DACSI 13-1128

Remarks on EMIR draft RTS re non-EU counterparties

Response to the ESMA consultation paper "Draft Regulatory Technical Standards on contracts having a direct, substantial and foreseeable effect within the Union and non-evasion of provisions of EMIR" of 17 July 2013 (ESMA 2013/892)

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DACSI (the Dutch Advisory Committee Securities Industry) is the principal not-for-profit association in The Netherlands for firms active in the securities industry. The association represents the interests of its members as users/clients of infrastructure providers in the field of securities, e.g. exchanges, central counterparties, central securities depositories. With 12 members, DACSI represents the vast majority of the banks active in The Netherlands, and positions the Dutch view to the market infrastructure service providers and the regulatory authorities in The Netherlands and the European Union.

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Thank you for the opportunity to comment on the discussion paper "Draft Regulatory Technical Standards on contracts having a direct, substantial and foreseeable effect within the Union and non-evasion of provisions of EMIR". We hope that our contribution is helpful in further detailing the technical standards on the various issues addressed in the paper and are of course more than prepared to provide further detail and explanation on particular items when helpful.

As we represent the interests of our members as users/clients of infrastructure service providers in the field of securities, we have restricted our comments to those parts of the paper that are most relevant in this context and where we think a remark might be helpful.

Remarks on individual questions

I. Contract considered to have a direct, substantial and foreseeable effect within the Union

Guarantee

Q1: Do you agree that a full or partial guarantee issued to the benefit of a third country counterparty by an EU guarantor, whatever is its form, be considered in order to specify the direct, substantial and foreseeable effect of the contract?

- YES. However, there is a need for clarification. The definition of guarantees is imprecise (see page 11 "the term should be interpreted to cover any other arrangement which operates in a substantially similar way"). What about joint and several liabilities from mother companies, insurances, credit default swaps, letters of comfort? It would be advisable to have a clear definition of the instruments concerned. A list could be published/updated on the ESMA website to avoid any interpretation issues.

Q2: Do you agree with the 2 cumulative thresholds proposed in the draft RTS? Do you consider that the proposed value of the thresholds is set at an appropriate level in order to specify the direct, substantial and foreseeable effect of the contract? Please provide relevant data to justify your answer.

- NO, we do not agree. The 8 billion gross notional threshold is not in line with guarantee policies. Generally, net amounts are concerned because guarantees apply after close-out netting (thus on a net basis). Some clarifications are needed regarding the outstanding gross notional (guaranteed amount?). In addition, the amount at risk will vary every day depending on the exposure of the relevant counterparty. Consequently it is possible to be above the threshold on day 1 and below the threshold on day 2. This will not be workable.

EU branches of third countries entities

Q3: Do you agree that OTC derivative contracts entered into between two EU branches of third country entities would have direct effect within the Union?

- YES, but it should be clear that all obligations are concerned (including reporting).

Currency

Q4: *Do you agree that criteria related to the currency or underlying of the OTC derivative contracts should not be used to specify the direct effect of the contract within the Union?*

- YES.

Subsidiaries

Q5: *Do you agree that contracts of third country subsidiaries of EU entities would not have a direct substantial and foreseeable effect within the EU?*

- YES.

Q6: *Do you believe that in absence of a guarantee, there is limited implicit backing by the EU parent of a third country subsidiary that can result in a direct, substantial and foreseeable effect in the EU?*

- YES, provided that the above question is formulated as follows: *Do you believe that in absence of a guarantee, there is limited implicit backing by the EU parent of a third country subsidiary that **CAN NOT** result in a direct, substantial and foreseeable effect in the EU?*

Contractual effect

Q8: *Do you agree that the acceleration of the obligation of listed entities resulting from the OTC derivative contract should not be considered to specify the direct, substantial and foreseeable effect of the contract?*

- YES.

II. Prevention of evasion

Q9: *Do you agree with a criteria based approach in order to determine cases where it is necessary or appropriate to prevent the evasion of the provisions of EMIR?*

- YES.

Q10: *Do you agree that artificial arrangements that would have for primary purpose to avoid or abuse of any provision of EMIR should be considered as cases where evasion of provision of EMIR should be prevented?*

- YES, provided however that It should be clearly provided for that back-to-back arrangements fall outside the scope of the evasion rules. Mother companies generally enter into back-to-back transactions with their subsidiaries for balance and liquidity efficiency purposes and these transactions should be clearly excluded from the artificial arrangement definition.

III. Miscellaneous – competition elements

- In principle, substituted compliance and mutual recognition will be available for parties established in third countries which are considered to have a direct, substantial and foreseeable effect in the Union which means that the parties will be able to opt for the applicable regime. This should be the intention. DACSI would appreciate this being confirmed. See page 7 paragraph 20.

- In principle, this paper only relates to trades between two non-EEA entities and not to cross-border (EU/Non-EU) trades. See scope page 5, point 9 ("the OTC derivative contracts that are considered in scope of this consultation paper are those entered into between two counterparties that are established in third countries"). However we have noticed that a few matters regarding cross-border issues are included (see for example page 12, paragraph 33 where transactions between a EU branch (read EEA branch) of a third party entity entered into with EU counterparty (read EEA counterparty) seem to fall under the scope of this paper). This does not seem logical to us; in our view these points should not be considered in this consultation paper, but addressed in a cross-border consultation.

- There is no consistency between the use of Union (EEA relevance) and European Union in the consultation paper: it should be clear in all relevant parts that non-EEA entities or EEA branches of non-EEA entities are under the scope. Some consistency in the paper is essential (see for examples page 8, page 13, page 17, etc) because the paper is of EEA relevance.

- If two non-EEA branches of EEA entities enter into OTC derivative transactions, no substituted compliance /mutual recognition may apply and there is no possible choice from the parties to opt for the applicable regime. This can be concluded from the summary of the scope (page 17) where the table concludes that when two EU firms (read EEA firms) *including branches established in third countries* enter into transactions, EMIR applies. It is our understanding that for non-EEA branches of EEA entities, substituted compliance should be available and EMIR could be disapplied if the parties agree so. See Article 13 par 3 where the word "established" is used, which suggests that branches outside the EEA could be considered as potential candidates for substituted compliance.

- Page 7, par. 16: solely the clearing obligation and risk mitigation techniques are stated. Reporting obligations are not excluded explicitly whereas for non-EEA entities or EEA branches of non-EEA entities the same principles should apply, i.e. if there is a direct, substantial and foreseeable effect in the EEA, parties should be able to disapply EMIR for reporting obligations and elect another set of rules to be applicable if substituted compliance is recognised, just like for the clearing and the risk mitigation obligations.

- Page 9, table: it is not clear to us why the substituted compliance should be applied per transaction ("for the purpose of this transaction"). The principle should be applied to all relevant transactions and not on a transaction-per-transaction basis.