Mr
Michel Barnier
European Commissioner for
Internal Market and Services

Brussels, 25 July 2013
HG/MvB/13-075

Mr
Steven Maijoor
Chairman of the European
Securities and Markets Authority

E-MAIL

Third Country Application of EMIR

Dear Mr Barnier, Dear Mr Maijoor,

At this moment European banks are in the middle of the process of implementing EMIR. Regarding the application of EMIR in relation to third country counterparties and for third country branches of European banks we encounter however major challenges.

We are concerned about the wide interpretation of the scope of EMIR as for instance stated by ESMA in the answer on question 12b of its Questions and Answers as issued on the 4th of June 2013. We wonder whether this extraterritorial interpretation is in line with Article 11 of EMIR and would like to ask for a more restrictive approach.

In case this extraterritorial approach will be maintained, European banks have major challenges to meet. We would appreciate your help in finding acceptable answers to these challenges. Therefore we hereby give you the following explanation and a proposed way forward.

Third country counterparties

Many European banks have outstanding (otc) derivatives with third country counterparties. How to comply with EMIR requirements which can only be effected on the basis of mutual agreement. For example the requirements regarding confirmation, portfolio reconciliation, dispute resolution and in many jurisdictions information to be reported regarding our third country counterparty ID. The problem is that the counterparty doesn't have to comply with EMIR and could refuse to accept these requirements. There could even be local regulation prohibiting the acceptance of these EMIR requirements.

Non EEA branches of European banks

We understand that non EEA branches of European banks are in scope of EMIR. This of course triggers extraterritoriality issues. In practice European banks with non EEA branches will be confronted with double or even conflicting regulations. As a result the non EEA branch won't comply with EMIR or the regulation in the jurisdiction where the non EEA branch is located.

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At this moment European banks are drafting EMIR documentation in order to comply with EMIR requirements. However many banks are hesitant of sending this EMIR documentation (when ready) to third country parties they agreed ISDA's/ LMA's with. In the framework of the Dodd Frank Act (DFA) many banks for example have experienced that non US counterparties refused to sign Dodd Frank documentation because DFA is not applicable on them. The same will happen with EMIR documentation. At least US counterparties will refuse to sign because they will state they have to comply with the Dodd Frank Act Title VII.

To avoid compliance risks and unnecessary costs as much as possible we would like to propose the following approach i.e. to focus EMIR implementation in first instance as an European regulation on European territory. Because of the problems as mentioned above, we would like to propose a phase-in of EMIR implementation with non-EEA counterparties or by or with non-EEA branches at a later stage. When there is more clarity on what equivalence/ substituted compliance will entail, implementation will be done on the basis of what is agreed between the regulators on equivalence/ substituted compliance.
By granting this relief, risks of non-compliance (in Europe or the third country) and extra costs of double implementation (one on the basis of EMIR and one on the basis of substituted compliance), could be avoided.

We appreciate the progress being made by the European Commission and the CFTC with regard to the application of equivalence/ substituted compliance as stated on the 11th of July 2013. We hope this way of attuning European and US derivatives regulation can be followed by the European Commission with other third countries as well.

We would appreciate your help in finding an acceptable and workable solution and to hear your thoughts regarding an approach as proposed above.
Of course we are ready to discuss this approach in more detail with you.

Kind regards,

Christian Talgorn
President

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General Manager

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