The Association of Corporate Treasurers

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Comments in response to:

PUBLIC CONSULTATION ON REGULATION (EU) NO 648/2012 ON OTC DERIVATIVES, CENTRAL COUNTERPARTIES AND TRADE REPOSITORIES

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The Association of Corporate Treasurers (ACT)

The ACT is a professional body for those working in corporate treasury, risk and corporate finance. It is established by Royal Charter in the public interest. Further information is provided at the back of these comments and on our website www.treasurers.org.

Contact details and a link to our approach regarding policy submissions can also be found at the end of this response.

We canvas the opinion of our members through our monthly e-newsletter to members and others, *The Treasurer magazine*, and our Policy and Technical Committee.

General

The ACT welcomes the opportunity to comment on this matter.

PUBLIC CONSULTATION ON REGULATION (EU) NO 648/2012 ON OTC DERIVATIVES, CENTRAL COUNTERPARTIES AND TRADE REPOSITORIES

http://ec.europa.eu/finance/consultations/2015/emir-revision/docs/consultation-document_en.pdf

QUESTIONS FOR STAKEHOLDERS

Question 1.1: CCP Liquidity

Article 85(1)(a) states that: “The Commission shall …… assess, in cooperation with the members of the ESCB, the need for any measure to facilitate the access of CCPs to central bank liquidity facilities.”

There are no provisions under EMIR facilitating the access of CCPs authorised under EMIR to additional liquidity from central banks in stress or crisis situations, either from the perspective of the members of the ESCB or from the perspective of CCPs. However, it is recognised that in some member states, CCPs are required to obtain authorisation as credit institutions in accordance with Article 6 of Directive 2006/48/EC. Such authorisation creates access to central bank liquidity for those CCPs. On the other hand, other member states do not require CCPs to obtain such an authorisation.

i. Is there a need for measures to facilitate the access of CCPs to central bank liquidity facilities?

Yes. The CCP relies on counterparties with derivative liabilities paying margin on a timely basis to cover those with asset positions in the event of a crisis. The 2008 crisis showed the risks of relying on payment systems to ensure timely settlement, and then only if payer parties are able to access their commercial liquidity facilities.

The purpose of EMIR, and similar regulation in other G20 countries has been to seek to ensure that governments through their central banks are not called upon to meet liquidity requirements of commercial banks in times of crisis and ultimately to avoid calls on deposit insurance. EMIR has exposed them to the movement of this liquidity risk to CCPs and its concentration within CCPs.

In addition, the procyclicality risk discussed in question 1.4 will amplify exposures and the value at risk within the CCP.

We note that the Bank of England has recognised the above by issuing banking permits to the UK based CCPs which directly exposes the central bank to calls for funding during crisis.

ii. If your answer to i. is yes, what are the measures that should be considered and why?

The CCPs liquidity requirement to meet asset positions cannot be capable of being measured. The scale of margin cannot be foreseen since it is entirely dependent on the degree of movement in benchmark prices, and the capacity of liability parties to deliver cash on a timely basis which would only become apparent in times of crisis.

Security of the CCP system used by EMIR therefore requires each EU central bank to act as lender of last resort to those CCPs domiciled within their jurisdiction. OR G20 coordinated circuit breakers be applied.

Question 1.2: Non-Financial Firms

Article 85(1)(b) states that: " The Commission shall…..assess, in coordination with ESMA and the relevant sectoral authorities, the systemic importance of the transactions of non-financial firms in OTC derivatives and, in particular, the impact of this Regulation on the use of OTC derivatives by non-financial firms;"

Non-financial counterparties are subject to certain requirements of EMIR. However, such counterparties will not be subject to the requirements to centrally clear or to exchange collateral on non-centrally cleared transactions provided that they are not in breach of predefined thresholds, in accordance with Article 10 of EMIR. Further, it is recognised that non-financial counterparties use OTC derivative contracts in order to cover themselves against commercial risks directly linked to their commercial or treasury financing activities. Such contracts are therefore excluded from the calculation of the clearing threshold.

(a)

i. Are the clearing thresholds for non-hedging transactions (Article 11, Regulation (EU) No 149/2013) and the corresponding definition of contracts objectively measurable as reducing risks directly relating the commercial activity or treasury financing activity (Article 10, Regulation (EU) No 149/2013) adequately defined to capture those non- financial counterparties that should be deemed as systemically important?

