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Mr Patrick Pearson,
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Rue de la Loi 200,
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23 April 2012

RE: Proposed regulation on OTC derivatives, central counterparties and trade repositories

Dear Mr Pearson,

I am writing to you to raise some technical concerns that we have identified on the provisional text of the proposed EMIR Regulation as published by the European Parliament. I would hope that at least some of these could be addressed in the jurist-linguist process. Others may require interpretative guidance from the Commission or the European Supervisory Authorities (ESAs) and we would be happy to discuss this with you.

At the outset, I should say that this letter does not discuss all the interpretative concerns that our members have raised with us with respect to the application of the proposed Regulation. As you would expect, a new piece of legislation of this kind will raise a wide range of new issues. Many of the interpretative issues that are raised by the Regulation fall outside the scope of the technical standards that are required to be adopted under the Regulation. We expect to initiate a wider dialogue with you and the ESAs on these in due course.

1. Time of application of certain articles

We understand that recital 93 is intended to make clear that no obligation imposed by the Regulation which is to be developed by delegated or implementing acts should apply until those acts are adopted and take effect (notwithstanding that Article 91 provides that the Regulation shall come into force 20 days following its publication in the Official Journal).

a) Article 11 (risk mitigation techniques)

In particular, we understand that recital 93 has the effect that the provisions in paragraphs 1 to 12 of Article 11 do not impose obligations on any market participant until the regulatory technical standards referred to in paragraphs 14 and 15 have been adopted and come into effect. We would be grateful if you would confirm this understanding.

We also understand that it was not intended that, when it begins to apply, Article 11(3) should apply retroactively to contracts entered into by financial counterparties on or after the date on which the Regulation comes into force (in accordance with Article 91) but before the date on which the relevant regulatory technical standards have been adopted and come into effect. Clearly, it would be very difficult for parties entering into contracts in the interim period after publication in the Official Journal and before the adoption of the technical standards to pre-agree how they should apply

unknown future margining standards or to determine their impact on the pricing and commercial terms of a transaction (and non-EU counterparties will not even know whether they are potentially within the scope of the new provisions until the technical standards specify the scope of Article 11(12)). We would be grateful if you would confirm that Article 11(3) should be treated as only applying prospectively from the date that the relevant regulatory technical standards come into effect and then only with respect to contracts entered into on or after that date.

b) Intragroup transactions under Article 11

In addition, we note that firms will not be able to give the notifications or apply for the authorisations for intra-group transactions referred to in paragraphs 6 to 10 until the regulatory technical standards have specified the information to be included in the notifications and the procedures to be applied for the purposes of those paragraphs. It would be inappropriate and unduly burdensome if the substantive obligations in paragraphs 1 to 4 and 12 came into effect before market participants could activate the mechanisms designed to exempt from the obligations.

Therefore, we urge the Commission to ensure that there is an appropriate gap between the date on which the regulatory technical standards adopted for the purposes of paragraphs 6 to 10 (and paragraph 11) of Article 11 come into effect and the date on which the regulatory technical standards adopted for the purposes of the substantive obligations in paragraphs 1 to 4 and 12 come into effect. This gap should be long enough to allow market participants to give the relevant notifications and have the opportunity to obtain the relevant authorisations. Alternatively, if all the regulatory technical standards are to come into effect at the same time, there should be an appropriate gap between their adoption and their effective date and it should be made clear that notifications and authorisations given in the interim period are effective.

We should add that we do not expect corresponding issues to arise in relation to the intra-group exemption in Article 4(2) as this does not require the adoption of delegated or implementing acts to be effective.

***c)* Article 25 (recognition of a third country CCP)**

Article 25(1) bans CCPs established in a third country providing clearing services to clearing members or trading venues established in the EU except where the CCP has been recognised under Article 25. Article 25(2) deals with the application for recognition and Article 25(8) provides for the adoption of regulatory technical standards specifying the information to provided in the application. In addition, it is reasonably clear that a third country CCP will not be able to apply for recognition until the detailed content of the regime for EU CCPs has been developed through technical standards (as the principal criterion will be whether the third country's requirements are equivalent to EU requirements).

We would be grateful if you would confirm our understanding that, in line with the intent of recital 93, the restriction on third country CCPs does not apply until all the regulatory technical standards have been adopted under Article 25 (and under the other provisions of Title IV), notwithstanding that no technical standards are specifically envisaged by the Regulation with respect to Article 25(1).

There may be a number of third country CCPs that have clearing members that are established in the EU, but which currently may not benefit from a specific recognition regime as envisaged by the second paragraph of Article 89(3), as none is currently required in that country. It would be inappropriate to impose compliance on such CCPs before they even have an opportunity to apply for recognition. If that were the case, there is a risk that those CCPs would seek to expel EU clearing members before the publication in the Official Journal.

d) Equivalent third country rules and markets

We would also add, at this point, that it is clear that there are significant risks of market disruption if the substantive obligations in Articles 4, 9, 10 and 11 begin to apply before the Commission has adopted implementing acts under Article 13 declaring that key third countries, such as the United States, have equivalent regulatory provisions. There is a real risk that market participants could be subjected to duplicative or conflicting rules if the adoption of declarations under Article 13 is not synchronised with the coming into force of the substantive provisions of Title II.

We are also concerned to ensure that the Commission will work towards publishing a list of third country markets considered as equivalent for the purposes of Article 2(7). Article 2(7) refers to the procedure specified in Article 19(6) of MiFID which was primarily designed for securities exchanges. It will be important for the Commission to publish a comprehensive list of equivalent third country exchange traded derivatives markets. Otherwise, EU entities which trade on those markets will have to comply with the risk mitigation requirements of Article 11 with respect to exchange traded derivatives (and potentially also be required to clear those contracts under Article 4).

2. Article 11 – risk mitigation techniques for OTC derivative contracts not cleared by a CCP

It seems clear from the heading of Article 11 and recital 24 that it was intended to be restricted to OTC derivative contracts not cleared by a CCP. However, paragraphs 2, 3 and 4 are not explicitly limited in this way (paragraph 2 refers to "outstanding contracts", paragraph 3 refers to "OTC derivative contracts" and paragraph 4 does not specifically define its coverage at all). We believe that this should be made clear either in the text or by the Commission.

3. Incorrect cross-references

There are a number of places where the Parliament provisional text contains incorrect cross-references due to the late renumbering of the regulation:

- Article 1(5), introductory paragraph – should refer to the reporting obligation under Article 9 (not Article 6).
- Article 11(2) – should refer to the non-financial counterparties referred to in Article 10 (not Article 7).
- Article 11(14)(c) – should refer to paragraphs 7, 9 and 10 (not 5, 9 and 10).
- Article 13(1), (3) and (4) – should refer to Articles 4, 9, 10 and 11 (not 4, 7, 9 and 10). It is critical that this is corrected in order to ensure that Article 13 can disapply duplicative and conflicting rules with respect to risk mitigation (as well as clearing and reporting).

We would be very happy to discuss these issues with you. Please feel free to contact me if you have any questions or comments on this matter.

Yours sincerely,

Richard Metcalfe
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