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## REPORT

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From: Presidency

To: Permanent Representatives Committee (Part 2)

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Subject: EMIR Review:

Proposal for a REGULATION OF THE EUROPEAN 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

and

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2009/65/EU, 2013/36/EU and (EU) 2019/2034 as regards the treatment of concentration risk towards central counterparties and the counterparty risk on centrally cleared derivative transactions

– Progress report

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## INTRODUCTION

The EMIR review package, adopted on 7 December 2022 by the European Commission as part of a wider Capital Markets Union package, consists of two legislative proposals:

- a Regulation amending EMIR, the Capital Requirements Regulation (CRR) and the Money Market Funds Regulation (MMFR), and
- a Directive amending the Undertakings for Collective Investment in Transferable Securities Directive (UCITS), the Capital Requirements Directive (CRD) and the Investment Firms Directive (IFD).

The process of reviewing the Commission's legislative proposal was launched under the Swedish Presidency (PCY) and the Council Working Party (CWP) on Financial Services has met four times to deliberate on the EMIR review. In addition, the CWP has met once informally to receive a presentation from ESMA on its views in relation to specific topics.

The discussions have been constructive and conducted in a spirit of reaching mutual agreement. During this process, all parts of the legislative proposal have been discussed in the presence of Member States' (MS) experts at least once. The PCY believes that significant progress has been made towards reaching a Council position and that the outlines of a compromise have emerged in a number of areas. Nevertheless, due to the complexity of the subject matter and diverging views on core issues, further discussions are warranted in order to reach an agreement in all areas.

This progress report sets out the view of the PCY regarding the state of play of the work of the CWP. It highlights the possible compromises it believes are within reach and it strives to illustrate the main positions and arguments of MS in areas where further work is required.

All delegations have received the opportunity to comment on this report and the PCY has done its best to take all comments into account. While the PCY believes that the descriptions of the state of play provided in this report are shared by delegations, this report ultimately represents the view of the Swedish PCY, with a view to helping the incoming Spanish PCY to keep this important dossier moving forward swiftly towards a Council position.

## ESSENTIAL ELEMENTS OF EMIR DISCUSSIONS

While the proposal consists of two legislative texts, for ease of presentation, the following section is structured along thematic fields:

### 1. Supervision Processes

The Commission's proposal introduces revised supervisory approval procedures with the aim of achieving a more competitive and modern EU clearing ecosystem.

#### 1.1 Authorisation and validation procedures

The Commission's proposal introduces new procedures with set timelines for applications for authorisation and validation. MS have expressed overall support for streamlining these procedures and defining timelines to make them more clear and efficient. However, several MS have raised concerns that the proposed timelines are too short, potentially increasing the risk of informal processes and/or insufficient assessments by NCAs. Regarding the validation procedure, MS have expressed support for providing clarity with respect to which model changes are to be considered significant, however, there are split views on how these criteria should be defined. Also, the idea of parallel assessments by ESMA and supervisory colleges in the authorisation procedure has raised concerns of potential duplications and increased complexity. A large majority of MS is therefore supportive of keeping the current EMIR processes but with defined timelines. MS are also supportive of providing the NCA a possibility to request missing information instead of directly rejecting an application.

## **1.2 Non objection procedure (NOP)**

To facilitate CCPs' ability to bring products to market or make a model change faster, the Commission's proposal introduces NOPs which should apply to non-significant changes to CCPs' risk models and non-material extensions of services not covered by initial authorisation. While supporting the ambition behind the NOPs in general, a majority of MS regarded it imprudent to allow CCPs to apply changes before a confirmation from their NCA. Moreover, several MS have raised concerns that the new procedure risks increasing the burden in relation to the current framework, contrary to its aim, since the proposal introduces a process for model changes that today are not subject to any procedure. A majority of MS therefore supports clarifying that there would be three categories of changes under the revised framework: "business as usual", non-significant/non-material and significant/material changes, where only the two latter would require an authorisation or validation procedure.

## **2. Supervisory framework**

### **2.1 Roles of ESMA and supervisory colleges**

The Commission's proposal expands areas where NCAs must seek opinions from ESMA and the college, gives ESMA the task of chairing colleges and accords ESMA a vote in the colleges. With regard to the chairing of the colleges, a large majority of MS opposes this change. Many MS are also against providing ESMA a voting right, whereas some are supportive or open to consideration.

### **2.2 Joint Supervisory Teams (JSTs)**

The Commission's proposal introduces JSTs for each Union CCP, composed of staff members from the CCP's competent authority, ESMA and certain members of the college. A large majority of MS have doubted the usefulness of introducing JSTs, also in alternative forms explored by the PCY, given the already existing possibility of enhanced cooperation among college members.

### **2.3 Emergency situations**

The Commission's proposal introduces new provisions regarding emergency situations. While some MS have shown support for the enhanced coordination role of ESMA in emergency situations, others have preferred it to be more of an information sharing role. Many MS have underlined that it must be clear that any coordination role of ESMA is without prejudice to the final responsibility of the NCA to take supervisory decisions. Several MS have also wanted to better frame the concept of emergency situations, limiting ESMA's role to situations where more than one CCP is affected, and ensure that information requests to market participants are channeled through NCAs. There appears to be a large majority supporting the latest PCY drafting compromise that takes these views into account.