We do not believe any or any sector of NFCs are systemically important for the standard range of foreign exchange and interest derivative contracts and this is borne out by data available through the Bank for International settlements which show non-financial institutions (corporate and governmental organisations) as 3% to 6% of all outstandings (the range being due to double counting already in evidence amongst FCs).

The contract definitions, with the exception of foreign exchange contracts for which discussion remains ongoing, are appropriate and the thresholds are appropriate although we repeat we do not believe NFCs are systemically important and nor that they should be reporting because dual sided Corporate reporting has led to inaccuracies, the inability to usefully analyse data across EMIR, adds no value or information, and Corporates should not be burdened with the systems and administrative costs or undertake useless work.

We object to the requirement of NFCs to collateralise contracts otherwise excluded by the hedge definition or the threshold where one class of derivative can meet neither test. This is in contrast to the treatment under the Dodd Frank regulations which does not require collateralisation of all classes of contract where one or more class(es) do require collateralisation.This places a liquidity exposure on EU domiciled NFCs not suffered by their USA domiciled competitors and this burden may be exacerbated as other markets bring their regimes into play.

ii. If your answer to question i. is no, what alternative methodology or thresholds could be considered to ensure that only systemically important non-financial counterparties are captured by higher requirements under EMIR?

Any methodology must be consistent with that adopted by other G20 regimes so at to avoid competitive disadvantage arising between G20 members.

We believe that one major change that should be introduced is to limit the obligation for NFC+s to centrally clear transactions only to the asset class where the clearing threshold has been exceeded. At the moment, exceeding the threshold in one asset classes triggers clearing obligation for all asset classes. This would bring EU legislation in line with USA legislation and remove the competitive disadvantage developing between EU and USA firms.

In our view the current design is illogical and counterproductive from a broader economic perspective. NFC+s should have an obligation to centrally clear only their non-hedging transactions above the clearing threshold but should benefit from the same exceptions as NFC-s for their hedging transactions. The balance sheets of NFC+s are likely to be significantly impacted by future EMIR margining requirements. Imposing variation margin on hedging transactions below the clearing thresholds will expose NFC+s to daily liquidity volatility up to the settlement date of the underlying commercial transaction and will entail higher levels of working capital. This will divert financial resources that could otherwise be invested in the real economy. It should also be noted that NFC+'s will essentially collateralise cash or bank guarantees because NFCs would typically not hold financial securities[*]. Therefore NFC+s' obligation to centrally clear and to post margin puts an additional layer of credit risk to the banking system as NFCs often have to hold credit lines in banks in order to be able to face margin calls.

[*]Note that some companies may in consolidated accounts have to show securities held by their pension schemes but such securities are not available to the group outside the pension fund.

(b) Please explain your views on any elements of EMIR that you believe have created unintended consequences for non-financial counterparties? How could these be addressed?

The ACT supports the intent of proportionate regulation, such as greater transparency and the minimisation of systemic risk. However we believe the regulation in its current form would amplify systemic risk through unintended consequences of certain regulations, including increased costs and complexity, reduced prudent risk management, increased cash volatility, reduced liquidity and availability of choice.

The two areas of concern are (i) unnecessary requirements for central clearing and/or margining/collateralisation and (ii) the unnecessary reporting requirements.

We propose that group funding activities which do not fall under Article 10.3 of EMIR and are therefore "hedging" of group debt and foreign exchange needs, for example intra group loans and back-to-back hedges between a holdco with market access which can enter into public debt and bank swaps and its subsidiary, should be exempt from the requirements of central clearing and bilateral collateralisation under EMIR. Trading activities which do not constitute such hedging should be subject to all of the requirements of EMIR.

