ABI Associazione Bancaria Italiana

ASSOGESTIONI associazione del risparmio gestito

ASSOSIM Associazione Italiana Intermediari Mobiliari 1996 - 2011 25

5 FEBBRAIO 2014

Spettabile
CONSOB – Commissione
Nazionale per le Società e la Borsa
Via G.B. Martini, 3
00198 - Roma

Spettabile
BANCA D'ITALIA
Via Nazionale, 91
00184 - Roma

Spettabile
MINISTERO DELL'ECONOMIA E
DELLE FINANZE
Via XX Settembre, 97
00187 - Roma

OGGETTO: Problematiche interpretative circa gli obblighi di *reporting* della EMIR

Come noto, gli obblighi di reporting nei confronti di un *Trade Repository* previsti dall'art. 9 del Regolamento EU n. 648/2012 entreranno in vigore il 12 febbraio p.v. e riguarderanno sia i derivati OTC sia i cosiddetti *Exchange Traded Derivatives*.

Sebbene la Commissione europea e l'ESMA si siano espresse nel tempo fornendo numerosi chiarimenti interpretativi, permangono aree di incertezza che, per la loro rilevanza, potrebbero pregiudicare la corretta esecuzione dei suddetti obblighi, dando luogo inoltre ad approcci operativi disomogenei nei diversi Paesi membri.

In particolare, in tema di obblighi di *reporting* sono emersi alcuni dubbi, più approfonditamente descritti nel documento allegato alla presente, relativi a:

1) Schemi di *reporting* per gli *Exchange Traded Derivatives*.
2) Obbligo di *reporting* nel caso di gestioni patrimoniali.
3) Applicabilità del Regolamento EMIR a taluni strumenti su valute.
4) Articolo 1(4)(a) del Regolamento EMIR: Membri dello ESCB e altri soggetti pubblici che svolgono funzioni similari. Modalità di identificazione.
5) Articoli 1(4)(a) e 1(5)(b) del Regolamento EMIR. Enti del settore pubblico.
6) Termine di segnalazione per i derivati conclusi il 16/8/2012 o dopo tale data e in essere alla data del 12/2/2014.

7) Posizione dei soggetti gestori di fondi alternativi nelle more di recepimento della AIFMD.

Le scriventi chiedono a codeste Autorità di promuovere, nelle competenti sedi istituzionali dell'Unione Europea, un intervento interpretativo sulle questioni sopra indicate, al fine di fare luce sui profili rimasti dubbi.

Al fine di consentire agli intermediari/SGR associati ad ABI, Assosim e Assogestioni di assolvere agli obblighi di cui sopra anche nelle more di un chiarimento ufficiale su tali aspetti, abbiamo indicato, nel documento allegato, quella che, a nostro avviso, appare una ragionevole interpretazione delle disposizioni che contemplano i suindicati adempimenti. Tutto ciò in considerazione della necessità di garantire un'applicazione per quanto più possibile omogenea degli obblighi stessi e a riprova della diligenza al riguardo operata dalle banche e dagli intermediari finanziari.

Per facilitare il confronto con le istituzioni comunitarie i quesiti sono formulati in inglese.

Confidando nel supporto che codeste Autorità vorranno fornire all'industria finanziaria, si coglie l'occasione per inviare

Distinti saluti,

Giovanni Sabatini	Gianluigi Gugliotta	Fabio Galli
Direttore Generale	Segretario generale	Direttore Generale
ABI	ASSOSIM	ASSOGESTIONI

ALLEGATO

ABI Associazione Bancaria Italiana

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ASSOSIM Associazione Italiana Intermediari Mobiliari 25° 1986 - 2011

