German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

on the Proposal of the European Commission for a Regulation amending EMIR (Regulation (EU) No. 648/2012)

Register of Interest Representatives

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A. General Comments

We, the German Banking Industry Committee (GBIC), representing more than 1,700 banks in Germany, would like to take the opportunity to bring to you attention our concerns regarding the proposal of the European Commission for a regulation amending EMIR (Regulation (EU) 648/2012).

As a general remark, we welcome most of the contemplated amendments, such as deletion of the backloading and frontloading requirements as well as the possibility to suspend the clearing obligation in situations other than resolution.

B. Comments on individual provisions

1. Cross references concerning a delayed application

Article concerned: Art. 2 (proposal)

Article 2 of the proposal defines a delayed application for article 1 para. 7 lit (d) and (e) of the proposal.

We note that the proposal does not contain these articles and therefore recommend clarifying to which parts of the regulation the delay applies.

2. Non-discriminatory access to clearing services

Article concerned: Art. 4 para 3a (new)

The new paragraph 3a stipulates that clearing members shall provide clearing services – whether directly or indirectly – under fair, reasonable and non-discriminatory commercial terms.

While we of course support the general approach that access to clearing should be granted under fair, reasonable and non-discriminatory commercial terms we see the need for a clarification in view of the risk associated with client clearing and indirect clearing. Institutions must be remain to able to determine for themselves if and under which terms they are prepared to offer clearing services, be it as a clearing member or as an intermediate. It should therefore expressly be clarified that clearing members or intermediates are not under any obligation to take on any customer as a direct or indirect client (no obligation to enter into contracts).

3. Suspension of Clearing-Obligation

Article concerned: Art. 6b (new)

As already pointed out above in the introduction, we fully support the introduction of a provision allowing for the temporary suspension of the clearing obligation by way of the introduction of a new Art. 6b.

As regards the proposed provision itself, we have only the following two comments and suggestions:

- Art. 6b para. 1 lit. (c) – conditions for a suspension

It could be clarified that the conditions under lit. (c) can be considered to be met where one or more CCPs lose their authorisation/recognition as a CCP for the purposes of EMIR.

- Art.6b para. 6

The proposal currently only allows for a maximum suspension period of twelve months. However, the possibility can at least not be fully excluded that the conditions which where the cause for the suspension continue to prevail for more than 12 months. It should therefore be considered to delete the 12 months maximum limit or at least to provide for rules how to address exceptional situations.

4. Single-sided reporting

Article concerned: Art. 9 para 1a (new)

According to subparagraphs (a) and (b), CCPs and financial counterparties respectively are responsible for reporting for both respectively the non-financial counterparty. We understand that ESMA wanted to introduce a single-sided reporting for ETDs as well as OTC derivatives where one of the counterparties is a non-financial counterparty not exceeding the clearing threshold. In such cases the non-financial counterparty or both counterparties (ETDs) are not subject to a reporting obligation.

Generally, we welcome the Commission's willingness to simplify the reporting obligation for small counterparties. However, we understand, that even one counterparty may not any longer be subject to the reporting obligation, the other party will still have to report its own report as well as the other party's report. Thus, even in cases of single-sided reporting, two or more reports have to be submitted. Moreover, the non-reporting counterparty still needs to provide further transaction information (such as whether the transaction is used for hedging purposes and other data). Thus, small counterparties will still be required – on the basis of delegation agreements which are currently already in place – to contribute and actively participate in the reporting process. The only material change in comparison to the present situation would be that the exempted counterparty would no longer be obliged to review the transaction report. Hence, the proposed changes do not significantly simplify the reporting obligation. We, therefore, reiterate our position that a meaningful simplification can only be achieved by introducing a true single sided reporting where only one report has to be submitted by the central counterparty or the relevant financial counterparty without the need to provide a further report on behalf of the other counterparty.

