Deutsches Aktieninstitut

Make the intra-group exemption as lean as possible

Non-financial companies must benefit from the reporting relieves without too much bureaucracy

Response to ESMA's consultation on "Draft Guidelines for reporting under EMIR", 30 September 2021

Introduction

Deutsches Aktieninstitut (identification number: 38064081304-25) represents the entire German economy interested in the capital markets. The about 200 members of Deutsches Aktieninstitut are listed corporations, banks, stock exchanges, investors and other important market partici-pants. Deutsches Aktieninstitut keeps offices in Frankfurt, Brussels and in Berlin. We followed the legislation process regarding EMIR very closely, expressing the view of non-financial companies using derivatives in their risk management.

More and more of our member companies want to benefit from the reporting exemption for intra-group transactions. Proceeding this exemption should be as lean as possible.

Answers to selected questions

Q13: Are there any other clarifications required with regards to the IGT exemption from reporting?

The relevant point in time should not be the NCA's objection, as stated in no. 54, but rather the date of receipt of the objection by the respective counterparty. We also consider it worthy to revaluate, that the objection of an already granted exemption by the NCA becomes valid with immediate effect. We do not see how a counterparty could seek effective legal protection against such objection issued by an NCA: the counterparties are then required to immediately report until a final decision is reached in a court of law. Furthermore, counterparties should get enough time to implement the reporting structure, which could be a complex and time-consuming process.

The wording of no. 56 in connection with 55 lit. a as proposed is unclear: No. 56 does not explicitly state that, for the purposes of the application for the exemption, it is not the ultimate parent undertaking, but the relevant parent undertaking that may apply for the exemption. We believe it should not be the ultimate parent undertaking that is in charge of the exemption application for the following reason: Parent undertakings of a subgroup ("Teilkonzern") have a legitimate interest in benefitting from the exemption and, hence, in applying for the exemption on their own. They may be the (sole) hedging counterparties for the respective part of the group and, therefore, required to report under EMIR. Therefore, it should be clarified that it is the parent undertaking and not necessarily the ultimate parent undertaking applying for the group exemption.

No. 57 should also provide for language regarding "anticipating" notifications to the NCAs. By "anticipating" notifications, we mean notifications by counterparties who are not required to report today but will be required to do so in future (for example, because they do not engage in derivatives trading at all today but will do so in the future). They will, however, have to fulfil the conditions for the intra-group exemption as from the same moment from which on they are required to report. Such counterparties have a legitimate interest in avoiding the need to implement the reporting infrastructure if it is already clear that they will be exempt from the reporting obligations. Hence, such counterparties would want to notify the relevant NCAs at the earliest possible point in time, i.e., today, but only make use of the exemption in future.

Under no. 57 as currently drafted it seems that such "anticipating" notifications are not admissible. If so, counterparties unable to state vis-à-vis the relevant NCA today that they "fulfil the conditions laid down in the third subparagraph of Art. 9(1) EMIR" may hence not send an anticipating notification to the NCA. We believe that this contradicts the clear letter and intent of the EMIR which refers to the "intention to apply the exemption". We therefore propose to amend to "fulfil the conditions laid down in the third subparagraph of Art. 9(1) EMIR as of the date the applicant intends to apply the exemption".

We believe the suggested wording in no. 60 conflicts with EMIR: There is no need to link the NCA's decision to each other, as each NCA will only grant the exemption (actively or by omission of a reaction) limited to its national jurisdiction. Hence, only the counterparty which is regularly required to report in this specific jurisdiction will be exempt. We do not see why the exemption of the NCA of the other counterparty should play a role. Moreover, it is not clear from the proposed language whether no. 60 only relates to a two-party scenario or also a multi-party scenario. It would be counterintuitive and too onerous for applicants to have to wait for the last NCA's decision any multi-party scenario (for example, where entity A in member state A serves as counterparty for a multinational group, i.e., as counterparty to entity B in member state B and to entity C in member state C).

Q14: Are there any other clarifications required for the handling of derivatives between NFC- and FC?

No. 65 lit. c states that the NFC- should "renew" its LEI after the FC becomes solely responsible for the reporting. Although the LEI has to be renewed once a year, this requirement seems misleading, as most of the NFC- already have a valid LEI in place; therefore, a "new" LEI is not necessary, which should be clarified.

Q18: Do you see any other challenges with the delegation of reporting which should be ad-dressed?

In order to avoid misunderstandings it would be helpful to clarify that the delegation process according to 5.5 is something different than the requirement of FCs to report for the NFC- according to 5.4.2.

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