We also have members the funding hedging activities of which will be subject to clearing and margining/collateralisation under EMIR on account of their worldwide commodity trading activity being in excess of the commodity clearing threshold. This:

- *Seems disproportionate in that they only engage in group funding hedging activity to minimise risks to their business as a whole and the Treasury functions of similarly sized/larger corporates without commodity trading activities will not be subject to central clearing and bilateral collateralisation obligations.*

- *Will increase cash flow volatility and liquidity risks at the group funding level as a result of the EMIR requirements.*

- *Will disincentivise prudent risk management for the business as a whole to reduce costs.*

- *May require the business to consider alternative methods of reducing the cost burden, for example, balancing against the potentially greater cost of restricting bond issuance to only one currency or conducting capital market activities in other regions.*

- *The EU commodity sector could face a disadvantaged cost of capital relative to other sectors, and relative to commodity sectors in other regions.*

- *Funds set aside for central clearing and margin requirements will not be available for to invest in Exploration and Extraction and Production or Refining and Marketing.*

  - *The scale of the possible cash call (a few billion Euros) would either require the business to borrow (with a cost of many millions of Euros) or to set aside capital which would otherwise be used to bring commodity to its portfolio of customers.*
  - *On a sector-wide basis the overall reduction in investment would be considerable and likely to lead to negative consumer outcomes.*

Allowing an exclusion from central clearing and bilateral collateralisation requirements for group funding activities which do not fall under Article 10.3 of EMIR (see above) and are hedging will:

- *achieve regulation of credit risk on OTC derivatives activity that is not entered into for hedging purposes*

- *avoid creation of liquidity and cash volatility risks at the group funding level;*

- *promote best practice, i.e. most efficient, treasury risk management in large EU commodity businesses;*

- *safeguard investment in the EU commodity sector; and*

- *encourage commodity businesses worldwide to continue to view the EU as an attractive region for corporate funding*

We therefore consider that two main changes and a further one are needed to the current EMIR regime:

- *<u>1. One-sided reporting</u>: we see absolutely no added value in reporting the same transaction twice, both by the financial and the non-financial counterparties. The EU should adopt one-sided reporting (as is already done in the US under Dodd Frank) as this would not compromise the supervisors' ability to monitor systemic risk but would greatly* *ease the burden on companies. NFCs have procedures and audit trails in place to manage risks arising from transacting financial derivatives. In that context, dual-side reporting is redundant as derivatives are traded with financial counterparties.*

- *2. Exempting non-financials' intra-group transactions from the reporting requirement. Non-financial companies centralise risk management for the purposes of efficiency and cost saving. External derivative transactions (usually of net but sometimes of gross exposures) are often undertaken by a central unit and these are then mirrored appropriately as intra-group transactions with the part of the group where the underlying business risk has arisen. While it significantly increases the reporting burden on companies, reporting the intra-group transactions does not bring any additional value to the supervisor, as the related external trades have already indirectly been reported (twice in fact, due to the dual reporting requirement).*

We believe that these two improvements to EMIR would also be helpful to the supervisor as they would decrease the number of reported transactions that bear no systemic significance, and would therefore allow the supervisor to better monitor real systemic risk concentrations within the financial system.

  - *3. A further improvement would be to exclude FX transactions undertaken for commercial purposes by non-financial companies from the scope of EMIR by not classifying them as financial instruments under MiFID as is the case currently in certain Member States.*

(c) Has EMIR impacted the use of, or access to, OTC derivatives by non- financial firms? Please provide evidence or specific examples of observed changes.

Anecdotal evidence and statistical evidence is not conclusive. Bank for International Settlements data on derivative outstandings has shown a material fall in interest rate derivatives by the non-financial sector, and a material fall in their share of the overall market since the 2008 crisis and further for some derivative classes since the introduction of EMIR and Dodd Frank.

This decline has been against a prolonged background of low floating and fixed interest rates which may be affecting corporates willingness to use derivatives to change their interest rate risk profile.

We note press reports[1] that corporates are increasingly accessing the bond markets which is a natural means of achieving fixed interest rate, and this at a time when floating rate bank debt has been less available. This change in mix of debt could be a factor in the reduction of the use of derivatives: non-financial firms are achieving a desired interest rate exposure through their means of borrowing.

A further factor will be firms increased concern over bank counterparty exposure. Bond market borrowing both reduces the funding risk of banks, and the counterparty exposure received through derivatives.

[1] http://www.ft.com/cms/s/0/fa33894e-7fe8-11e0-b018-00144feabdc0.html#axzz3bthqwuz3

Question 1.3: CCP Colleges

Article 85(1)(c) states that: “ The Commission shall….assess, in the light of experience, the functioning of the supervisory framework for CCPs, including the effectiveness of supervisory colleges, the respective voting modalities laid down in Article 19(3), and the role of ESMA, in particular during the authorisation process for CCPs.”

