THE DIRECTOR GENERAL

Ms Danuta Maria Hübner
Member of the European Parliament
European Parliament
Rue Wiertz 60
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BELGIUM

27 September 2023

Dear Member of the European Parliament,

The European Market Infrastructure Regulation (EMIR)

I write to you regarding current discussions on the proposed amendments to the European Market Infrastructure Regulation (EMIR).

BusinessEurope strongly supports upholding the existing clearing exemption for non-financial counterparties (NFCs) which use 'over-the-counter' (OTC) derivatives in conjunction with risk mitigation of underlying real economic risks. The retention of this risk management (hedging) exemption is crucial for the real economy, and we thus hope that the Commission's proposal will be accepted by the legislator. Amendments to the proposal that seek to change the EMIR regime regarding non-financial companies, especially in relation to the removal of the hedging exemption, would, if accepted, lead to companies with larger derivative exposures falling under the clearing obligation even though they mainly or exclusively use derivatives to mitigate risks from fluctuations of currencies, interest rates, or commodity prices. Risk-mitigating derivatives are of strategic importance in the risk management of non-financial companies, they stabilise cash-flows and enhance creditworthiness. As such they do not contribute to systemic risks in the financial system, as set out in the current rules, so we urge you to support the Commission's proposals to the clearing threshold calculation methodology under Article 1 0, notably to exempt centrally cleared derivatives from these calculations and to limit these calculations to non-centrally cleared derivative positions of group members established in the EU. Otherwise, it would be harder for corporates to hedge their commercial risks using derivatives which implicitly leaves businesses having to either accept higher levels of risk (such as exposure to interest rate and currency exchange rate fluctuations or in extremis to reduce the commercial activity).

We also support the creation of an "active account requirement" excluding cleared derivatives from the clearing threshold calculation (which adequately reflects that clearing already mitigates the risk of these instruments) and we welcome proposals to extend eligible collateral to (uncollateralised) commercial bank guarantees and allow non-financial companies to continue to act as direct clearing members. We also support the Commission's proposal to improve the transparency and predictability of margin

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calls, and subsequent amendments that ensure that CCPs provide clearing members with the information they need, to provide transparency to clients.

Having said that, we are concerned about some parts of the Commission's proposal and subsequent amendments.

First, we urge that European non-financial companies should be able to continue to centrally hedge the commercial risks of their entire corporate group. This means that also in the future a centralised risk management by a central group entity should remain possible, i.e., on behalf of the other group entities, to avoid that these companies have to include in their clearing threshold calculations trades entered into for hedging risks of other entities within their group. Therefore, we support re-instating in Article 10(3) of EMIR a wording that allows corporate groups to continue having a centralised entity in their non-financial group which role is to reduce (hedge) the group-wide commercial or treasury financing activities. In this context we would like to mention that proposals to include transactions undertaken by any part of a corporate group worldwide in the clearing threshold calculation seem to us to damage the competitiveness of European firms in the global marketplace. As proposed by the EU Commission, it is more appropriate to limit these calculations to non-centrally cleared derivative positions of group members established in the EU.

Second, the exemption for the reporting requirements for intra-group transactions should not be removed. Intra-group transactions are typically used by centralised treasury units within corporate groups to mirror external transactions and to re-distribute risk to and from operative entities; they do not increase the overall risk of the group in total or have any effects on financial markets. Intra-group transactions are for hedging purposes only so there is always an underlying economic business subject to hedges (the effects of the underlying commercial business and the hedging transactions offset each other). Also, centralising treasury activities with intra-group transactions clearly benefits from the financial expertise gathered in a specialised treasury unit of the group or on headquarter level. Consequently, many companies notified their supervisory authorities that they will make use of the reporting exemption. Another practical problem with intra group reporting is that it cannot be delegated easily to banks, whereas the external facing transaction can be (and is covered by current EMIR). Removing the exemption now would oblige these companies to re-establish both their reporting infrastructure and processes, which would be extremely burdensome and costly, so we support amendments to the Commission proposal that seek to maintain the exemption.

Third, we are concerned about amendments that seek to bring non-EU firms into the scope of EMIR reporting. Extending the reporting obligation to all subsidiaries across the world of an EU parent company on a general basis, even if no EU-product, EU-venue, or EU-entity is involved would impose heavy administrative burdens and create significant additional costs without obvious benefit. In many cases, the non-EU entities will already be reporting trades to trade repositories in other jurisdictions, leading to recurring and possibly non-consistent reporting.

And lastly, while we support the creation of an "active account" requirement, we are concerned by its contemplated scope. We consider that the "active account" should include only the own account activities of EU financial counterparties and EU non-

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financial counterparties subject to the EMIR clearing obligation. It should notably exclude market making activities and client clearing activities provided by EU financial institutions to non-EU counterparties and to EU counterparties not subject to the EMIR clearing obligation. These counterparties are by nature excluded from EU clearing requirements and including in the "active account" derivative transactions contracted with them would not contribute to relocate clearing activities into the EU. What's more, imposing such a requirement would lead these counterparties to trade away from EU financial institutions.

We hope that you share these concerns and remain at your disposal should you wish to discuss this further.

Yours sincerely,

Markus J. Beyrer