

## Our position

# Review of the European Market Infrastructure Regulation

## Trilogue recommendations

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## Executive summary

In light of the ongoing interinstitutional negotiations on the review of the European Market Infrastructure Regulation (EMIR), the co-legislators should consider certain issues to make sure the text reaches the right balance. Since a competitive and open clearing ecosystem in the EU is essential for a well-functioning Capital Markets Union (CMU) due to the global dimension of derivatives markets, the co-legislators should not lose sight of the current reality of clearing markets and should come with positive proposals to develop European markets and capabilities.

## Introduction

Informal interinstitutional (trilogue) negotiations between the co-legislators are taking place with a view to reach a first reading agreement on the EMIR review. As noted by the European Securities and Markets Authority (ESMA) in its 2023 EU derivatives markets report, the EU derivatives markets continues grow by 29% in 2022 by reaching EUR 314tn in Q4 2022. The EMIR review therefore comes at a critical moment for the future of EU capital markets and the competitiveness of EU financial and non-financial counterparties.

As such, the narrative on EU open strategic autonomy, including for financial services and clearing, may harm the significant non-EU investor base, reinforcing the need for EU policymakers to come with positive proposals to develop European markets and capabilities. In light of the upcoming trilogue, the co-legislators should not lose sight of the current reality of clearing markets: due to the global dimension of derivatives markets, a competitive and open clearing ecosystem in the EU is essential for a well-functioning CMU, in which the third country aspects need to continue playing a critical role in order to foster sustainable and sound competition between clearing alternatives in the single market.

US market participants are active at UK central counterparty clearing houses (CCPs) which notably holds substantial market shares in the clearing market for certain US dollar-denominated products. Overall, US reliance on UK CCPs is lower and US CCPs offer a sizeable clearing alternative while the US also has strict rules under which, for example, all CCPs which wish to provide services to US firms must be directly registered and supervised by the Commodity Futures Trading Commission (CFTC).

## Active Account Requirement

While the Commission's impact assessment concludes that no major operating costs would stem from this new requirement since most clearing members already have active accounts at EU CCPs, this measure could amount to an indirect forced relocation of some clearing activity, thereby undermining the sound principle of competitive and open markets.

The constructive and pragmatic approaches taken by the European Parliament and the Council are a positive development. Co-legislators seem to agree that a phased-in approach is warranted in order to leave enough time for market participants to adapt to this *sui generis* new requirement.

Regarding phase 1 and the attached operational elements, co-legislators should clearly define what is expected from market participants directly at the level 1, in order to provide a much-needed legal certainty. The same also goes for the conditions and frequency under which the operational elements of phase 1 need to be stress tested. On the representativeness criteria in phase 1, both Council and European Parliament's text seem to include a very high degree of complexity and lack of clarity. While the European Parliament's text seems to favour more of a principle-based approach, in which initial

and daily variation margins would have to be posted in the account, the mandate left to ESMA, both in European Parliament's and Council's text, remains quite unclear and would need to be further refined in the level 1 in order to make sure that ESMA's calibration does meet the intended conceptual purposes of the phase 1.

Regarding Phase 2, the Council's approach offers the most pragmatic way forward. ESMA's annual report on risk reduction, volumes cleared and risk exposures of EU market participants should provide a reliable and unbiased view of the current and future state of the EU clearing markets. When assessing the extent to which risks could have been substantially reduced and any subsequent next steps, there are risks stemming from the creation of captive EU markets composed of EU firms clearing in EUR subject to the same economic cycle, triggering consequences on the liquidity of the EU derivatives markets as well as potential market inefficiencies stemming from the restrictions for EU firms to benefit from multicurrency portfolio efficiencies.

Equally, the separate legislative proposal on amendments to the Capital Requirements Directive (CRD) is concerning. The proposed amendments are ambiguous and could capture exposure to other non-EU CCPs in addition to UK CCPs. The CRD amendments would penalise firms for holding exposures at CCPs, which is contrary to the general push by policymakers to encourage more central clearing.

