Deutsches Aktieninstitut

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EMIR 3.0: Constructive Agreements reached on Parliament and Council Level

Clarification is needed regarding the proposed third country reporting provisions

Proposal for a Regulation amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 (EMIR 3.0), Mandates for Trilogue Negotiations, 14 December 2023

Agreements heading in the right direction

Deutsches Aktieninstitut follows the EMIR legislation process very closely expressing the view of non-financial companies using derivatives in their risk management. After reaching an agreement, we welcome the following positions that both, the European Parliament and the European Council, have adopted:

- The re-introduction of the reporting exemption for intra-group transactions for non-financial counterparties (Council) and non-financial counterparties which did not cross the clearing thresholds (Parliament);
- The exclusion of cleared derivatives from the clearing threshold calculation;
- To limit the clearing threshold calculation to derivative positions of legal entities established in the EU;
- The possibility to hedge on group level due to a hedging definition covering the whole group and not only the entity;
- The extension of eligible collateral to commercial bank guarantees;
- To improve of transparency and predictability of margin calls;

Nevertheless, there is uncertainty regarding the reporting requirement for counterparties established outside the Union and belonging to a group subject to consolidated supervision proposed by the European Parliament. It should be clarified that this requirement is limited to financial counterparties, as non-financial counterparties are not in the scope of a consolidated supervision. Otherwise, this extension would impose unnecessary and disproportionate reporting requirements by subjecting non-EU entities to the EMIR reporting obligation in addition to third country reporting obligations such as UK EMIR (for UK entities) or Dodd-Frank (for US entities). This proposal would then negate the principles of substituted equivalence and regulatory cooperation which have been put at the centre of financial market regulation following the 2008 financial crisis. Such an initiative would put European non-financial groups at a competitive disadvantage as they would face double reporting obligations and associated costs which might only be increased by non-EU regulators taking a similar stance. Also, we do not see any additional benefit from a supervisory perspective for such double reporting. Last but not least, as third country banks are not obliged to report on behalf of the non-financial counterparties, the delegation possibility for non-financial counterparties under EMIR would run dry, contradicting the aim of the legislator to alleviate reporting burdens.

Furthermore, we oppose the Council proposal that Article 10(3) should only enter into force when the regulatory technical standards referred to in Article 10(4) are enacted. This would mean a delay which we deem completely unjustified.

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