

MICHEL BARNIER

*Membre de la Commission européenne*

Brussels, 08. 07. 2014  
JC/tb D(2014) 2392454

Dear Mr Maijoor, *Jean Steven*.

Thank you for your letter dated 8 May 2014 on the application of the obligation set out in Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR) to clear OTC derivative contracts entered into after a central counterparty (CCP) has been authorised under EMIR and before the date of application of the clearing obligation (frontloading requirement).

Let me take this opportunity to thank you very much for ESMA's excellent work on implementation of EMIR, which is a cornerstone of our financial reform agenda. In the same vein, I am committed to ensure that the Commission contributes to a full and timely application of EMIR, in order to enhance financial stability and market transparency.

I welcome your explanation on ESMA's analysis of the frontloading requirement and your request on the Commission's views on it. The Commission is aware of the time constraints ESMA is subject to since the first authorisation under EMIR of a CCP on 18 March 2014. Therefore, it is of utmost importance to clarify some aspects of the frontloading requirement under EMIR to facilitate the development by ESMA of the draft regulatory technical standards (RTS) under Article 5(2) of EMIR, their submission to the Commission in a timely manner and their adoption by the Commission.

As explained in Recital 20 of EMIR, the frontloading requirement aims at ensuring a uniform and coherent application of EMIR and a level playing field for market participants. However, as pointed out in your letter, the application of the frontloading requirement does not ensure in all cases the achievement of the goals pursued by it. On the contrary, the application of the frontloading requirement to certain OTC derivatives may have substantial negative effects on the functioning of the market, financial stability and systemic risk. This is the reason why EMIR provides for the possibility to adjust the application of the frontloading requirement, through the determination of minimum remaining maturities adapted to the specificities of the different classes of OTC derivatives, which must ensure a uniform and coherent application of EMIR and a level playing field for market participants without undermining the overarching objective of the clearing obligation to reduce systemic risk.

On the basis of the above, the Commission is of the view that the frontloading of OTC derivatives should be avoided in cases where it would not ensure the achievement of those objectives.

Mr Steven Maijoor  
Chair  
European Securities and Markets Authority  
CS 60747  
103 rue de Grenelle  
75345 Paris Cedex 07  
France

The determination of remaining maturities should not result, in particular, in the application of the frontloading requirement to OTC derivatives concluded before counterparties could reasonably foresee that those contracts would need to be cleared as a consequence of the frontloading requirement. Such application could jeopardize the principle of legal certainty. In this respect, the Commission considers that before ESMA submits the RTS to the Commission, counterparties cannot reasonably foresee the terms of the frontloading obligation. Moreover, since the RTS may be amended or even rejected before they enter into force, some uncertainty may remain as to the concrete terms of the frontloading requirement until the delegated act adopting the RTS is finally published in the Official Journal.

In light of the above, the determination of remaining maturities should be carefully assessed and duly motivated on the basis of the goals pursued by EMIR in general, and by the frontloading requirement in particular, taking into account the specificities of the different classes of OTC derivatives and the degree of uncertainty inherent to the different periods mentioned in your letter (ie the period between the notification of a class of derivatives to ESMA and the entry into force of the RTS introducing the clearing obligation for that class of derivatives, and the period between the entry into force of the RTS and the date of application of the clearing obligation provided for in the RTS).

I appreciate your cooperation on this issue and remain at your disposal for any further discussion on this and on any other issues arising in our common work towards full and timely implementation of EMIR.

Yours sincerely,

  
  
Michel BARNIER