



27 February 2017

Valdis Dombrovskis
Vice-President
European Commission

By email: Valdis.dombrovskis@ec.europa.eu

Dear Vice-President Dombrovskis,

RE: EMIR Review – enhancing data quality and simplifying double-sided reporting

We, the undersigned associations, are writing to you in the context of the upcoming revisions of the European Market Infrastructure Regulation (EMIR) and its implications for participants in European derivatives markets.

We acknowledge and applaud the stated efforts by the European Commission (EC) to streamline the reporting of OTC derivative transactions by simplifying the double-sided reporting system. We are encouraged that the EC has acknowledged the unnecessary significant reporting burdens that many firms face and agree that now is the right time to streamline requirements where appropriate, while at the same time enhancing the data quality received by regulators.

We fully support the reporting of OTC derivatives and we believe reporting provides regulators with increased transparency in OTC derivatives markets and enables the effective monitoring and assessment of threats to the stability of the financial system.

However, practical experience has shown that double-sided reporting has introduced significant costs and implementation complexities on end users (both for end users that self-report using their own infrastructures and those that delegate reporting). These complexities and the burden placed on end users creates noise in the data quality received by regulators and undermines their ability to monitor systemic risk.

Therefore, we encourage the EC – in keeping with the objectives set out in the call for evidence to reduce, as appropriate, existing reporting requirements – to adopt an entity-based reporting framework, where the sole reporting responsibility is assigned to one counterparty (based on an Entity-based Reporting Hierarchy)¹ as occurs in other major jurisdictions globally including US and Canada. We believe such an approach will streamline and simplify the operational complexity associated with the current reporting requirements,

¹ Under an entity-based reporting framework the sole reporting responsibility is assigned to one counterparty (typically a dealer or central counterparty), which can provide, through a single trade report the requisite level of trade information to regulators while reducing the burden on derivatives end users. It is crucial that intragroup transactions for NFCS and small financials are exempted from reporting requirements.

resulting in an improvement in the accuracy of reported transactional data quality by relying on existing data sources²; greatly reduce the cost and operational burdens of transaction reporting that are currently placed on end users; and eliminate the duplication and replication of other regulatory requirements. This entity-based reporting framework would sit alongside an exemption from reporting requirements for non-financial counterparty (NFC) and small financial counterparty (FC) intragroup transactions.

We would also like to express significant concern with regards to the Securities Financing Transaction Regulation (SFTR) approach, which we understand has been considered as an option under the EMIR review. In particular, we believe the obligatory delegation of reporting by a NFC³ to the FC will not achieve the stated ambitions of the EC to simplify existing reporting requirements and significantly reduce existing reporting burdens under EMIR. We urge the EC to give careful consideration before adopting the SFTR model in EMIR as it will potentially impose a more problematic regime than the current requirements, and prove a missed opportunity to improve data quality and simplify the existing reporting system. We also note that the SFTR model has not yet been implemented meaning that the practical operation of the model is still untested and may not be an appropriate template to replicate in EMIR.

We believe the SFTR-approach would need to be substantially modified in order to prove a viable approach under EMIR. Firstly, SFTR provides no exemption from the reporting requirements for intragroup trades. Therefore, even for the NFCs that fall within the exclusion, it only exempts them from reporting where they enter into transactions with FCs. Thus it does not exempt them from needing to establish reporting systems (or reduce the frequency of reporting for) intragroup trades undertaken, for example, as a part of centralised treasury management operations – a risk reducing best practice which many end users utilise. We strongly urge intragroup trades be exempted from these reporting requirements.

Secondly, the scope of the SFTR approach is too narrow – in that the obligatory delegation applies only to those NFCs that do not exceed the limits of at least two of the three stated criteria⁴. This means that a significant proportion of NFCs will fall outside the scope of obligatory delegation – notwithstanding that they are the entities most significantly negatively impacted by the current EMIR reporting requirements. Further, smaller FCs will also not be able to benefit from obligatory delegation given that the SFTR approach does not distinguish between large and small sized FCs and requires all FCs to perform delegated reporting when dealing with NFCs. In addition, if EMIR were to apply the same definition and criteria as in SFTR to determine whether a NFC can benefit from obligatory delegation, this would create an additional layer of complexity as it would not align with the current definition or methodology in EMIR for classifying NFCs.

Thirdly, the SFTR approach of obligatory delegation to the FC is problematic, as the reporting language in Art. 4 of SFTR has been interpreted by regulators to mean that the legal obligation for the data reported by the FC remains with the NFC, even though the NFC did not, and was not permitted to, report its own data. Therefore, if the SFTR approach was replicated in EMIR this would present three issues:

- (a) From the perspective of the NFC: It would create legal liability ‘overhang’. It is in effect similar to the current EMIR delegated reporting structure where end users are completely reliant on the counterparty or third party to comply with their obligations and generally have no recourse for errors or non-compliance.

² For example, existing EMIR risk mitigation requirements including confirmations and portfolio reconciliation.

³ The definition of NFC used in the SFTR is based on the definitions of a 'medium-sized undertaking' from Directive 2013/34/EU.

⁴ As laid down in Article 3(3) of Directive 2013/34/EU (namely a balance sheet of €20m, net turnover of €40m, or an average number of employees of 250)

- (b) From the perspective of the FC: FCs would be exposed to a high degree of potential liability for any errors or omissions in the data provided by the NFC that must be reported, and which would effectively be out of the FC's control⁵.
- (c) From the perspective of regulators: If there is uncertainty in the industry about where the boundaries for legal responsibility start and end for each counterparty, this could heighten the risk of authorities receiving poor quality data. This can occur when the legal responsibilities of each party are not clear and there are misunderstandings and miscommunication.

To address these issues, we believe it is important for the EMIR review legislation to clearly set out the extent of the legal responsibilities for both the reporting and non-reporting counterparties. This includes specifying the following:

- (a) NFCs that are obliged to delegate reporting to an FC must provide complete and accurate counterparty-specific data to the FC to enable the FC to submit correct reports.
- (b) Where the NFC fulfils its obligations under (a), the legislation should be clear that the legal responsibility for the NFC ends in order to prevent legal liability overhang.
- (c) The FC should not be held responsible for failures in the data that was provided to it by the NFC.

Lastly, the SFTR approach would unnecessarily require the reporting of two identical data streams to the trade repository by the reporting counterparty. This duplicative process adds additional costs to reporting counterparties without any benefits or improvements to data quality. Such duplication is superfluous and adds unnecessary "noise" to the data by requiring regulators to "match" identical data streams sent by the same counterparty against one another.

We would be happy to discuss this further with your team at your earliest convenience or to answer any questions you may have on this topic.

With kind regards,



Scott O'Malia
CEO
ISDA



Chris Cummings
CEO
Investment Association



Jack Inglis
CEO
AIMA



James Kemp
Managing Director
Global Foreign
Exchange Division,
GFMA

⁵ To mitigate their exposure to liability, it is likely that reporting counterparties would need to enter into further contractual arrangements with their counterparties to include indemnification clauses and an obligation on the NFC to provide data to enable the FC to prepare accurate reports (similar to current delegated reporting arrangements under EMIR). Ultimately, this would lead to an increase in the legal and compliance costs associated with entering into and adhering to such contractual agreements but would still not achieve the EC's goal of relieving the burden on NFCs from having to provide data.