ANNEX

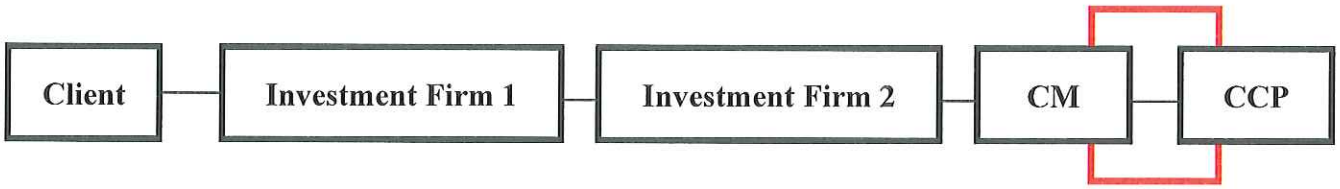
1) Exchange Traded Derivatives Reporting

ESMA pointed out how to report *Exchange Traded Derivatives* ("ETD") answering to *Question* no. 2, Part V of Q&A updated in December 20 2013.

In details, ESMA made reference to two scenarios, the first to be implemented whereas the broker intervenes in the order execution chain on its own account and the second for transactions where the broker trades as "agent" on the account of and on behalf of a client.

The second scenario gives evidence to critical issues both from an implementing point of view and under a commercial profile.

Please, consider the following example where the client is a person/entity not subject to EMIR (hypothesis no. 1).

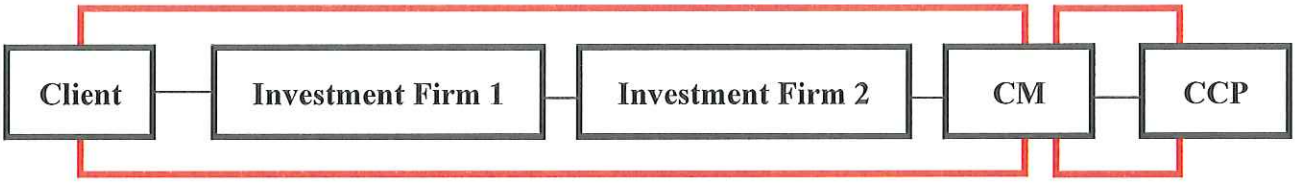


In the example above, the Investment Firm 2 is the broker executing the order on the exchange, while the Investment Firm 1 can be an intermediary providing the service of reception and transmission of orders or the service of portfolio management (in the latter case, instead of an Investment Firm, we can foresee a management company).

On the basis of the answer to Q2, the Central Counterparty (CCP) and the Clearing Member (CM) must only report the trade to the Trade Repository (TR) as the Investment Firm 2 and the Investment Firm 1 are only acting on the account and on behalf of a client, so they are not expected to submit a report under EMIR. The Client will not report anything to the TR either, given that it is not subject to EMIR Regulation (hypothesis no. 1).

Moreover, the Clearing Member will not be able to specify the final Client in the Beneficiary field because it does not have any relationship with the latter, neither the Investment Firm 1 is willing to transmit these information to other subjects in the execution chain as the relevant data are commercially sensitive. Consequently, the reports provided to the TR could lack of some significant information on risk allocation, thwarting an important goal of the EMIR Regulation.

Please, consider now the following example where the client is a person/entity subject to EMIR (hypothesis no. 2).



In the example above, the Investment Firm 2 is once again the broker executing the order on the exchange, while the Investment Firm 1 can be an intermediary providing the service of receiving and transmission of orders or the service of portfolio management (in the latter case, instead of an investment firm, we can foresee a management company).

