretation and application of the Consolidated Accounts Directive from which these definitions stem.

Interpretation Contrary to Consolidated Accounts Directive, EMIR & EMIR Refit

As we understand it, ESMA's proposed Q&A would be based on an interpretation of the term "parent undertaking" as being capable of referring only to undertakings established in the EU. (On that basis only "groups" headed by "parent undertakings" established in the EU would be eligible for the exemption from reporting under article 9.1 of EMIR).

Consolidated Accounts Directive

Both the Consolidated Accounts Directive and its predecessor, the Seventh Company Law Directive 83/39/EEC ("**7CLD**"), treat the term "parent undertaking" as being capable of applying to undertakings established outside the EU.

The definitions of "parent undertaking", "subsidiary undertaking" and "group" in the Consolidated Accounts Directive do not require the parent undertaking to be established in the EU. There are numerous further occasions in the Directive where the term "parent undertaking" is used in contexts which make it clear that "parent undertakings" are capable of being established outside the EU.[1]

EMIR

Similarly articles 3.3(a) and (b) of EMIR both utilise the term "parent undertaking"[2] in a manner which recognises that it can apply to undertakings established outside the EU. They both make specific provision for the treatment of intragroup transactions in relation to '*a group the parent undertaking of which has its head office in a third country'*.

Accordingly, for the term "group" to be capable of being interpreted as excluding groups with a third country parent would require a change to Level 1 of EMIR.

That a "group" may have an ultimate parent established in a third country was recognised by ESMA itself in EMIR Q&A, OTC Answer 3(d)(3) which states that: "*The group to which the EU NFC belongs includes subsidiaries, sisters and parent companies wherever the ultimate parent company is established*."

That Q&A relates to the scope of the clearing threshold calculation under article 10(3) of EMIR as it applies to entities within a "group". EMIR uses the defined term "group" in that context, as it does in the context of the reporting exemption under article 9.1 and there can be no sustainable basis for interpreting the same term differently within the same Regulation.

EMIR Refit

Turning to the new intragroup reporting exemption under article 9.1 itself, there is no indication that the exemption should be limited to groups with an EU parent undertaking. The second subparagraph of Article 9(1) of EMIR (as amended by EMIR Refit) specifies:

'Notwithstanding Article 3, the reporting obligation shall not apply to derivative contracts within the same group where at least one of the counterparties is a non-financial counterparty or would be qualified as a non-financial counterparty if it were established in the Union, provided that;

(a) both counterparties are included in the same consolidation on a full basis;

(b) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures, and;

(c) the parent undertaking is not a financial counterparty'

Given the well-established interpretation of the term "group" discussed above, the only requirement that specifically applies with respect to the parent undertaking is that it is not a "financial counterparty".

[1] For example, articles 37(1), 42(2), 44(2)(c), where the term has had to be expressly qualified by the phrase "subject to the laws of a Member State" in order to narrow it for use in those provisions.

[2] Which is defined under article 2(21) of EMIR by reference to the definition of "parent undertaking" in the Consolidated Accounts Directive.

A parent undertaking that would be qualified as a non-financial counterparty if it were established in the EU is **not** a "financial counterparty" and therefore meets the requirement of sub-paragraph (c) above.

Had there been any intention to limit the scope of this exemption to groups with ultimate parents established in the EU, it would have been possible – and in line with legislative practice in other contexts[3] – to refer instead in sub-paragraph (c) to "parent undertakings" registered or with a head office in a Member State, thus qualifying the term and limiting the scope of the exemption.

Knock-on Consequences

More broadly, CMCE is concerned that if the terms "group" and "parent undertaking" were to become subject to a supervisory interpretation of this nature, this would undermine their correct and well-established usage in many other contexts under EU financial regulatory legislation.

To take two simple examples from MiFID2:

- the position limits regime under article 57 of MiFID2 applies to positions at "aggregate group level" (using the defined term "group"); and
- the ancillary activity exemption under article 2.1(j) of MiFID2 applies to firms which, among other things, fall below the thresholds set out in RTS20, article 3 of which requires a relative assessment of the firm's volumes or capital with those of its "group".

As a result, ESMA's proposed narrow interpretation of the term "group" would lead to (a) the position limits regime applying more strictly for groups with EU parents than those without, and (b) a similarly unequal application of the main business test under RTS 20.

Under EMIR itself, of course, this narrow interpretation would lead to a reassessment of the scope of the clearing threshold calculation under articles 4a and 10 of EMIR. To date – and in accordance with ESMA's own published interpretation – it has been widely understood that the clearing threshold is calculated on a group-wide basis and that this is not limited to groups beneath an EU parent undertaking. If the proposed interpretation were to apply the calculation would apply only to EU groups and EU sub-groups of wider global groups – potentially reducing the number of firms which would be subject to the clearing obligation under EMIR.

The proposed interpretation of "group" would also have repercussions on the exemptions from the clearing and margin requirements under articles 4.2(b) and 11.8 – 11.10 of EMIR for intragroup transactions, effectively limiting the ability of counterparties to use these exemptions.

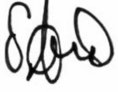
To conclude, it is clear from these legal provisions that intragroup transactions involving at least one non-financial counterparty are eligible for the exemption from reporting intragroup transactions regardless of whether their parent undertaking is an EU or third-country entity, provided the requirements of Article 9(1) of EMIR are met. Accordingly, CMCE can find no legal basis for NCAs to object to the use of the exemption where the ultimate parent undertaking is located in a third-country.

Mindful of the clear legal provisions cited above, CMCE would encourage the Commission and/or ESMA to confirm that all groups – regardless of whether they have a parent undertaking located in the EU or a third-country – are eligible for the exemption from intragroup transaction reporting provided the criteria in Article 9(1) of EMIR are satisfied.

[3] See for example, article 37.1 of the Consolidated Accounts Directive which adopts a similarly narrowing qualifying term to limit the scope of an exemption.

We would be very pleased to further discuss the issue and to provide any clarifications you may need.

Sincerely,



Samina Anwar
Chair
CMCE Executive Committee