In order for a CCP established in the Union to provide clearing services, it must obtain authorisation under Article 14 of EMIR. EMIR introduced a college system for the granting of such authorisation, which has, to date, been used for the process of authorisation of sixteen CCPs. The College comprises members from relevant competent authorities, relevant members of the European System of Central Banks and ESMA.

(a) What are your views on the functioning of supervisory colleges for CCPs?

No comment

(b) What issues have you identified with respect to the college system during the authorisation process for EU CCPs, if any? How could these be addressed?

No comment

Question 1.4: Procyclicality

Article 85(1)(d) states that: " The Commission shall….assess, in cooperation with ESMA and ESRB, the efficiency of margining requirements to limit procyclicality and the need to define additional intervention capacity in this area."

CCPs authorised in the Union must take into account potential procyclical effects when calculating their margin requirements. The specific factors that must be considered to avoid disruptive movements in margin calculations are provided for under Article 41 EMIR and Article 28 of Commission Delegated Regulation (EU) No 153/2013.

(a)

i. Are the requirements under Article 41 EMIR and Article 28 Regulation (EU) No 153/2013 adequate to limit procyclical effects on CCPs' financial resources?

No. Market volatility during the period since the last financial crisis has been high (interest rate falling from 5.5% to 0.5%) and greater movements have been suffered in post war period. Full cover would not be provided if a margining calculation does not fully recognise the movement from the contract price. Procyclicality is the essential by-product of margining: counterparties will aggravate a market movement by attempting to close out their contracts, and thereby further aggravate the market movements. The problem is the act of margining which had previously been the mechanism of a few discreet markets, those in which only marginal price movements were expected, and those in which counterparties tended to be of a consistent and high credit quality but is now being used to push the risk elsewhere: most likely back into the banking system of the margin payer's domicile.

ii. If your answer to i. is no, how could they be improved?

Regulation needs to recognise this essential weakness either by dismissing margining, and/or using market circuit breakers set by regulators, and coordinated across the G20 member, to stop movements beyond thresholds at which margining is feasible without creating material risk.

(b)

i. Is there a need to define additional capacity for authorities to intervene in this area?

Yes

ii. If your answer to i. is yes, what measures for intervention should be considered and why?

The intervention needs to be co-ordinated at G20 level due to interconnectivity of markets.

Question 1.5: CCP Margins and Collateral

Article 85(1)(e) states that: " The Commission shall….assess, in cooperation with ESMA the evolution of CCP's policies on collateral margining and securing requirements and their adaptation to the specific activities and risk profiles of their users."

Collateral collected by way of initial and variation margin requirements is the primary source of financial resources available to a CCP. Title IV of EMIR and Commission Delegated Regulation (EU) No 153/2013 provide detailed requirements for the calculation of margin levels by CCPs as well as defining the assets that may be considered eligible as collateral.

(a)

i. Have CCPs' policies on collateral and margin developed in a balanced and effective way?

No

ii. If your answer to i. is no, for what reasons? How could they be improved?

Because the margining process is procyclical and creates a liquidity problem in the banking market.

As noted in question 1.4 above: stop margining and use other methods such as circuit breakers to arrest price movements.

(b)

i. Is the spectrum of eligible collateral appropriate to strike the right balance between the liquidity needs of the CCP and its participants?

We are concerned that different forms of collateral will impact on other markets in uncertain ways.

ii. If your answer to i. is no, for what reasons? How could it be improved?

There is general open discussion on the illiquidity of the bond markets where they are used, the use of bank guarantees is no different to reliance on banks to provide cash. As noted in question 1.4 above: stop margining and use circuit breakers and other methods to arrest price movements.

Definitions and Scope

Title I of the Regulation contains Articles 1-2.

Article 1 determines the primary scope of the Regulation, in particular with regard to public and private entities.

Article 2 provides definitions in use throughout the Regulation which further determine the scope of application of certain of its provisions.

Question 2.1

i. Are there any provisions or definitions contained within Article 1 and 2 of EMIR that have created unintended consequences in terms of the scope of contracts or entities that are covered by the requirements?