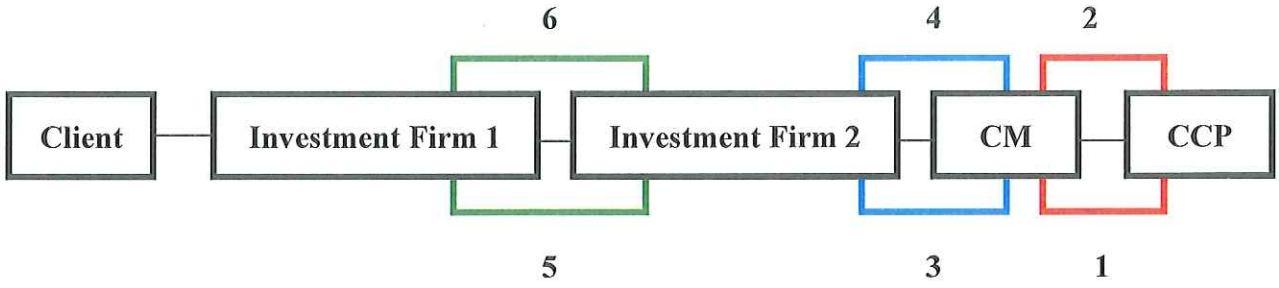
On the basis of the answer to Q2, the CCP, the Clearing Member and the Client must report the trade to the TR while the Investment Firm 2 and the Investment Firm 1 are only acting on the account and on behalf of a client, so they are not expected to submit a report under EMIR.

In the scheme above, the Client becomes the Counterpart of the Clearing Member. Nevertheless, the latter does not have any knowledge of the Client identity as the Clearing Member does not have a contractual relationship with it. To this regard, it is worth considering that the Counterpart ID is a compulsory field that cannot be left blank.
At the same time, the Investment Firm 1 is not willing to transmit the Client ID to other subjects in the execution chain as the relevant data are commercially sensitive. In particular, please consider that, differently from hypothesis no. 1, the Client is now identified with a LEI that makes easy for everyone to identify the underlying person/entity.

In order to tackle the issues above taking into account the goals pursued by EMIR regulation, after consulting the financial industry, the Associations[1] have identified the following solution to be applied in all cases when the Client cannot be properly identified by the Clearing Member.

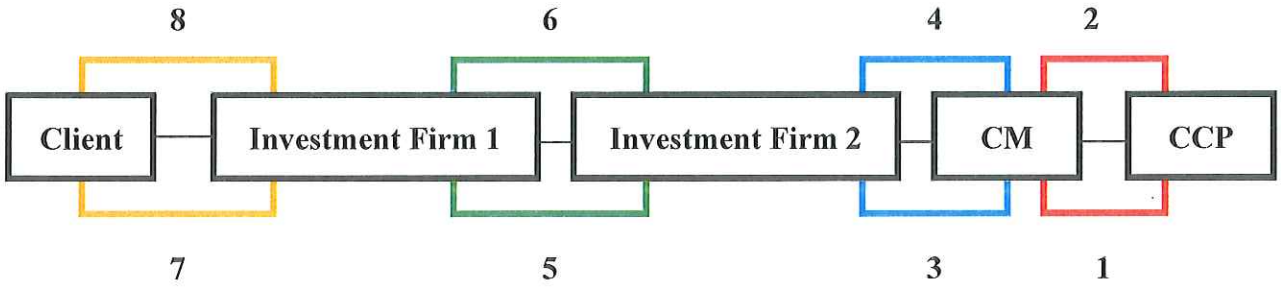
Hypothesis no. 1: the client is a person/entity not subject to EMIR

[1] The Italian Association of Financial Intermediaries (ASSOSIM); the Italian Banking Association (ABI); the Italian Asset Management Association (ASSOGESTIONI).



Assuming that one of the main goals of the reporting activity is to collect information about risks allocation, we propose that when the Client cannot be properly identified (see above) all subjects in the execution/clearing chain have to report the trade relevant data. In particular, besides the CCP and the Clearing Member, the reporting entities become the Investment Firm 2 - as it is counterpart of the Clearing Member for the relevant trade - and the Investment Firm 1 - as it assumes all the obligations deriving from the trade with the Investment Firm 2. The Investment Firm 1 will therefore specify the Investment Firm 2 in the Counterparty field and the Client internal code in the Beneficiary field. This approach gives the TR full knowledge about all subjects involved in the trade under a risk profile.

