THE DIRECTOR GENERAL

Ms Danuta Maria Hübner
Member of the European Parliament
European Parliament
Rue Wiertz 60
B-1047 Brussels
BELGIUM

16 May 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 the proposed amendments to the clearing threshold calculation methodology under Article 10, 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. 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). We welcome proposals to extend eligible collateral to (uncollateralised) commercial bank guarantees and to improve the transparency and predictability of margin calls. We also strongly support 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. However, we are concerned about some parts of the proposal.

First, we urge that European NFCs should be able to continue to centrally hedge the commercial risks (in particular commodity, foreign exchange and interest rate 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 NFCs have to include in their clearing threshold calculations trades entered into for hedging risks of other entities within their group. Therefore, we propose to re-instate 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.

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. Removing the exemption now would oblige these companies to re-establish both their reporting infrastructure and processes, which would be extremely burdensome and costly. On top of that, there would be the significant implementation costs for technical changes in reporting formats remaining from EMIR Refit, due in 2024.

We fail to see the reason for removing the reporting exemption as it makes no sense from an economic perspective to "speculate" with intra-group transactions. Potential losses of an intra-group transaction occurred for a group member are offset by potential gains of the other group member. There is no possibility to make profits/losses in a group as a whole. Groups are also not connected with the financial system through intra-group transactions but via external derivatives concluded with banks. Intra-group transactions have an exclusively internal focus, and, as such, those transactions do not significantly contribute to systemic risk. Also, as external transactions are reported to trade repositories, supervisory authorities already get a clear picture on the derivative position of non-financial companies and their interconnectedness to the financial system. We also do not understand how transparency of intra-group derivative transactions could have contributed to a prevention of firms' liquidity stress in the context of the energy crisis. In fact, a few gas importing energy companies had to be rescued from insolvency with state aid that was triggered by the stop of the gas delivery under long-term energy delivery contracts with certain gas suppliers, not because of firms' exposure to (speculative) derivative transactions and consequential margin calls. As market participants must report futures and all other external transactions, such external risk positions should be already known to the regulatory authorities.

Third, we are concerned about the possible review by ESMA of the "hedging" definition through regulatory technical standards (RTS). We underline that any modification to the definition shall ensure the current exclusion from clearing obligation of all NFCs using financial derivatives for hedging purposes. For the other aspects of draft regulatory standards, recital (16) sets objectives that we support, such as coherence of the hedging definition with market developments, a more granular approach for commodities classes allowing a differentiation amongst energy, metals and agriculture, and values of thresholds updated on the basis of market volatility. We also welcome recommending to ESMA to consult relevant stakeholders that have specific knowledge on specific commodities and that RTS wording shall guarantee consistency between mentioned objectives and practical implementation.

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-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