Draft CMCE response to the ESMA consultation on EMIR reporting – focus on intragroup exemption from reporting
23 September 2021

- The ESMA consultation paper on Draft Guidelines for reporting under EMIR can be found here, the relevant part is section 5.3 on Intragroup exemption from reporting

Section 5.3 Intragroup Exemption reporting

Context for background

EMIR Regulation (as amended by EMIR Refit Regulation no 2019/834):

Recital (16)

Intragroup transactions involving non-financial counterparties represent a relatively small fraction of all OTC derivative contracts and are used primarily for internal hedging within groups. Those transactions therefore do not significantly contribute to systemic risk and interconnectedness, yet the obligation to report such transactions imposes significant costs and burdens on non-financial counterparties. Transactions between counterparties within a group, where at least one of the counterparties is a non-financial counterparty, should therefore be exempted from the reporting obligation, regardless of the place of establishment of the non-financial counterparty."

Article 9(1) (Reporting obligation)

Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported in accordance with paragraphs 1a to 1f of this Article to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.

The reporting obligation shall apply to derivative contracts which:

(a) were entered into before 12 February 2014 and remain outstanding on that date;
(b) were entered into on or after 12 February 2014.

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.

Counterparties shall notify their competent authorities of their intention to apply the exemption referred to in the third subparagraph. The exemption shall be valid unless the notified competent authorities do not agree upon fulfilment of the conditions referred to in the third subparagraph within three months of the date of notification.';

Article 13 (Mechanism to avoid duplicative or conflicting rules)

1. The Commission shall be assisted by ESMA in monitoring and preparing reports to the European Parliament and to the Council on the international application of principles laid down in Articles 4, 9, 10 and 11, in particular with regard to potential duplicative or conflicting requirements on market participants, and recommend possible action.

2. The Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a third country:

(a) are equivalent to the requirements laid down in this Regulation under Articles 4, 9, 10 and 11;
(b) ensure protection of professional secrecy that is equivalent to that set out in this Regulation; and
(c) are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 86(2).

3. An implementing act on equivalence as referred to in paragraph 2 shall imply that counterparties entering into a transaction subject to this Regulation shall be deemed to have fulfilled the obligations contained in Articles 4, 9, 10 and 11 where at least one of the counterparties is established in that third country.

ESMA Q&A 51 (m) (from 31 March 2021):

Question: *In the case of derivatives contracts where at least one of the counterparties is a non-financial counterparty: does the exemption of reporting obligation for intra-group transactions introduced in Article 9(1) of EMIR REFIT apply when the parent undertaking is established in a third country?*

Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation:*

The exemption contained in Article 9(1) of EMIR does not cover intragroup transactions for which the parent undertaking is established in a third country, even if the transaction occurs between two counterparties which are both established in the EU. This conclusion is based on the following elements:

1. *The definition of parent undertaking refers to an undertaking governed by the law of a Member State and nothing in EMIR indicates a will to modify that reference.*
2. *This interpretation fits the actual purpose of Article 13 of EMIR: deference is granted where there is equivalence with the jurisdiction hosting the parent undertaking.*
3. *This interpretation ensures a meaningful use and purpose of the transparency objective of Article 9 while limiting the exemption in article 9(1) to the minimum necessary."*

**EC disclaimer:* *The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.*

***Art. 16b(5) of the ESMA regulation (Questions and answers):*
5. *The Authority shall forward questions that require the interpretation of Union law to the Commission. The Authority shall publish any answers provided by the Commission.*

Note from advisors:

CMCE wrote a letter to ESMA and the EC in autumn 2019. Officially, CMCE did not receive a response to that letter. The Answer to the Question was published on 31 March 2021 (see above). Therefore, in terms of timing, the Answer should therefore be understood as a reaction to the CMCE letter.

According to the internal assessment by the advisers, it might not be helpful to repeat the arguments presented in the CMCE letter from autumn 2020. As the matter is rather political, ESMA could effectively not address it. We would use this ESMA consultation mainly as a hook to bring the topic back to the table. It should be brought to the attention of the EC (as a follow up to the response to this ESMA consultation), and sufficiently robust policy arguments should be put forward.

It is important to note that if the policy/political circumstances remain the same, and the EC will not adopt an implementing decision on equivalence vis-à-vis the UK, it is not very likely that the immediate outcome of the political engagement would be positive. The engagement should be understood as a tool to address the situation in the longer term.

Question 13
Are there any other clarifications required with regards to the IGT exemption from reporting?
CMCE answer
CMCE members are strongly concerned about the interpretation of Article 9(1) in the Q&A TR 51(m) from 31 March 2021, as referred to by ESMA in the consultation document (footnote 14), which relies on an interpretation of the term "parent undertaking" which is directly at odds with the use of that term elsewhere in EMIR (and other EU accounting and regulatory laws where it is used). As a result, we consider this reading could have wide-reaching unintended interpretative consequences. Moreover, the imposition of intra-group reporting obligations on non-financial firms with third country parents has competitive implications which tend to disincentivise investment by third country industrial and commercial groups in EU businesses, as they would be required to bear costs with respect to their hedging, which corresponding non-EU groups do not. We are aware that ESMA referred this question to the European Commission in line with Art. 16b(5) of the ESMA Regulation, hence the respective answer was provided by the European Commission. We merely want to bring this issue back to the attention of ESMA so that proper consideration might be given the impact of such an interpretation by the European Commission on the industry linked to the commodity markets in the EU. We deem it very important to note that such a restrictive interpretation of Art. 9(1) of EMIR Regulation might have a detrimental impact on the competitiveness of the EU.

We note that the EC has stated that its interpretation supports the transparency objective behind article 9 of EMIR. We question whether that transparency objective is aimed at the intra-group trading of industrial and commercial groups (which consists invariably of hedging transactions) and, if so, how that transparency objective is served by adopting an interpretation of the exemption which places the obligation on some but not all market participants of this type in the market. In this context it is helpful to note the terms of Recital 16 of EMIR Refit Regulation no 2019/834. It says that "*Intragroup transactions involving non-financial counterparties represent a relatively small fraction of all OTC derivative contracts and are used primarily for internal hedging within groups. Those transactions, therefore, do not significantly contribute to systemic risk and interconnectedness, yet the obligation to report such transactions imposes significant costs and burdens on non-financial counterparties. Transactions between counterparties within a group, where at least one of the counterparties is a non-financial counterparty, should therefore be exempted from the reporting obligation, regardless of the place of establishment of the non-financial counterparty.*"

If the interpretation of Art. 9(1) is maintained as clarified in the Q&A TR 51(m), it would mean that the EU firms would face the increased cost and burdens. The increased complexity and cost of hedging for the industrial groups in Europe would have a negative impact on industrial groups in the EU with third country parents. Such an interpretation could disincentivize investment from non-EU jurisdictions. It would very likely result in a situation that an industrial group ultimately owned by an EU "parent undertaking" would be subject to different market conditions than the groups owned by a third country "parent undertaking". This would clearly mean there would be an unlevel playing field among the businesses. Overall, it could negatively impact the competitiveness of the EU manufacturing and industrial groups which are in any way connected to the commodity markets.

Therefore, we would kindly ask ESMA to consider the context and the intention of the regulation when discussing the ways forward with the European Commission.