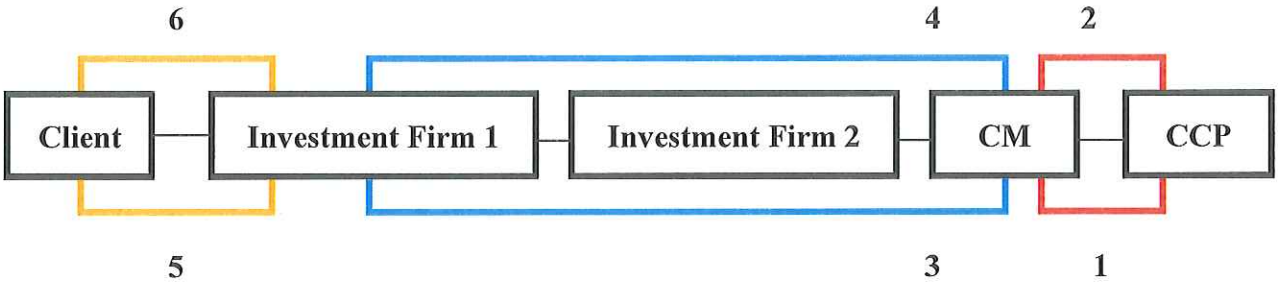
Hypothesis no. 2: the client is a person/entity subject to EMIR



Once again we propose that when the Client cannot be properly identified (see above) all subjects in the execution/clearing chain have to report the trade relevant data. In particular, besides the CCP and the Clearing Member, the reporting entities become the Investment Firm 2 - as it is counterpart of the Clearing Member for the relevant trade -, the Investment Firm 1 - as it assumes all the obligations deriving from the trade with the Investment Firm 2 - and the Client - as it is the final Counterpart of the trade. Therefore, the Investment Firm 1 will send two reports, the first with the Investment Firm 2 in the Counterparty field and the second with the Client in the Counterparty field. The Client will send a report with the Investment Firm 1 in the Counterparty field. This approach gives the TR full knowledge about all subjects involved in the trade under a risk profile.

The above proposals need to be adapted in case of give-up agreements.

Hypothesis no. 3: the Investment Firm 1 has a give-up agreement with the Clearing Member



The description provided under Hypothesis no. 1 and 2 has to be adapted in presence of a give-up agreement. In particular, according to ETDs Reporting Answers 2 and 3 of ESMA Q&A, the CM will send a report pointing out the Investment Firm 1 as its Counterpart as a result of the give up agreement. Accordingly, the Investment Firm 1 will send a report pointing out the CM as its Counterpart. On the contrary, in the scheme herein the Investment Firm 2 does not have a reporting obligation as it is only acting on the account and on behalf of the Investment Firm 1, without assuming a risk position from the trade execution. Indeed, the Investment Firm 1 will constitute the collateral directly with the CM.

2) *What are the reporting obligations in case of discretionary portfolio management carried out by an asset manager on behalf of an investor?*

All counterparties, both natural persons and undertakings, should be identified as part of a derivative contract and individually identified in the reporting to the TR. While counterparties qualified as undertakings - as defined in the European Commission Q&A (see above) - should apply for a LEI code, natural persons - if not undertakings - should be identified using an internal code defined by the asset manager.

3) *Inapplicability of the Regulation to purchases and sales of foreign currencies (FX Swaps and Forwards)*

Regulation No 648/2012, as at Article 2 (5), defines a derivative instrument as a financial instrument set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC as implemented by Article 38 and 39 of Regulation (EC) No 1287/2006.

Point 4 of such Annex states: «*Options, futures, swaps, forward* ***rate*** *agreements* ***and any other derivative contracts relating to*** *securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash*».

As a preliminary consideration, forward agreements **on currencies** do not fall within Point 4 above, as only forward agreements on **rates** are mentioned therein. Also, «*...any other derivative contracts relating to ... currencies*» does not refer to the case of forward agreement on currencies. Accordingly, as the so called **FX Forward** contracts are not comprised in Point 4 above, they do not fall within the scope of application of EMIR.

