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EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

Proposal for a Regulation of the European Parliament and of the Council

amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and the requirements for the recognition of third-country CCPs

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Executive Summary Sheet

Impact assessment on possible amendments to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

A. Need for action

Why? What is the problem being addressed?

In accordance with the 2009 G20 Pittsburgh agreement to reduce the systemic risk linked to the extensive use of derivatives, the EU adopted the European Market Infrastructure Regulation (EMIR) in 2012. A key pillar of EMIR is the requirement for standardised OTC derivatives contracts to be cleared through a Central Counterparty (CCP), which entered into force in December 2015. Mandatory clearing for certain asset classes as well as an increased voluntary use of central clearing amid growing awareness of its benefits among market participants have led to a rapid growth of the volume of CCP activity since the adoption of EMIR – in the EU and globally. Against the backdrop of the associated increasing concentration of credit risk in these infrastructures the supervisory arrangements for EU and third-country CCPs included in EMIR could be made more effective.

The current arrangements under EMIR for supervision of EU CCPs involving colleges coordinated by the home-country authority raise a number of concerns: (i) given the importance of a limited number of CCPs for the EU financial system as a whole the reliance mainly on the home-country supervisory authority raises concerns; (ii) diverging supervisory practices across the EU could create risks of regulatory and supervisory arbitrage for CCPs and, indirectly, for their clearing members and clients; (iii) the role of central banks as issuers of currency is not adequately reflected in CCP colleges.

Concerns also arise in respect of supervisory arrangements for third-country CCPs operating in the EU: (i) the implementation of EMIR rules on equivalence and recognition has shown some shortcomings, in particular as regards ongoing supervision of recognised third-country CCPs, (ii) there is considerable potential for misalignments between supervisory and central-bank objectives within colleges in the context of third-country CCPs where non-EU authorities are involved; (iii) possible changes to CCP rules and/or the regulatory framework in a third-country could create an un-level playing field between EU and third-country CCPs and scope for regulatory or supervisory arbitrage as there is currently no mechanism to ensure that the EU is informed automatically of such changes. A substantial volume of euro-denominated derivatives transactions and other transactions subject to the EU clearing obligation is currently cleared by UK CCPs; this reinforces the concerns set out, in view of the proportion of such transactions being cleared in CCPs outside the EU's jurisdiction following the UK's exit from the EU.

What is this initiative expected to achieve?

The initiative is expected to increase the consistency of supervisory arrangements for CCPs established in the EU, including adequate recognition of the specific role of the Central Bank of Issue (CBI), and to enhance the EU's ability to monitor, identify and mitigate third-country CCP risks.

What is the value added of action at the EU level?

EMIR governs the supervisory framework for CCPs established in the EU and the regime for third-country CCPs providing clearing services in the EU. Increasing supervisory consistency at EU level will help to address: (i) the systemic risks posed by highly integrated and interconnected CCPs, which operate on a cross-border basis beyond the reach of national supervisors; and (ii) risks arising from diverging supervisory practices, which Member States cannot solve on their own. Enhancing the intensity of EU supervision of systemic third-country CCPs can also address better threats to the financial stability of the EU as a whole.

B. Solutions

What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?

Regarding the consistency of supervisory arrangements for CCPs established in the EU, three options have been considered: (1) maintaining the status quo (i.e. no policy action); (2) the establishment of an EU supervisory mechanism; and (3) the establishment of a single EU supervisor. The preferred choice is option 2, which would leave existing supervisory powers largely with national supervisors in view of their fiscal responsibility while creating an EU supervisory mechanism to handle areas of common interest on a more centralised basis and strengthen CBIs' input into the supervisory process. This option is also the most appropriate to achieve the objective of increasing the consistency of supervisory arrangements for EU CCPs while avoiding the shortcomings of option 3.

With respect to the mitigation of third-country CCP risks, three options have been considered. Option 1 consists of maintaining the status quo (i.e. no policy action). Under option 2, third-country CCPs would be required to be established and authorised in the EU in order to provide services to EU counterparties or trading venues or to provide clearing services in EU currencies. Pursuant to option 3, the degree and intensity of EU supervision would be proportionate and depend on the risks posed by third-country CCPs to the EU. Different criteria or thresholds could be set: (i) low impact CCPs could be subject to an enhanced implementation of the EMIR equivalence and recognition regime; and (ii) medium to high impact CCPs could be subject to a sliding scale of additional supervisory requirements. The impact assessment concludes that option 3 is the most appropriate to achieve the objective of enhancing the EU's ability to monitor, identify and mitigate third-country CCP risks.

