Deutsches Aktieninstitut

ESMA: Consultation Paper on Draft Regulatory Technical Standards on contracts having a direct, substantial and foreseeable effect within the Union and non-evasion of provisions of EMIR

Comment of Deutsches Aktieninstitut e.V., 16 September 2013

1 Introduction

Deutsches Aktieninstitut represents the view of non-financial companies using derivatives almost exclusively to mitigate risks related to their commercial or treasury finance activities. Therefore, our answers on the Draft Regulatory Technical Standards (RTS) present the non-financial company's perspective.

2 Responses to Specific Questions

Q.1 Do you agree that a full or partial guarantee issued to the benefit of a third country counterparty by an EU guarantor, whatever is its form, be considered in order to specify the direct, substantial and foreseeable effect of the contract?

Yes, we agree. Furthermore, we confirm ESMA's view that guarantees issued by entities other than financial counterparties are not expected to be substantial. Therefore, it is justified to exclude guarantees by non-financial counterparties from the scope of the RTS.

Q.4 Do you agree that criteria related to the currency or underlying of the OTC derivative contracts should not be used to specify the direct effect of the contract within the Union?

Yes, we agree as this approach would disproportionally widen the scope of the RTS.

Q.5 Do you agree that contracts of third country subsidiaries of EU entities would not have a direct substantial and foreseeable effect within the EU?

Yes, we agree, as in the absence of a guarantee the subsidiary cannot rely on assistance of the parent company in case of financial distress or default.

Q.6 Do you believe that in absence of a guarantee, there is limited implicit backing by the EU parent of a third country subsidiary that can result in a direct, substantial and foreseeable effect in the EU?

We agree with ESMA's view that contracts entered into by third country subsidiaries of EU parent companies should not be in the scope of the RTS in the absence of an explicit guarantee.

Q.8 Do you agree that the acceleration of the obligation of listed entities resulting from the OTC derivative contract should not be considered to specify the direct, substantial and foreseeable effect of the contract?

Yes, we agree, as the reference to the contract details as discussed in the consultation paper would be disproportionate.

Q.9 Do you agree with a criteria based approach in order to determine cases where it is necessary or appropriate to prevent the evasion of any of the provisions of EMIR?

See our answer on Q.10.

Q.10 Do you agree that artificial arrangements that would have the primary purpose to avoid or abuse any provision of EMIR should be considered as cases where evasion of provision of EMIR should be prevented?

There are many reasons for corporates to implement a local treasury unit in a third country instead of using intra-group transactions between the EU treasury centre and the respective third country subsidiary. Examples are legal barriers for the cross border flow of capital imposed by the respective government or restrictions to convert the domestic currency into Euro. Therefore, the conjecture that the purpose of an arrangement is to evade the EMIR requirements should not be too narrow. Otherwise, many arrangements which are legitimate for several (legal, commercial, business etc.) reasons would be regarded as evasion of the EMIR provisions.

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