### **2.4 Joint Monitoring Mechanism (JMM)**

The Commission's proposal introduces a JMM, composed of Union bodies involved in the supervision of EU CCPs, clearing members and clients. The purpose of the JMM would be to monitor risks and developments related to central clearing in the EU, in particular as regards the implementation of the Active Account Requirement (AAR). Several Member States consider discussions on the JMM to be dependent on the outcome of deliberations on the AAR (see below).

### 3. Active Account Requirement (AAR)

The Commission's proposal introduces an AAR that requires financial and non-financial counterparties that are subject to the clearing obligation to clear at least a certain proportion of their derivative contracts identified as being of substantial systemic importance at EU CCPs.

Over the course of the discussions so far, a majority of MS have expressed support for the overarching aim to address financial stability risks related to overreliance on certain third country clearing services. Several MS are supportive of the main elements of the COM proposal which they see as balanced and less disruptive than other options that have been considered prior to the proposal. Many other MS have however raised concerns, mainly regarding the lack of clarity on the impact of the AAR, in particular for EU market participants' competitiveness and potential negative effects for financial stability, and the framing of mandates for ESMA and the Commission. MS have also raised concerns regarding the feasibility of introducing quantitative thresholds for the AAR and how those thresholds in practice would impact for example final EU clients and clearing members serving third-country clients and/or engaging in market making. Several MS are fully opposed to the introduction of the AAR, referring inter alia to the risk of market fragmentation and associated costs and risks. The PCY presented MS with four options ranging from retaining the main elements of the Commission's proposal to completely deleting it. Whereas a majority of MS generally seems to support or be open to the PCY illustrative drafting proposal linking the scope of the AAR to ESMA's assessment of the substantial systemic importance of third-country CCPs or some of their clearing services, including the cost-benefit assessment made thereunder, other MS preferred the Commission's approach. MS also seem roughly divided into two groups when it comes to the design of the AAR. One group seems to prefer some version of an AAR with a quantitative threshold while another, larger, group seems only able to consider some version of an AAR without such a threshold. A further AAR version ("operational active account") developed by two delegations gathered the support of a large number of MS at the last CWP meeting and could in the PCY's view be one of the main bases for further discussions.

#### **4. Treatment of non-financial counterparties (NFCs) and other topics**

The Commission's proposal aims to help build a safe and resilient clearing system by drawing lessons from the developments in energy markets in 2022. A number of changes to EMIR have therefore been proposed for example to ensure the availability of eligible collateral, strengthen participation requirements and ensure sufficient supervisory monitoring of non-financial counterparties (NFCs).

##### **4.1 Eligible collateral**

The Commission's proposal aims to allow uncollateralised commercial and public/public bank guarantees to be considered eligible as highly liquid collateral subject to certain conditions. While many MS seem to support the intention to ensure the availability of collateral, in particular for NFCs, views are split as to how changes could be made without increasing risks.

##### **4.2 Participation requirements**

The Commission's proposal tightens participation requirements as regards NFCs. A majority of MS supported the latest PCY drafting compromise with targeted amendments to the Commission proposal, although a few would have preferred the status quo.

##### **4.3 Intragroup reporting**

The Commission proposal removes the reporting exemption for intragroup transactions in order to provide supervisors with a more holistic view of risks related to central clearing. While a few MS support the view of the Commission, a vast majority of MS supports retaining the status quo, arguing that the cost and burden of such a requirement are not justified by its value-added in terms of risk monitoring.

#### 4.4 Other changes

Other changes to EMIR that could deserve further discussion include the proposed changes to the calculation methodology for the clearing obligation, such as the change from group to entity level calculation for NFCs, where a majority of MS so far have expressed concerns, and changes as regards the expansion of the scope of EMIR to non-financial instruments.

One delegation suggested to introduce a change to an ESMA mandate regarding anti-procyclicality tools. MS supported introducing a report mandate for ESMA in collaboration with the ESRB in this regard. Another delegation suggested to introduce a limited exemption from the clearing obligation for post-trade risk reduction derivative transactions. MS expressed broad support for the inclusion of these amendments in a future compromise text. Other issues that have been raised for further discussions from MS are the introduction of the central database, the treatment of equity options and changes to the reporting regime.

#### FOLLOW-UP CONSIDERATIONS

To sum up, the PCY believes that substantial progress has been made over the course of the first half of 2023 towards a Council agreement on the EMIR review.

In the area of supervisory processes and frameworks, the PCY believes that the way forward is relatively clear based on MS comments so far, of which the main elements are described under sections 1-2. The PCY intends to distribute a first draft partial compromise text to Member States before the end of June for written comments in this regard.

On the issue of the AAR, the Council is split, with no option appearing to have the necessary majority at this stage. Therefore, further reflections will be required in order to find a solution that could constitute an acceptable compromise.

With regard to the other topics mentioned in this report, although solutions seem within reach, certain further discussions seem warranted to ensure a technically sound and balanced compromise.