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Industry voices its concerns over EMIR 3.0

Background

As readers will be aware, on 7 December 2022, the European Commission published a [package of proposals](#) seeking to develop the EU's Capital Markets Union (**CMU**), including a proposal to amend the European Market Infrastructure Regulation (**EMIR**)¹ seeking to make derivatives clearing in the EU more attractive. This [proposal](#) is commonly referred to EMIR 3.0.

The Commission views the proposal as strengthening the supervisory framework of the EU clearing ecosystem and contributing to the development of a more efficient and safer post-trading landscape in the EU.

The EMIR 3.0 proposal includes measures to improve the attractiveness of EU counterparties (**CCPs**). It seeks to simplify the procedures for CCPs launching products and changing models as well as introducing a non-objection procedure for certain changes. The proposal also includes measures to reduce the excessive reliance of EU market participants on non-EU CCPs as well as other miscellaneous measures such as amendments to intragroup transactions, changes to reporting obligations and risk mitigation measures, changes to clearing thresholds and proposals in relation to Non-Financial Counterparties (**NFCs**). It also seeks to amend rules governing CCPs participation and collateral requirements.

In addition, a separate proposed [Directive](#) seeks to amend the UCITS Directive², Investment Firms Directive (**IFD**)³ and Capital Requirements Directive (**CRD**)⁴. There are also proposed amendments to the Money Market Funds Regulation (**MMF**)⁵ to exclude centrally cleared derivative transactions from counterparty risk limits.

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¹ Regulation (EU) No 648/2012 as amended

² Directive 2009/65/EU

³ Directive (EU) 2019/2034

⁴ Directive 2013/36/EU

⁵ Regulation (EU) 2017/1131

ISDA, AIMA, EFAMA and FIA publish a joint statement on EMIR 3.0

On 2 February 2023, the International Swaps and Derivatives Association, Inc. (**ISDA**), the Alternative Investment Management Association (**AIMA**), the European Fund and Asset Management Association (**EFAMA**) and the Futures Industry Association (**FIA**) published a [joint statement](#) in response to EMIR 3.0 strongly objecting to certain elements of the proposal.

One of the most noteworthy elements of EMIR 3.0 is the proposal to require EU market participants to clear a proportion of their transactions in certain derivatives at active accounts at EU CCPs (**Active Account Requirement**), thereby moving a significant proportion of euro derivatives trading to EU CCPs. The proposal seeks to counter risks to the EU financial stability which the European Commission believes arise from the concentration of clearing in some third-country CCPs, notably in a stress scenario. It is proposed that this requirement will be introduced by the insertion of a new Article 7a into EMIR.

The classes of derivatives which are proposed to fall in scope initially, subject to regulatory technical standards, are those set out below:

- (i) interest rate derivatives denominated in Euro or in Polish Zloty,
- (ii) credit default swaps denominated in Euro, and
- (iii) short-term interest rate derivatives denominated in Euro.

The list of classes can be increased as on foot of additional regulatory technical standards following an assessment by ESMA on the basis of whether a class of derivatives poses a threat to financial stability/ are of substantial systemic importance.

The proportion of activity for each class of derivative for which an active account must be used has not yet been specified and this will be determined by regulatory technical standards to be prepared by ESMA. It is also proposed that clearing members and clients that clear through a non-EU CCP will need to provide certain annual reporting to their relevant competent authority. This will also be determined by future regulatory technical standards.

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ISDA, AIMA, EFAMA and the FIA have strongly objected to the proposed Active Account Requirement stating that;

“The EC has taken some important steps towards strengthening the competitive position of Europe’s growing derivatives markets in the EMIR 3.0 proposal....

However, the EC has proposed that firms subject to the EU clearing obligation should have an active account at an EU CCP, while giving the European Securities and Markets Authority the power to define the portion of certain euro- and Polish zloty-denominated contracts that should be cleared through those accounts via secondary regulation.

Changes to capital rules would reinforce this, making it less commercially viable for EU market participants to clear through CCPs based outside the EU.

We remain convinced that these measures, as proposed, would be harmful to EU capital markets. They would make EU firms less competitive and would have a negative impact on the derivatives market, EU clearing members and their clients, EU investors and savers, and the Capital Markets Union. For EU firms, this would not only hinder their ability to provide best execution to clients but would also be costly to implement”.

Currently, the equivalence of U.K. CCPs (ICE Clear Europe, LCH and LME) is set to expire on 25 June 2025. The proposal will result in the movement of a significant portion of trading from ICE Clear Europe, LCH and LME to EU CCPs.

ISDA Comments on EMIR 3.0

On 2 February 2023, ISDA also published its full [comments](#) on EMIR 3 package in which it sets out its support for certain measures within the proposal and highlights its concerns in other areas. Areas for concern highlighted by ISDA include:

1. New reporting for clearing members and clients.

EMIR 3.0 proposes that clearing members and clients that clear through a non-EU CCP will need to provide certain annual reporting to their relevant competent authority. This will also be determined by future regulatory technical standards.

ISDA is concerned by what it views as “*An overly complex and burdensome reporting for clearing participants, especially clients and end-users*”. It calls for the scope of the proposed reporting to “*be significantly narrowed to take into account the costs and operational burden for market participants, especially clients.*”

2. Intragroup transaction exemptions

Under the current EMIR regime, the exemptions from the clearing and bilateral margining requirements for transactions with third country entities under Article 4 and Article 11 of EMIR can only be requested by counterparties (FC or NFC) if the third country entity is located in a jurisdiction for which an equivalency decision has been issued by the European Commission. The EMIR 3.0 proposals seek to remove this requirement for an equivalency decision.

Whilst ISDA “*very much welcomes the removal of equivalence as a pre-condition for the availability of the intragroup transaction*”, it has raised concerns over the proposal within EMIR 3.0 to empower the Commission to adopt delegated acts from time to time identifying additional third countries whose entities may not benefit from the intragroup exemptions (beyond AML high risk countries and non-cooperative jurisdictions for tax purposes).

ISDA believes that this power “*will re-introduce an element of uncertainty for firms*”. ISDA also concerned by the full deletion of Article 13 of EMIR (mechanism to avoid duplicative or conflicting rules) and it calls for the mechanism to be retained in the Level 1 text “*to enable avoidance of duplicative or conflicting rules*”.

3. Reporting by NFCs

The EMIR 3.0 proposal seeks to amend Article 9 of EMIR to remove the existing exemption from reporting requirements for intragroup transactions where at least one of the counterparties is an NFC. ISDA has expressed its concern in relation to this proposal on the grounds that *“removal of this exemption would impose significant costs on NFCs”*.

4. Transparency of margin models

ISDA objects to the proposal in EMIR 3.0 which will require clearing members and clients providing clearing services to be required to inform their clients of the possibility of clearing through an EU CC. ISDA argues that *“Transparency about margin models should come from CCPs. Clearing members cannot provide more transparency than they receive from CCP”*.

5. Additional measures

ISDA has called for the introduction of additional measures which are not yet addressed in EMIR 3.0 such as *“making the exemption from margin requirements for single-stock equity options and index options permanent”*.

6. Introduction of Pillar 2 measures

ISDA is concerned about the introduction of Pillar 2 measures to address a perceived concentration risk at CCPs as it is fearful of placing EEA firms at a competitive disadvantage in relation to non-EU firms.

General Queries

If you have any questions or require assistance, please contact the authors or your usual Dillon Eustace contact.

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