

**EMIR-Refit: Comments on the  
upcoming Trilogue Negotiations –  
Retain the Hedging Exemption and  
provide substantial Burden Relief for  
Reporting**

Comments on the Proposal of the European Commission for a Regulation amending Regulation (EU) No 648/2012 (EMIR), amended by the European Parliament on 12 June 2018 and the Council of the European Union on 11 December 2017,  
18 June 2018

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## Introduction

Deutsches Aktieninstitut has followed the review process of EMIR very closely from the perspective of Non-Financial Companies (“NFC”) using derivatives in their risk management. Please find below our comparative assessment of the European Commission’s proposal for a regulation amending regulation (EU) No 648/2012 (EMIR), amended by the European Parliament in its report of 12 June 2018 and the general approach reached by the Council of the European Union on 11 December 2017.

### 1 Clearing Thresholds and Hedging Definition

EMIR exempts NFCs from clearing and margining requirements if they do not cross the clearing thresholds. Derivatives used for the mitigation of risks stemming from the operative businesses (e.g. to hedge against currency, interest rates or commodity price fluctuations) are not counted against the thresholds. By this, the legislator acknowledges that derivatives are of utmost importance for the risk management of NFCs. Hedging with derivatives stabilizes cash flows thus enhancing creditworthiness and long-term ratings of NFCs.

We welcome the proposal of the Commission and the Council to retain the hedging exemption currently in force. We however reject the proposed policy change put forward by the European Parliament that the clearing threshold shall be regularly updated in order to increase the clearing rate for the following reasons:

- The main purpose of clearing is to enhance financial stability. Therefore, clearing is an issue mainly for financial counterparties or NFCs with a significant volume of derivatives not being classified as hedging. This is also acknowledged in the EMIR proposal (see recital 7): “Non-financial counterparties are less interconnected than financial counterparties. They are also often active in only one class of OTC derivative. Their activity therefore poses less of a systemic risk to the financial system than the activity of financial counterparties.” Further, clearing or bilateral collateralisation by NFC- would undermine financial stability as the respective NFCs would have to find additional funding to post margins, primarily from banks, resulting in an overall increase in solvency risk.
- Retaining the current and well established hedging definition and the clearing thresholds is obviously the aim of all co-legislators, as neither European Parliament, the Council nor the Commission proposed any

amendments for adjustments of the respective rules under Article 10 EMIR.

- So far, the clearing thresholds and the definition of hedging under EMIR reflects common international standards resulting in an exemption in other major third countries with important derivatives markets (Japan, US, Canada, Australia, Singapore, HK, Republic of Korea). To adjust the clearing thresholds in order to push more NFCs into the clearing obligation would lead to an uneven level playing field at international level and puts European non-financial companies in a less favorable position compared to their competitors. As an example, thresholds for NFCs under the US-Dodd-Frank reflect much better the corporate practice (e.g. thresholds based on market values, not nominal exposures). And the recent review activities of the Dodd-Frank-Act have delivered less stringent rules, not the opposite. Bearing that in mind, we strictly reject to impose stricter rules in the EU, given there have been no events in markets justifying such a move.
- The main instrument used by NFCs are FX derivatives. According to an analysis conducted by ESMA FX transactions amount to 73 per cent of the total volume of derivatives used by NFC-. So far, on European level there exists a clearing obligation for FX non-deliverable forwards only. Other FX derivatives are not in the scope of the clearing obligation due to the fact that there is no respective offer from central counterparties. The reason is that these instrumentes are in the majority of cases of shorter maturities and clearing efforts are too costly for this short time span. Therefore, the realistic potential to increase the clearing volume by pushing more non-financials in the clearing obligation is very limited.
- Last, the amendment in the EU Parliament`s report to review the thresholds periodically is superfluous as ESMA already has this mandate in the current EMIR text. For the reasons mentioned above we do not see the need for any adjustments.

## 2 Reporting Issues for NFCs

We welcome the proposed burden relief for NFCs by changing the current reporting regime. As a prerequisite for effective burden relief, we deem it important that all transactions have to be included in the proposed exemptions. Otherwise, due to the fix cost character most NFCs would have to retain the respective reporting infrastructure anyway.

The approach to achieve the aim to alleviate reporting burdens for NFCs differs among the co-legislators:

- Legal liability should be restricted to the financial counterparty under a single sided reporting regime. The EU Parliament and the Council propose a clear liability shift to the financial counterparty regarding the accuracy of the reporting.
- For single-sided reporting to be implemented holistically, third-country banks must be able to report under the European rules. The EU Parliament proposes a practical solution (not included in the Council proposal) by establishing a Union-wide register for third-country financial counterparties to become subject to the reporting requirements voluntarily as if those third-country financial counterparties were a financial counterparty established in the Union.
- The reporting exemption for intragroup transactions must apply to all transactions within a group worldwide without any restrictions. Anything else will contradict the political aim to provide significant burden relief for NFC-. Therefore, we welcome the proposal of the Council and the EU Parliament to extend the exemption on the world wide group. It should however also encompass risk mitigation techniques, see 5 in this paper.
- Above mentioned issues remain to be clarified to make the proposed single sided reporting regime a success story. Therefore, NFC- should have the possibility to assess their situation individually. Hence, we support the option to stick to the current dual sided system, having the required infrastructure in place anyway. The option to continue the dual sided reporting is proposed by the EU Parliament and the Council.

### 3 Clearing Obligation

While we welcome the idea to “ringfence” transactions already concluded when the clearing thresholds are crossed, the cost savings of this step would be very limited for non-financial companies if there was still the requirement for bilateral collateralization in place. Therefore, we welcome the EU Parliament proposal which brings both requirements – for clearing and bilateral collateralisation – in line by stating that the scheduled reliefs for the clearing obligation include the omittance of bilateral collateral exchanges.

## **4 Counterparty Classifications**

Currently securitisation special purposes entities (SSPEs, e.g. for automotive leasing receivables) are classified as NFC. The Commission proposed to reclassify SSPEs as financial counterparties which would unconditionally trigger the clearing obligation and would require the posting of collateral, even if the derivatives are used for hedging purposes only. Furthermore, the relevant vehicles are highly unlikely to get access to eligible collateral and will be restricted in their activities by the terms of the transaction documents. This would be counterproductive to the European Commission's Capital Markets Union efforts to revive the securitisation markets and should hence be reversed. Therefore, we welcome the proposal of the Council and the European Parliament not to include SPVs as financial counterparties.

## **5 Risk Mitigating Techniques**

We welcome the European Parliament's for an exemption of intragroup transactions from risk mitigation techniques such as timely confirmation, portfolio reconciliation etc. This amendment is an important supplement of the reporting exemption for intragroup transactions.

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