Furthermore, since the proposal means that the reporting counterparty still relies on information provided by the exempted counterparty, it should be clarified that the reporting counterparty cannot be responsible for the accuracy and completeness of information, which can only be provided by the exempted counterparty. To this end, there is a need for clarification of the precise nature and scope of responsibilities of the reporting party. Under the current wording (Art. 9 Para. (1a)) the CCP or financial counterparty reporting on behalf of both counterparties is not only "responsible" for the reporting but also obligated to "ensure" that the contracts are reported "accurately and without duplication". The wording is at least misleading and can be easily misconstrued: While the reporting party will of course be obliged to be duly diligent when reporting on behalf of another counterparty, it will nevertheless be dependent upon the cooperation of the counterparty on whose behalf the reports are being made. Consequently, the reporting counterparty cannot be held liable for any breaches resulting from insufficient or inaccurate information provided by the counterparty on whose behalf the reports are being made. For example, the reporting counterparty cannot be held liable for the accuracy of the LEI communicated to it by the other counterparty, etc. It should therefore be clarified that the reporting counterparty can only be held liable for any deficiencies and inaccuracies arising within its sphere of influence.

5. ESMA's empowerment to draft implementing technical standards regarding the reporting obligation

Article concerned: Art. 9 para 6 (amended)

In paragraph 6 (a) LEI, UTI and ISIN are explicitly mentioned as data standards and formats to be specified by ESMA. Since these terms are already part of the Level II reporting standards we do not see any advantage in including these terms. Therefore, we would propose to delete this explicit reference.

Furthermore, paragraph 6 (b) enables ESMA to specify the methods and arrangements for reporting. We cannot assess what exactly is intended by this empowerment and would propose to delete it.

One area where technical standards could be helpful to prevent uncertainty and inconsistencies would, however, be the coordination of the timeline of the beginning of the reporting obligations under MiFIR on the one hand and under EMIR on the other.

6. ESA's empowerment to draft technical standards regarding the risk-management procedures

Article concerned: Art. 11 para 15 (a) (amended)

The ESA's right to draft regulatory technical standards has been significantly broadened and can be understood to cover a general right to develop technical standards regarding risk-management procedures. The precise scope and limits of these rights to develop technical standards are very vague. The references to levels and types of collateral and segregation arrangements as well as supervisory procedures to ensure initial and ongoing validation of the risk-management procedures do not set out any clear limits. This is, because these references only set out examples of the issues which may be addressed in the technical standards and do not necessarily limit or circumscribe the remit of the ESAs in this context. Such a far reaching right to set technical standards is neither desirable nor necessary, especially considering that this broad remit may result in very general and extensive standards which may overlap or even conflict with existing rules and standards already in place or under development (including standards to be developed under MiFID/MiFIR). We therefore strongly urge the commission to clearly describe and limit the precise scope of issues, which are to be addressed in these technical standards, namely the development of standards regarding the recognition and validation of standardised internal models for the calculation of initial margins.

7. Insolvency estate of the CCP or the clearing member

Article concerned: Art. 39 para 11 (new)

According to this new provision, the assets and positions recorded in such a way that the assets and positions are distinguished (i.e. assets and positions held in separate accounts, netting prevented, etc.); these assets and positions shall not be part of the insolvency estate of the CCP or the clearing member. We welcome this clarification, in view of the fact that indirect clearing can only work if applicable insolvency rules support the legal structures required to allow for indirect clearing chains. In this context we assume that the provision is intended to set out a requirement for member states to ensure that the national insolvency rules do indeed support the clearing chains, and in particular do not allow for a retroactive voidance of asset transfers or provide for damage claims of the insolvency estate of an indirect client or client against the intermediate, clearing member or CCP where collateral has been booked and transferred in accordance with EMIR requirements.

8. Fines

Article concerned: Art. 65 para 2 (amended)

The increase of the fines seems exorbitantly high. We are of the opinion that 100 000 EUR (subparagraph (a)) and 50 000 EUR (subparagraph (b)) are more appropriate.

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