Further to this, Point 4 above was **transposed** into the Italian Legislative Decree No 58/1998 (also known as Consolidated Law on Finance), as at Article 1 (Definitions), para. 2, letter (d)[2]. It is also accompanied by para. 4 of Article 1 adding that **purchases and sales of foreign currencies are to be considered financial instruments and, precisely, financial contracts for difference, if and only if they are not related to commercial purposes and are settled by difference**, even when these transactions are automatically renewed (so called, "roll-over")[3].

Accordingly, on the basis of the latter, those purchases and sales of foreign currencies which are concluded for commercial purposes or settled "physically", are not identified and considered as financial instruments. Consequently, they are not to be treated as financial instruments falling in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC, and do not fall within EMIR's scope of applicability (*i.e.* both for the clearing and reporting obligations).

4) Article 1(4)(a) of EMIR: Members of the ESCB and other Member States' bodies performing similar functions. Identification issues.

As per Article 1(4)(a) the «*Regulation shall not apply to the members of the ESCB and other Member States' bodies performing similar functions and other Union public bodies charged with or intervening in the management of the public debt*»

A financial counterparty to a derivative financial contract concluded with a member of the ESCB and other (...) bodies performing similar functions shall, in any case, be subject to the reporting obligation.

To this regard, our Members signal the impossibility to report a trade to trade repositories because:

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[2] The text of the Legislative Decree is available on-line at: http://www.consob.it/mainen/documenti/english/laws/fr_decree58_1998.htm.

[3] Article 1, para. 4, of the Italian Consolidated Law on Finance reads: «The payment instruments are not financial instruments. Financial instruments, and specifically swaps, are foreign currency buy and sell contracts, extraneous to commercial transactions and settled on the difference, also by means of automatic "roll-over" transactions. The additional foreign currency transactions identified pursuant to article 18, subsection 5, are also financial instruments.»

- field 7 of Table 1 in the Annex to Regulation (EU) No 1247/2012 can only be populated with 'Financial' or 'Non-Financial' counterparty qualification, either of which would not be applicable in the case of a member of the ESCB and other bodies performing similar functions. However, field 7 cannot be left blank, considering that a TR would, most likely, not allow to transmit the report with a blank field.
- A similar issue arises when such *Members of the ESCB and other Member States' bodies performing similar functions* have not requested a LEI code, which would allow them to be identified in the report sent out to the TR by their counterpart. Indeed, as these entities are not subject to EMIR, they do not have an obligation to apply for a LEI. Notwithstanding, along with field 7 mentioned above, also field 3 of Table 1 (*i.e.* 'ID of the other Counterparty') cannot be left blank.

Financial parties, which are subject to the reporting obligation even when their counterpart is exempted, would face the impossibility to send out a complete report or, worse, would receive an error message (by the software/interface in use) as a response to their attempt to send out a report which contains blank fields. Not to mention the fact that no party is allowed, nor is willing, to send an incomplete report to a TR.

Accordingly, less than two weeks' time to the entry into force of the reporting obligation, it has become crucial to provide clarity on the reporting of trades with such counterparties, in the specific instances described above.
We believe that entities under 1(4)(a) of EMIR should be identified within the reporting reports - as "Counterparty" or, if more appropriate, "Beneficiary" - using an internal code excepting the case where such entities have asked for a LEI on a voluntary or contractual basis. Such solution would be in line with the provisions stated for individuals (ESMA Q&A, TR Answer no. 10).

5) Articles 1(4)(a) and 1(5)(b) of EMIR. Public sector entities: in or out of EMIR.

In the same way as the instances described in the previous point, a trade entered into by a public sector entity mentioned herein (*i.e.* exempted from the sole clearing obligation but subject to reporting) with a financial counterparty (subject to reporting), would bear the issue of the availability of a LEI code for the public sector entity party of a trade subject to reporting, as well as the issue of its qualification, as a 'Non-Financial' counterparty or else[4].

