WORLD FEDERATION OF EXCHANGES

Patrick Pearson
Head of Financial Markets Infrastructure
European Commission
DG-FISMA
rue de Spa 2
1000 Brussels

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[via portal]

Dear Mr Pearson

We write to you regarding the draft legislation published by the European Commission to implement the recent EMIR reforms to the cross-border supervision of CCPs.

The World Federation of Exchanges (WFE) is the global trade association for regulated exchanges and clearing houses. Of our members, 37% are in the Asia-Pacific region, 43% in Europe, Middle East and Africa, and 20% in the Americas. They include over 50 distinct CCP clearing services, including stand-alone CCPs, which collectively ensure that risk takers post some $750bn (equivalent) of resources to back their positions, in the form of initial margin and default fund requirements.

As operators of critical market infrastructure, we share regulatory authorities' goals of ensuring the safety and soundness of the global financial system, which is critical to enhancing the confidence of investors and citizens, and promoting economic growth. This includes ensuring a sound and robust regulatory regime for CCPs.

The WFE broadly welcomes the three draft legislative instruments which have been published by the Commission. They represent important progress in achieving international regulatory coherence in the cross-border supervision of CCPs and make substantial progress compared to earlier proposals in meeting the G20 commitment toward regulatory deference. Furthermore, they have largely addressed the issues raised by the WFE and other stakeholders in terms of predictability, proportionality, and risk-sensitivity.

While welcoming the proposals in principle, we wish to suggest considerations for further refinement in the following areas:

- Additional clarity on the exclusion of non-EU entities / non-Union currencies from metrics in the Tier 2 determination process
- Strengthening the outcome-based orientation of comparable compliance

Exclusion of non-EU entities / non-Union currencies

We welcome the effort of the European Commission to provide a clear nexus to the EU in the determination of CCPs which are systemically important to the Union. We believe that the policy intention could, however, be strengthened by providing additional clarity on the exclusion of non-EU entities / non-Union currencies.

First, we believe that the intention of the draft legislation is to exclude sterling-denominated assets and UK-entities from threshold calculations, such as in the first paragraph of Article 6, subparagraphs (c) and (d). Given that the UK left the Union on 31 January 2020 and that from 1 January 2021 UK CCPs will be subject to the tiering regime under EMIR 2.2 as third country CCPs, the inclusion of sterling-denominated assets and UK-entities as having a per se nexus to the Union would be inconsistent with the core purpose of EMIR 2.2 to reduce systemic risk in the Union. However, given the evolving process around UK withdrawal from the Union and the lookback period built into the legislation, we believe additional clarity on the exclusion of sterling-denominated assets and UK-entities would provide welcome legal certainty. Similar clarity surrounding the exclusion of the Swiss Franc and Swiss-entities should also be given, especially as the Act has EEA relevance. It is relevant to provide legal clarity on this aspect due to previous consultations showing some confusion relating to the treatment of the Swiss Franc. This clarity is both important to give predictability and to ensure effective and uniform calculations by the actors involved.

To achieve this, we suggest the addition of the following paragraph to Article 6:

> *[3. For the purposes of subparagraphs (c) and (d) of the first paragraph of Article 6, no entity whose primary consolidated supervisor is outside the Union shall be treated as a Union entity, nor shall any currency whose primary central bank of issue is outside the Union be treated as a Union currency.]*

Second, in the first paragraph of Article 6, subparagraph(d) of the draft legislative instrument regarding tiering, we believe the third country CCP's nexus to the EU could be additionally strengthened by clarifying that payment obligations in non-Union currencies are excluded. We believe that, in line with the Commission's commitment to regulatory deference, it is the intention of legislation to exclude obligations to third country CCPs in non-Union currencies from the threshold calculation. The case for this is particularly strong for those EU entities which have central bank liquidity access and commensurate supervisory oversight from the third country in question.

To achieve these aims, we suggest the following amendments to the first paragraph of Article 6, subparagraph (d):

> *(d) The estimated aggregated largest payment obligation committed by entities established in the Union or part of a group subject to consolidated supervision in the Union, ~~converted into EUR,~~ over a period of one year prior to the assessment, in total for each Union currency that would be caused by the default of any one or two largest single clearing members (and their affiliates) in extreme but plausible market conditions is more than EUR 3 billion.*

Outcome-based orientation of comparable compliance

We believe that the outcome-based orientation of comparable compliance is an important means of realising the G20 commitment to regulatory deference. In this regard, we feel that the draft legislation could be strengthened by adopting a holistic approach to comparable compliance that focuses on the achievement of policy outcomes EMIR seeks.

At a minimum, to provide more clearly for an outcomes-based approach, we suggest the following amendments to subparagraph (b) of the second paragraph of Article 1:

> *(b) the reasons why the Tier 2 CCP's compliance with the applicable third-country framework satisfies compliance with the relevant [outcomes achieved by the] requirements set out in Article 16 and Titles IV and V of Regulation (EU) No 648/2012;*

Furthermore, to achieve this, we suggest the following amendments to subparagraph (b) of the second paragraph of Article 3:

> *(b) The Tier 2 CCP complies with all [requirements under the third-country framework that are comparable to the outcomes achieved by the] relevant elements set out in Annex I to this Regulation.*

Furthermore, to achieve this, we suggest the following additional subparagraph in the second paragraph of Article 5:

> *[(b) and/or, such rules or processes, if established, would be unenforceable under third-country insolvency laws;]*

We believe the legislative intent of EMIR 2.2 was to recognize the clear relationship between the Commission's third-country equivalence decision and ESMA's comparable compliance assessment; we believe greater clarity in the legislative instrument is required to achieve this. Particularly, the comparable compliance assessment for Title IV of EMIR should focus on areas where the European Commission has

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adopted an equivalence decision *subject to specific conditions*. A broader approach would be a duplicative effort on the part of European institutions and agencies, and give rise not only to unnecessary uncertainty but also the problematic possibility of a Commission agency coming to a conclusion at odds with that of the European Commission.

It is unclear whether ESMA would begin tiering and comparable compliance processes in respect of UK CCPs ahead of UK's exit from the EU; we believe this would be extremely challenging. The decision on the date of the final adoption of these Delegated Acts should therefore be taken considering legal consequences for any equivalence decision adopted before their promulgation.

Conclusion

The draft legislation provides welcome clarity for third country CCPs. The predictability, proportionality, and risk-sensitivity of the legislation represents a major improvement on earlier proposals and will be helpful in achieving international comity and the G20 ambition of outcomes-based regulatory deference. The suggestions contained in this submission aim to work with the grain of the Commission's draft text – providing needed clarity in certain areas and additional scope for achieving regulatory coherence when outcomes are truly comparable.

Subject to the above clarifications, we believe the approach outlined by the Commission provides a sound basis for enhanced cross-border cooperation, striking the right balance between proportionate deference towards home supervisors and the legitimate financial stability imperatives of any jurisdiction.

In this context, we also encourage other jurisdictions to follow a similar proportionate approach based on predictable criteria for the determination of systemic markets and reciprocate the EU's efforts at achieving Tier 1-style deference for those CCPs which do not pose a systemic financial stability risk.

We are grateful for your consideration of these suggestions and stand ready to provide further input should that be helpful.

Best regards

Nandini Sukumar.

Nandini Sukumar

Chief Executive Officer