   Yes

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

   The inter relationship with MiFID definitions of a financial derivative has led to the inclusion under EMIR of arrangements which are commercial in nature and not financial, and are not or do not derive from transactions in a financial market and do not represent position taking.

   For example, contracts to fix the purchase price of commodities and goods where physical consumption or physical delivery is foreseen whether or not including the setting of a price in a certain currency which is the currency of reporting of only one party. Contracts of this type should be excluded from EMIR.

   In addition, we draw your attention to our response to Question 1.2(b):

The ACT supports the intent of proportionate regulation, such as greater transparency and the minimisation of systemic risk. However we believe the regulation in its current form would amplify systemic risk through unintended consequences of certain regulations, including increased costs and complexity, reduced prudent risk management, increased cash volatility, reduced liquidity and availability of choice.

The two areas of concern are (i) unnecessary requirements for central clearing and /or margining/collateralisation and (ii) the unnecessary reporting requirements.

We propose that group funding activities which do not fall under Article 10.3 of EMIR and are therefore "hedging" of group debt and foreign exchange needs, for example intra group loans and back-to-back hedges between a holdco with market access which can enter into public debt and bank swaps and its subsidiary, should be exempt from the requirements of central clearing and bilateral collateralisation under EMIR. Trading activities which do not constitute such hedging should be subject to all of the requirements of EMIR.

We also have members the funding hedging activities of which will be subject to clearing and margining/collateralisation under EMIR on account of their worldwide commodity trading activity being in excess of the commodity clearing threshold. This:

- *Seems disproportionate in that they only engage in group funding hedging activity to minimise risks to their business as a whole and the Treasury functions of similarly sized/larger corporates without commodity trading activities will not be subject to central clearing and bilateral collateralisation obligations.*

- *Will increase cash flow volatility and liquidity risks at the group funding level as a result of the EMIR requirements.*

- *Will disincentivise prudent risk management for the business as a whole to reduce costs.*

- *May require the business to consider alternative methods of reducing the cost burden, for example, balancing against the potentially greater cost of restricting bond issuance to only one currency or conducting capital market activities in other regions.*

- *The EU commodity sector could face a disadvantaged cost of capital relative to other sectors, and relative to commodity sectors in other regions.*

- *Funds set aside for central clearing and margin requirements will not be available for to invest in Exploration and Extraction and Production or Refining and Marketing.*

    - *The scale of the possible cash call (a few billion Euros) would either require the business to borrow (with a cost of many millions of Euros) or to set aside capital which would otherwise be used to bring commodities to its portfolio of customers.*
    - *On a sector-wide basis the overall reduction in investment would be considerable and likely to lead to negative consumer outcomes.*

Allowing an exclusion from central clearing and bilateral collateralisation requirements for group funding activities which do not fall under Article 10.3 of EMIR (see above) and are hedging will:

- *achieve regulation of credit risk on OTC derivatives activity that is not entered into for hedging purposes*

- *avoid creation of liquidity and cash volatility risks at the group funding level;*

- *promote best practice, i.e. most efficient, Treasury risk management in large EU commodity businesses;*

- *safeguard investment in the EU commodity sector; and*

- *encourage commodity businesses worldwide to continue to view the EU as an attractive region for corporate funding*

Clearing Obligations

Under EMIR, OTC derivatives transactions that have been declared subject to a clearing obligation must be cleared centrally through a CCP authorised or recognised in the Union. ESMA has proposed a first set of mandatory clearing obligations for interest rate swaps which are yet to come into force. Counterparties are therefore in the process of preparing to meet the clearing obligation, to the extent that their OTC derivatives contracts are in scope of the requirements.

Question 2.2

(a)

i. With respect to access to clearing for counterparties that intend to clear directly or indirectly as clients; are there any unforeseen difficulties that have arisen with respect to establishing client clearing relationships in accordance with EMIR?

Yes

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

It is our understanding, from press reports, that the Royal Bank of Scotland, Bank of New York, Nomura and State Street have all decided within the past year to leave the OTC client clearing market with Nomura stating that "due to the evolving and uncertain regulatory and market environment associated with OTC client clearing, we are exiting the OTC derivatives client clearing businesses in the Americas and EMEA". Additionally JP Morgan at their Investor Day on 24th February 2015 stated in their Corporate and Investment Banking Presentation (slide 15) that "Current market economics are incompatible with capital rules in their current form for many of the leading clearing providers"

Other clearing members are also believed to be reconsidering their commitment to a low return business that is acting as a drag on scarce capital resources as banks come under shareholder pressure to boost returns.