[4] It seems out of doubt that a public sector entity falling into the scope of Article 1(5)(b) of Regulation No 648/2012 will never be qualifiable as a 'Financial' counterparty, considering that such definition – see Article 2(8) – recalls a precise list of cases, none of which are applicable to a public sector entity, *i.e.* an investment firm (…); a credit institution (…); an insurance undertaking (…); an assurance undertaking (…); a reinsurance undertaking (…); a UCITS and its management company (…); an institution for occupational retirement provision (…); an alternative investment fund managed by AIFMs (…).

Article 2(9) of Regulation (EU) No 648/2012 defines a 'non-financial' counterparty as *an undertaking established in the Union other than the entities referred to in points (1) and (8).*

The European Commission contributed to the clarification of the *concept of undertaking* thanks to the release of new Q&As on the 18th of December 2013. Indeed, question no. 14 of such document clarified that «(…) *the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. Therefore, the qualification of a specific entity as an undertaking depends entirely on the nature of its activities. As regards the concept of "economic activity", the Court has considered that any activity consisting in offering goods and services on a market is an economic activity, regardless of the entity's legal status and the way in which it is financed.*»

Accordingly, a public sector entity falling into the scope of Article 1(5)(b) will be identifiable as an *undertaking* and, consequently, as a 'non-financial' counterparty **when, and only when,** this public sector entity offers goods and services on a market. For those instances in which a public sector entity, *i.e.* a municipality, not offering goods or services on a market, intervenes in the management of the public debt, the entity should be exempted from EMIR obligation. To this regard, we ask to clarify whether such exemption is valid only for derivatives concluded in relation with the public debt management or it applies to all derivatives transactions carried out by the municipality.

Should the municipality be considered exempted, please see par. 4 about identification issues; should it not be considered exempted, partially (derivatives linked to public debt management) or totally (all derivatives), and is not an undertaking (see above), then it has a reporting obligation and therefore it should apply for a LEI.

6) Reporting start date for derivatives entered on or after August 16, 2012 and still outstanding on February 12, 2014

We are aware that some market participants, financial newspapers and trade repositories provide different interpretations of Article 5, paragraph 4, of EU Regulation No 1247/2012. We would like to shed some light on the reporting start date for derivatives entered on or after August 16, 2012 and still outstanding on February 12, 2014.

It is our belief that the above mentioned Regulation is complete and, somehow, it takes into consideration every single possibility regarding reporting start date. The uncertainty arises when it comes to single out the correct term for the backloading activity requested for the derivatives herein analyzed.

Indeed, on the one hand, Article 5, paragraph 3, of the EU Regulation No 1247/2012 seems to set a **90 days** delay for derivatives outstanding on August 16, 2012 and still outstanding on February 12, 2014 (*i.e.* they should be reported by May 12, 2014).

On the other hand, a simple straightforward literal interpretation of Article 5, para. 4, of EU Regulation No 1247/2012 shows a different deadline for such backloading: derivatives entered on or after August 16, 2012 and still pending on February 12, 2014 should be reported within **3 years** from the reporting start date. Indeed, Article 5, para. 4, lett. b) of Regulation No 1247/2012 states "Those derivative contracts which [...] were entered into on or after 16 August 2012, and that are not outstanding on or after the reporting start date" means that it takes into consideration also derivatives that will be outstanding from February 12, 2014 onwards and that will expire sometime between February 12, 2014 and a future date.

In light of the above uncertainty, we would ask to confirm which deadline for the backloading of the derivatives concerned herein should be respected; meanwhile we will consider the delay allowed equal to 90 days (*i.e.* May 12, 2014).

7) *What is the position of asset managers of alternative funds pending the full implementation of the AIFMD into the national legislation?*

Alternative funds are to be considered outside the definition of FC of the EMIR as long as AIFMD does not enter fully into force at national level; to that date, alternative funds are hence to be classified as NFC.