

Mr Olivier Guersent
Director General
Financial Stability, Financial Services
and Capital Markets Union
European Commission
Rue de Spa 2
1049 Brussels
Belgium

Re: EMIR Refit – Hedging exemption in the calculation of the clearing thresholds for non-financial groups

Dear Mr Guersent,

I am writing to you concerning an issue related to the implementation of the new EMIR Refit Regime with regards to the calculation of the month-end average positions of financial counterparties (FC) in non-financial groups, which is then used to determine whether these FCs are subject to the clearing obligation when they are above the clearing thresholds.

In particular, for the purpose of performing the calculation of the positions against the clearing thresholds, an FC will need to take into account all OTC contracts entered into by that FC or entered into by other entities within the group to which that FC belongs (irrespective whether those other entities are FCs or NFCs). In contrast, for the purpose of performing the calculation of the positions against the clearing thresholds, a non-financial counterparty (NFC) will only need to take into account all OTC derivative contracts entered into by that NFC or by other NFCs within the group to which that NFC belongs, which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity (i.e. hedging) of the NFC or of that group (without taking into account positions entered into by any FC within the same group).

One of the objectives of EMIR Refit is to recalibrate the requirements and make them proportionate to the systemic risk of counterparties. In particular, with regards to NFCs or NFC groups more broadly, EMIR takes into account that NFCs use OTC derivative contracts in order to cover themselves against commercial risks directly linked to their commercial or treasury financing activities (hedge transactions). With this in mind, we understand that the hedging exemption is

meant to avoid impediments for NFCs to appropriately mitigate their commercial risks. Therefore, from a policy point of view it would make sense that if an NFC can apply the hedging exemption for its positions, then the FCs in their group could also apply the same hedging exemption when taking into account the position of the NFCs at group level.

ESMA understands that this would be in line with the policy intentions of EMIR Refit. However, ESMA is unable to find a solid legal ground to interpret the EMIR Refit text in this way. ESMA is also concerned that requiring FCs to include all the positions of the NFCs in their group, whether concluded for hedging purposes or not, could have some unintended consequences on non-financial groups' behaviour. On the one hand, it could act as a disincentive for NFC groups to enter into hedging transactions in order for their FC entities to remain below the clearing thresholds. On the other hand, it could potentially impact how NFC groups organise their derivatives activity. For example, incentives may be provided to change from a model where NFCs in the group rely on one FC to conduct the derivatives activity, to a model where the NFCs enter into derivative contracts themselves to avoid becoming subject to the clearing obligation. We are of the view that it may be useful for market participants if the European Commission could clarify what is the correct interpretation of the applicable provision for FCs with NFCs in their group.

We remain at your disposal, should you require any additional information.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'S/M', is written over a light blue horizontal line.

Steven Maijor