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# EAPB Position Paper on EMIR Review (REFIT) COM(2017)208

**Abstract:**

The European Association of Public Banks (EAPB) welcomes the proposal of the European Commission for a regulation amending the **European Market Infrastructure Regulation** (**EMIR REFIT**). We support the most of the presented amendments, such as deletion of the backloading and frontloading requirements as well as the possibility to suspend the clearing obligation in situations other than resolution. Nevertheless, we call for clarification of the provision concerning the non-discriminatory access to clearing services. Moreover, we stress that the discrepancy in the introduction of the single-sided reporting should be corrected by the legislators, as the Commission proposal is not delivering the intended simplification for the market players.

## I. General Comments

This position paper is aimed to present the views of the European Association of Public Banks (EAPB) concerning the proposal of the European Commission for a regulation amending the **European Market Infrastructure Regulation** (EMIR, Regulation EU 648/2012). The EAPB is generally supporting the proposal and welcomes the most of the presented amendments, such as deletion of the backloading and frontloading requirements as well as the possibility to suspend the clearing obligation in situations other than resolution. The EAPB believes that a consideration of the below discussed point will contribute to a more efficient, liquid, and resilient derivatives market for the post-Brexit Europe.

## II. Specific comments

### A) Cross references concerning a delayed application

Article concerned: Art. 2 (proposal)

Article 2 of the proposal defines a delayed application for article 1 para. 7 lit (d) and (e) of the proposal.

We note that the proposal does not contain such articles and therefore recommend clarifying to which parts of the regulation the delay applies.

### B) Non-discriminatory access to clearing services

Article concerned: Art. 4 para 3a (new)

The new paragraph 3a stipulates that clearing members shall provide clearing services – whether directly or indirectly – under fair, reasonable and non-discriminatory commercial terms.

While we no doubt support the general approach that access to clearing should be granted under fair, reasonable and non-discriminatory commercial terms, we see the need for a clarification in view of the risk associated with client clearing and indirect clearing. Institutions must remain able to determine for themselves whether and under which terms they are prepared to offer clearing services, be it as a clearing member or as an intermediate. It should therefore be clarified that clearing members or intermediates are not under any obligation to take on any customer as a direct or indirect client (no obligation to enter into contracts).

To increase transparency ESMA shall specify the fair, reasonable and non discriminatory commercial terms, i.e. prices for clearing services.

A CCP simulation tool should be made available for direct and indirect clearing-members at reasonable costs.

### C) Suspension of clearing obligation

Article concerned: Art. 6b (new)
As already pointed out above in the introduction, we fully support the introduction of a provision allowing for the temporary suspension of the clearing obligation by way of the introduction of a new Art. 6b.
As regards the proposed provision itself, we have only the following one comment:

- Art. 6b para. 1 lit. (c) – conditions for a suspension

It could be clarified that the conditions under lit. (c) can be considered to be met where one or more CCPs lose their authorisation/recognition as a CCP for the purposes of EMIR.

### D) Single-sided reporting

Article concerned: Art. 9 para 1a (new)
According to subparagraphs (a) and (b), both the CCPs and financial counterparties respectively are responsible for reporting for both counterparties. We understand that ESMA wanted to introduce a single-sided reporting for ETDs as well as OTC derivatives where one of the counterparties is a non-financial counterparty not exceeding the clearing threshold. In such cases the non-financial counterparty or both counterparties (ETDs) are not subject to a reporting obligation.

Generally, we welcome the Commission’s willingness to simplify the reporting obligation for small counterparties. However, we understand that even if one counterparty may not any longer be subject to the reporting obligation; the other party will still have to report its own report as well as the other party’s report. Thus, even in cases of single-sided reporting, two or more reports have to be submitted. Moreover, the non-reporting counterparty still needs to provide further transaction information (such as whether the transaction is used for hedging purposes and other data). Thus, small counterparties will still be required – on the basis of delegation agreements which are currently already in place – to contribute and actively participate in the reporting process. The only material change in comparison to the present situation would be that the exempted counterparty would no longer be obliged to review the transaction report. Hence, the proposed changes do not significantly simplify

the reporting obligation. We, therefore, state that a tangible simplification can only be achieved by introducing a true single sided reporting where only one report has to be submitted by the central counterparty or the relevant financial counterparty without the need to provide a further report on behalf of the other counterparty.

Furthermore, since the proposal means that the reporting counterparty still relies on information provided by the exempted counterparty, it should be clarified that the reporting counterparty cannot be responsible for the accuracy and completeness of information, which can only be provided by the exempted counterparty. To this end, there is a need for clarification of the precise nature and scope of responsibilities of the reporting party. Under the current wording (Art. 9 Para. (1a)) the CCP or financial counterparty reporting on behalf of both counterparties is not only "responsible" for the reporting but also obliged to "ensure" that the contracts are reported "accurately and without duplication". The wording is at least misleading and can be easily misconstrued: While the reporting party will of course be obliged to be duly diligent when reporting on behalf of another counterparty, it will nevertheless be dependent on the cooperation of the counterparty on whose behalf the reports are being made. Consequently, the reporting counterparty cannot be held liable for any breaches resulting from insufficient or inaccurate information provided by the counterparty on whose behalf the reports are being made. For example, the reporting counterparty cannot be held liable for the accuracy of the LEI communicated to it by the other counterparty, etc. It should therefore be clarified that the reporting counterparty can only be held liable for any deficiencies and inaccuracies arising within its own sphere of control.

### E) Insolvency estate of the CCP or the clearing member

Article concerned: Art. 39 para 11 (new)

According to this new provision, the assets and positions recorded in a way that the assets and positions are distinguished (i.e. assets and positions held in separate accounts, netting prevented, etc.); these assets and positions shall not be part of the insolvency estate of the CCP or the clearing member. We welcome this clarification, in view of the fact that indirect clearing can only work if applicable insolvency rules support the legal structures required to allow for indirect clearing chains. In this context we assume that the provision is intended to set out a requirement for Member States to ensure that the national insolvency rules do indeed support the clearing chains, and in particular do not allow for a retroactive voidance of asset transfers or provide for damage claims of the insolvency estate of an indirect client or client against the intermediate, clearing member or CCP where collateral has been booked and transferred in accordance with EMIR requirements.

** **The European Association of Public Banks (EAPB)** gathers over 30 member organisations which include promotional banks such as national or regional public development banks and local funding agencies, public financial institutions, associations of public banks and banks with similar interests from 17 European Member States and countries, representing directly and indirectly the interests of over 90 financial institutions towards the EU and other European stakeholders.*

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