## EU supervision

Co-legislators' convergence pertaining to the establishment of a new central database through which documentation can be submitted is a positive development. Such a platform will be key in making sure firms are not overwhelmed with duplicative and inefficient requests.

Furthermore, EMIR review should not be yet another missed opportunity for EU centralized supervision. The Commission's limited proposal in this domain is likely to maintain the current inefficiencies of the framework and the complex arrangements between authorities that lead to long and burdensome procedures.

Centralising CCP supervision through a single EU authority (eg ESMA) would allow CCPs and their clients to benefit from a safer environment for their operations to ensure a better monitoring of cross-border risks. In this fashion, the European Parliament's ambitious text is more than welcomed and would be game changing in paving the way for further progresses on the capital markets union, in which EU supervision is meant to play a paramount role.

## Other technical points

### Intragroup transactions

Co-legislators' common willingness to insert a new article 13 introducing a mechanism to avoid duplicative or conflicting rules is a positive development. However, the Commission's empowerment foreseen in article 3 to adopt a delegated act aiming at identifying third countries which may not benefit from the exemption has the potential to create unnecessary uncertainty and fragmentation for firms.

### **Bilateral margining exemption**

There is a potential cliff-edge effect stemming from the end of the current exemption of single stock equity and index options from the EMIR bilateral margining framework which expired on 4<sup>th</sup> of January 2024. AmCham EU welcomes the interim solution put forward for the ESAs at the end of December 2023 providing for a phase-in period of two years of the application of requirements related to the exchange of bilateral margins to over-the-counter (OTC) derivative contracts on single-stock equity options and index options not cleared by a CCP. The Commission should prioritise the decision relating to the adoption of the amending draft technical standards to ensure continuity with the current treatment thereby avoiding market fragmentation by avoiding instability in the regulatory framework applicable to equity options. Co-legislators seem to agree on appropriate and compatible positions with specific provisions on the treatment of equity options, including an exemption.

### **Pension scheme arrangements (PSA) exemption**

The introduction of an exemption from the clearing obligation where an EU financial counterparty or a non-financial counterparty – subject to the clearing obligation under EMIR – enters into a transaction with a PSA established in a third country (which is exempted from the clearing obligation under its national law) would strengthen the competitiveness of EU firms. Thus, it is positive that the Commission's original proposal was maintained by co-legislators in this domain.

### **Money Market Fund (MMF) / Undertaking for Collective Investment in Transferable Securities (UCITS) amendments**

Excluding all centrally cleared derivative transactions, including Repurchase Agreement derivatives, from the counterparty risk limits appears to be an important step in establishing a level playing field between exchange traded and OTC derivatives and to better reflect CCPs' risk-reducing nature in derivative transactions. Therefore, it is appropriate that co-legislators maintained the original Commission's proposal on the matter in their respective approaches.

### **Collateral availability and mobility**

Measures to strengthen European capital markets should facilitate access to liquidity pools and improve collateral availability and mobility within the EU. The proposed restriction from co-legislators to use un-collateralised bank guarantee as collateral only to NFCs, coupled with Parliament's proposed mandate to ESMA to specify the conditions under which un-collateralized bank guarantees can be accepted by CCPs as collateral, are likely to fragment even more the collateral market and affecting its liquidity. A greater harmonisation of the rules relating to collateral management activity, coupled with greater optionality as to how CCP participants can provide collateral to CCPs (EMIR article 47), would be paramount in overcoming restrictions on collateral usage and barriers to mobility.

## **Conclusion**

As the EMIR review comes at a critical moment for the future of EU capital markets and the financial and non-financial counterparties, the text should strive for the right balance to ensure a competitive and open clearing ecosystem in the EU without harming the significant non-EU investor base. Even though further refinements are needed, the positive steps to reach these objectives include, amongst others, the pragmatic approaches taken regarding the active account requirement and the concrete steps towards a real and efficient enhanced EU supervision.