Commodity Markets Council - Europe

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1. General comments

CMCE welcomes the European Commission proposal to review the EMIR framework. We understand the broader context of this initiative related to the Capital Markets Union, developments in energy markets in 2022 and EU open strategic autonomy and that the policymakers wish to ensure that measures are put in place to make the EU clearing ecosystem respectively (i) competitive and modern, (ii) safe and resilient, and (iii) overall supporting the EU's open strategic autonomy.

CMCE members agree that one of the priorities is to make the EU commodity derivatives markets more competitive while ensuring the resilience of the ecosystem. With this goal in mind, we aim to comment on the first two mentioned objectives.

As for the competitiveness of EU clearing system, we focus on the simplification of the intragroup transaction framework. In relation to ensuring a safe and resilient ecosystem, we allow ourselves to comment on several provisions.

2. Specific comments

Simplification of the intragroup transaction framework (Article 3)

CMCE members welcome the simplification of the definition of the intragroup transaction. We agree that the removal of the need for an equivalence decision, and replacing it by a list of jurisdictions for which an exemption should not be granted, leads to more predictability and legal certainty. For such lists, we believe that the European Commission should keep track of the relevant lists and assess their relevance on a regular basis.

<u>Active Accounts (Article 7)</u>

While CMCE members understand the European Commission's aims to reduce exposure and reliance on third country CCPs, there are some concerns that the prescriptive measures being proposed are unproportional and will have a net negative effect on EU market participants. Market participants currently benefit from netting arrangements available through the concentration of clearing within product groups. Forcing partial clearing at other CCPs will only reduce those benefits and increase the overall costs and reduce the competitiveness of EU market participants compared to non-EU market participants. The proposals will also likely have the unintended effect of restricting competition within CCPs, resulting in increased clearing costs, at a time when the European Commission wants to encourage clearing to mitigate risks from market volatility.

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Measures aimed at making the framework for clearing commodity derivatives more robust

Intragroup Transaction Exemption (Article 9)

CMCE Members are unclear as to the need for removal of the intragroup transaction reporting exemption, specifically about the degree of the risk mitigation when increasing the transparency requirements of such transactions. While we understand the overall objective that NCAs have the necessary data to assess the build-up of risk in the system, it is not clear for us the exact issue the removal of the exemption would seek to solve.

Review of clearing thresholds and clarifying the hedging exemption (Article 10)

CMCE Members welcome the amendments on the methodology for clearing threshold calculation to focus on the entity level, though retaining the element of consolidated assessment and evaluation by the competent authorities at the group level. Overall, we believe that this change will make the calculation process less burdensome. We welcome the threshold calculation criteria change from trading venue to clearing venue, as it brings the clearing threshold calculation in line with its principal aim of risk management.

We also welcome the ability of ESMA to set the dynamic thresholds subject to the market conditions and pre-defined triggering mechanism.

Authorisation of CCPs (Article 14/15,17, 17a and 49)

We strongly welcome the European Commission's commitment to improving the regulatory approval procedures for new services and changes to risk models (Art. 14, 15, 17, 17a and 49 EMIR). In particular, we appreciate the clearly defined and reduced timelines for the regular procedures as well as the introduction of a 10-day non-objection procedure for non-significant or non-material changes which will bring the EU framework closer to other jurisdictions in this regard.

CMCE appreciates the fact that the proposal includes some criteria to distinguish between significant (or material) and non-significant (or non-material) changes. However, as some of these criteria in Articles 17a (1) and Art. 49(1g) EMIR are rather restrictive and also less relevant to the overall resilience of a CCP, NCAs may apply the new non-objection procedure only in very few circumstances, whereas many changes will remain subject to the regular procedures. We would generally recommend fewer, clearer, and objective criteria with a view to increase legal certainty and ensure that competent authorities focus their resources on changes which could truly affect the resilience of a CCP.

Prohibition for a CCP to be a clearing member of another CCP (Article 26, 37)

CMCE suggests deleting the provision impeding a CCP from becoming a clearing member, a client, or establishing indirect clearing arrangements with a clearing member with the aim to undertake clearing activities at a CCP. CMCE sees different reasons to delete such provision, namely:

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- The rationale behind the provision should be based on risk grounds. Providing services to non-clearing members that do not trigger financial stability issues should therefore be allowed;
- It can be concluded that the wording of the Article might negatively impact interoperability arrangements;
- This provision may be damaging for CCPs that plan to increase their resilience for USD cash collateral reinvestment onshore in the US by gaining access to increased liquidity through the FICC cleared/sponsored offering for reverse repo/repo.
- Furthermore, within the scope of Market Coupling, CCPs cooperate closely with other power spot exchanges, their clearing entities and the connected power Transmission System Operators (TSOs). As clearing houses, they provide clearing and settlement services for cross-border energy flows according to Commission Regulation (EU) 2015/1222. CCPs nominate the cross-border electricity flows to the TSOs and settle trades for all counterparties involved. In order to fulfil this service, there is a need for cooperation between the involved CCPs that should be not interfered by the provided EMIR proposal.

<u>Specific admission criteria for a clearing member which is a non-financial counterparty (Article 37)</u>

On the substance, the CMCE notes that the participation in the CCP is already based upon a stringent objective assessment by the CCP of the entity's capacity to manage risk, liquidity governance and position management. The ability of non-financial counterparties to be able to self-clear their own activity is an important tool in facilitating the responsible management by such entities of their own liquidity and exposure. The relatively few non-financial counterparties which successfully satisfy the stringent requirements required to self-clear by a CCP have had to demonstrate sound financial, operational and risk governance to a much higher degree than entities who simply access futures markets via third party clearing brokers. There is no reason to perceive non-financial counterparties who wish to self-clear their own activity as somehow increasing the risk of market disruption. In fact, it is the other ways around as the diversification of clearing members at a CCP reduces the overall risk and financial burden of all clearing members in a default situation, thus improving the CCPs resilience in periods of stress.

The CMCE believes that non-financial entities should be encouraged, where appropriate, to work towards an ability to self-clear own activity as a means of facilitating the diversification of risk away from the small number of existing clearing brokers. All in all, CMCE believes that diversification of a CCP's membership actually improves the resilience of the CCP. Fair and open access to CCPs should be a priority to the European Commission's aim to ensure that clearing in the EU is competitive.

<u>Enhanced transparency on margin calls (Article 38)</u>

CMCE members, and particularly the ones participating in energy markets, are mostly clients of clearing members. As such, we welcome the proposed measure which would contribute to increasing transparency which should ensure the clients and indirect clients have better visibility and predictability of margins required by the CCPs and additional margins required by the clearing members. The recent critical situation has clearly shown that lack of transparency and predictability (e.g. related to add-ons) on the clearing members side made liquidity management unnecessarily challenging for the clients. It is understood that clearing members make their own credit assessment of the clients to make sure they comply with their own regulatory requirements, however, the margin simulations from the clearing members are not available, hence difficult to predict at this point.

Collateral requirements (Article 46)

CMCE members welcome the amendment allowing public guarantees eligible as highly liquid collateral (subject to the conditions attached).

3. About CMCE

CMCE is the only association in Europe representing the range of commodity market participants - agriculture, energy, metals and other commodity market participants, benchmark providers, price reporting agencies, and trading venues operating in the EU, EEA, Switzerland and neighbouring countries. The majority of CMCE members use commodity derivative markets to hedge the risks related to their physical activities and assets. CMCE's key purpose is to engage with policymakers and regulators to promote liquid and well-functioning commodity derivative markets in Europe.