ASSOCIAZIONE INTERMEDIARI
MERCATI FINANZIARI - ASSOSIM

Milan, 20 March 2023

European Commission

Prot. n. 19/23
MFE/gc

Re: ASSOSIM contribution to "*Derivatives clearing – Review of the European Market Infrastructure Regulation*: *Proposal for a Regulation of the EU Parliament and of the Council amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets*"

ASSOSIM[1] welcomes the opportunity to provide comments on the proposal of the Regulation in subject as better detailed here below.

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- *Intragroup transaction*

  We are in favour of the proposed amendment to article 3 EMIR since we believe that *a priori* identification of non-EU jurisdictions for which an intragroup exemption cannot be granted would be beneficial and bring greater clarity in the application of the relevant rules.

- *Clearing obligation for financial and non-financial counterparties*

  We welcome the proposed amendment to articles 4(a) and 10 EMIR and the envisaged change relating to the calculation method for the clearing threshold.

  However, we note that a change of approach (e.g. from involving OTC derivatives *tout-court* to involving OTC derivatives which are not-cleared at all or not-cleared by EU/recognized CCPs) would entail operational impacts considering that a part of OTC derivatives would have to be unbundled from the positions currently calculated for clearing threshold purposes.

[1] *Associazione Intermediari Mercati Finanziari* - ASSOSIM is the Italian Association of Financial Markets Intermediaries, which represents the majority of financial intermediaries acting in the Italian markets.

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- *Active account*

Firstly, we note that Recital 10 of the proposed Regulation amending, *inter alia*, EMIR provides that "[…] *It is therefore appropriate to require any financial counterparties and non-financial counterparties that are subject to the clearing obligation to hold, directly or indirectly, accounts with a minimum level of activity at CCPs established in the Union.* […]". The proposed text of the new article 7a EMIR states that "*Financial counterparties or a non-financial counterparties that are subject to the clearing obligation in accordance with Articles 4a and 10 and clear any of the categories of the derivative contracts referred to in paragraph 2 shall clear at least a proportion of such contracts at accounts at CCPs authorised under Article 14*" […].

When reading the aforementioned provisions together we noted an apparent mismatch. While the text of article 7a expressly mentions articles 4a and 10 of EMIR (and, therefore, terms and conditions triggering the clearing obligation for both financial and non-financial counterparties), the text of Recital 10, when saying "*any*", may seem to refer to any and all financial counterparties (therefore, regardless of their status with respect to the clearing obligation (e.g. subject to or not subject to)).

Secondly, and considering operational impacts stemming from the obligation of opening and having the envisaged "active account", we underline the need of ensuring counterparties an adequate timeframe for implementing and complying with such new requirement.

Thirdly, we believe that the list of the categories of derivatives contracts subject to the active account obligation set out in the second paragraph of the new article 7a should be moved to Level 2 measures in order to ensure more flexibility and timeliness in case of changes to the list are necessary.

Furthermore, we think that the contents of Recital 11 relating to (i) "*suitable phase-in periods for the progressive implementation of the requirement to hold a certain level of the clearing activity in the accounts at Union CCPs*", and (ii) to the need of calibrating and not going "*beyond what is necessary and proportionate to reduce the clearing in the identified clearing services at Tier 2 CCPs concerned*" are significant and constitute important guidelines for the application of the new provisions (also in light of ESMA's mandate to develop Level 2 measures). Therefore, we would suggest to move or to insert reference to such criteria (also) in the wording of the relevant article.

Finally, as the new article 7a will be applicable to both clearing members of an EU CCP (**CM**) and clients of such clearing members, we would suggest the provision of Level 2 measures setting out the procedure for the exchange of information between the CM and its clients in order to allow such entities to comply with envisaged calculations and reporting obligations under paragraphs 2 and 3.

- *Information on clearing services*

Paragraph 1 of the new article 7b requires CM and clients providing clearing services to inform the respective clients about the possibility to clear a relevant contract at an EU CCP (or at a recognised CCP). We note that nothing is stated with respect to (i) an obligation (or not) to comply with the client's instructions following receipt of the aforementioned information, and (ii) how such information should be provided.

Therefore, we suggest clarifying if there is an obligation to comply with clients' instructions and, as regards (ii) above, we would propose either to provide a mandate to ESMA for developing Level 2 measures relating to standard EU format for the abovementioned notice to clients or to expressly provide that firms are free to choose means and format of such notice to clients.

As regards the report to the relevant NCA set out in paragraph 2 of the new article 7b we would suggest ESMA being in charge of collecting and transmitting relevant information to the NCAs in order to avoid further burdens (especially for small-sized counterparties).

- *Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP*

  With reference to the new article 11 we would request confirmation that the reduction of the initial margin by an amount up to EUR 50 million (as better detailed under article 29(1) of Commission Delegated Regulation 2016/2251) would not include uncleared OTC derivative contracts entered into by the non-financial counterparty during the four months following the clearing obligation notification.

- *Collateral requirements*

  We welcome the proposed replacement of article 46(1) and the introduction of further kind of guarantees that can be provided as collateral.

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We remain available for any further information or clarification.

Gianluigi Gugliotta
Secretary General