Who supports which option?

Stakeholder feedback was obtained through three Commission public consultations: the 2015 consultation on the EMIR Review, the 2017 consultation on the capital markets union (CMU) mid-term review and the 2017 consultation on the operations of the European Supervisory Authorities. On the supervision of CCPs established in the EU, respondents, among which a majority of companies, highlighted the need for enhanced supervisory convergence at EU level to reflect the systemic nature of CCPs, while ensuring an adequate role for national authorities and CBIs. On the supervision of third-country CCPs, ESMA and public authorities supported enhancing the existing recognition process, while a number of stakeholders, including industry representatives, warned against the risk of market fragmentation.

C. Impacts of the preferred option

What are the benefits of the preferred option (if any, otherwise main ones)?

With regard to the consistency of supervisory arrangements for CCPs established in the EU, the preferred option would improve the coherence of supervisory arrangements, while ensuring that specific areas of supervisory responsibility and related national fiscal responsibility remain aligned. This option would also ensure the proper involvement of CBIs within the scope of their responsibilities and provide CCPs and market participants with more clarity and predictability in the way CCPs are supervised within the EU. By streamlining key elements of CCP supervision, the preferred option should lower costs both for supervisory authorities and CCPs.

Regarding the mitigation of third-country CCP risks, the preferred option would enable EU authorities to better monitor and mitigate such risks and reinforce the overall stability of the EU financial system.

Both preferred options will help lower the already low probability (but extremely high-impact) risk of a CCP failure through the enhanced ability of the relevant public authorities in the EU to prevent the build-up of systemic risk within EU CCPs and to mitigate the transmission of harmful financial distress through third-country CCPs.

What are the costs of the preferred option (if any, otherwise main ones)?

Regarding the consistency of supervisory arrangements for CCPs established in the EU, the preferred option, which involves setting up a new CCP European supervisory mechanism, would have no impact on the EU budget, as any additional costs would be covered by supervisory fees collected from EU CCPs. These would however be proportionate to their activity and would only represent a negligible fraction of their turnover. Hence, the preferred option is not expected to have a significant impact on the cost of clearing, whether it is for clearing members or their clients and indirect clients.

Similarly, the changes envisaged to mitigate the risks posed by third-country CCPs would also have no impact on the budget of the EU, as any additional resources for the European mechanism would also be funded through the collection of supervisory fees from third-country CCPs. Beyond supervision-related costs, most of the costs clearing counterparties (clearing members and their clients) would face would relate to the introduction of a location policy for Tier 2 CCPs, which would be triggered on the basis of objective criteria.

How will businesses, SMEs and micro-enterprises be affected?

The costs associated with enhanced supervision of EU and third-country CCPs could potentially be passed on to the ultimate clients of CCPs including businesses, SMEs and micro-enterprises. In net terms, the possible increase of the costs of clearing are unlikely to be significant, in particular when compared to the benefits associated with the proposal. Businesses, SMEs and micro-enterprises will benefit from increased stability resulting from the enhanced ability of EU authorities to prevent the build-up of systemic risk within EU CCPs and to mitigate the transmission of financial distress through third-country CCPs. The clarification of supervisory arrangements both for EU and third-country CCPs, in combination with the Commission's recent EMIR REFIT initiative on the reduction of disproportionate costs for smaller counterparties, should help to further promote the use of central clearing, facilitate cross-border transactions within the EU and thus improve the ability of SMEs to access financial instruments, either to hedge their risks or to invest.

Will there be significant impacts on national budgets and administrations?

No. The amendments considered should not trigger relevant costs for national budgets and administrations.

Will there be other significant impacts?

No.

D. Follow up

When will the policy be reviewed?

An evaluation of EMIR in its entirety should be carried out, with a particular focus on the effectiveness and efficiency of the proposed supervisory arrangements in meeting EMIR's original objectives. This evaluation should take place at least 5 years after the application of these amendments.