Deutsches Aktieninstitut

Reporting exemption for intra-group transactions (Art. 9 EMIR REFIT)

For a lean and workable notification procedure

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Introduction

Art. 9 EMIR REFIT exempts intra-group transactions from the reporting obligation where at least one of the counterparties is a non-financial company. Those counterparties who intend to apply the exemption have to notify their competent authority.

The details of the notification process are not specified so far. Deutsches Aktieninstitut is convinced that the notification process should be as lean as possible. Otherwise, the overarching aim of the legislator, to provide a significant relief for non-financial companies, cannot be achieved. If the notification procedure does not adequately strike a cost-benefit balance, non-financial companies will have no realistic choice but to continue reporting of their intra-group transactions using an infrastructure already available.

For that reason, Deutsches Aktieninstitut proposes the following key aspects of a well-balanced notification procedure:

Free choice of firms to make use of the exemption

As long as a non-financial company has not made the required notification that is agreed upon by the national competent authority, it remains subject to the intragroup reporting obligation. Therefore, the exemption is optional and applies to those non-financial companies who wish to benefit from it by notifying their national competent authority thereof. It can occur at any time after the entry into force of EMIR REFIT. Nevertheless, the choice to unwind reporting of intra-group transactions depends on the specifics of the notification procedure (see below).

Only one notification should be required

From a cost-perspective, it is not feasible for every subsidiary, which is a counterparty of an intra-group transaction, to perform the notification procedure on their own. Even in smaller companies, dozens of group entities are involved in intra-group transactions. In bigger companies, this number easily surpasses 100 entities. As these entities domicile in different EU jurisdictions, it is also very likely that they would be subject to different notification requirements. This would lead to an unreasonable amount of applications featuring different requirements and would be too costly to handle for the market participants.

Hence, it should suffice that the central risk management unit (central treasury, parent company etc.) files the application with its national competent authority on behalf of all subsidiaries in the group.

Reflect the group structure as a "living" organization

Company structures are frequently subject to organizational changes due to entity restructuring, e.g. mergers, acquisitions, spin-offs or carve-outs. In a carve-out situation this can easily be a two-digit number for larger international companies. Most restructurings comprise a sequence of legal steps. The different legal entities constituting the „new" group are not established at once but one after the other. This would require a notification on a weekly basis. Besides these specific restructuring cases, acquisition/selling of companies/group entities is part of the „normal" business and occur many times a year. Furthermore, already existing subsidiaries may not have required derivative hedges in the past.

Therefore, the notification should comprise all parts of the group without specifying the individual group members. In that case, the central risk management unit confirms that the conditions given in EMIR REFIT are met for all of those entities using intra-group transactions. A list of the relevant group members included in the exemption would be superfluous. Otherwise, amongst others, an additional notification would be required after the initial notification in order to deal with changes in the group structure. Companies as well as supervisory authorities would have to spend extra resources processing additional notifications.

Furthermore, the validation of the notification could take up to three month. Without a valid exemption, companies would be required to report the relevant intra-group transactions during this period in order to comply with the reporting obligations. Obviously, it is not economically justified to implement a reporting structure and then abandon it a short time thereafter.

Bona-fide statement for the legal conditions should be sufficient

As EMIR REFIT does not prescribe any format for the notification national competent authorities should keep the notification process as lean as possible, ideally based on a short template form. A bona-fide statement of the firm that the legal conditions set out in Art. 9 (1), subpara. 2, lit a – c EMIR REFIT are fulfilled should be sufficient. The national competent authority may at any time request additional justifications on an ad-hoc basis if necessary – which the NFC shall then provide. In addition, national authorities could decide whether they take into account information already gathered e.g. by the external auditor.

Conclusion

Regulators should appropriately consider these proposals. Otherwise, many non-financial companies might refrain from the onerous notification process and hence would not benefit from the exemption. This would contradict the aim of the legislator to decrease operational burden and to streamline regulations for non-financial companies.

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