We, therefore, are concerned that client clearing services will only be offered by a few of the larger commercial banks and so the market will lack competition with the consequence that businesses may incur higher costs and may also have to accept adverse operating terms and conditions.

(b)

i. Are there any other significant ongoing impediments or unintended consequences with respect to preparing to meet clearing obligations generally in accordance with Article 4 of EMIR?

Yes

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

A multi-national commodity group's funding hedging activities most likely will be subject to clearing and margining/collateralisation under EMIR on account of the business's worldwide commodity trading activity being in excess of the commodity clearing threshold.

As noted in our response to Question 1.2(b):

The ACT supports the intent of proportionate regulation, such as greater transparency and the minimisation of systemic risk. Hwoevert we believe the regulation in its current form would amplify systemic risk through unintended consequences of certain regulations, including increased costs and complexity, reduced prudent risk management, increased cash volatility, reduced liquidity and availability of choice.

The two areas of concern are (i) unnecessary requirements for central clearing and/or margining/collateralization and (ii) the unnecessary reporting requirements.

We propose that group funding activities which do not fall under Article 10.3 of EMIR and are therefore "hedging" of group debt and foreign exchange needs, for example intra group loans and back-to-=back hedges between a holdco with market access which can enter into public debt and bank swaps and its subsidiary, should be exempt from the requirements of central clearing and bilateral collateralisation under EMIR. Trading activities which do not constitute such hedging should be subject to all of the requirements of EMIR.

We also have members the funding hedging activities of which will be subject to clearing and margining/collateralisation under EMIR on account of their worldwide commodity trading activity being in excess of the commodity clearing threshold. This:

- *Seems disproportionate in that they only engage in group funding hedging activity to minimise risks to their business as a whole and the Treasury functions of similarly sized/larger corporates without commodity trading activities will not be subject to central clearing and bilateral collateralisation obligations.*
- *Will increase cash flow volatility and liquidity risks at the group funding level as a result of the EMIR requirements.*
- *Will disincentivise prudent risk management for the business as a whole to reduce costs.*
- *May require the business to consider alternative methods of reducing the cost burden, for example, balancing against the potentially greater cost of restricting bond issuance to only one currency or conducting capital market activities in other regions.*
- *The EU commodity sector could face a disadvantaged cost of capital relative to other sectors, and relative to commodity sectors in other regions.*

- *Funds set aside for central clearing and margin requirements will not be available for to invest in Exploration and Extraction and Production or Refining and Marketing.*

The scale of the possible cash call (a few billion Euros) would either require the business to borrow (with a cost of many millions of Euros) or to set aside capital which would otherwise be used to bring commodities to its portfolio of customers.

On a sector-wide basis the overall reduction in investment would be considerable and likely to lead to negative consumer outcomes.

Allowing an exclusion from central clearing and bilateral collateralisation requirements for group funding activities which do not fall under Article 10.3 of EMIR (see above) and are hedging will:

- *achieve regulation of credit risk on OTC derivatives activity that is not entered into for hedging purposes*

- *avoid creation of liquidity and cash volatility risks at the group funding level;*

- *promote best practice, i.e. most efficient, Treasury risk management in large EU commodity businesses;*

- *safeguard investment in the EU commodity sector; and*

- *encourage commodity businesses worldwide to continue to view the EU as an attractive region for corporate funding*

Trade reporting

Mandatory reporting of all derivative transactions to trade repositories came into effect in February 2014. The Commission services are interested in understanding the experiences of reporting counterparties and trade repositories, as well as national competent authorities, in implementing these requirements. As noted above, ESMA recently conducted its own consultation on amended versions of these standards. This consultation does therefore not seek any views with respect to the content of either Regulation No. 148/2013 and Regulation No. 1247/2012 nor the proposed amended versions.

Question 2.3

i. Are there any significant ongoing impediments or unintended consequences with respect to meeting trade reporting obligations in accordance with Article 9 of EMIR [Regulation 648/2012]?

The major impediment to meeting trade reporting requirements has been inconsistency in the format and content of reporting fields for transactions which makes pairing difficult and brings into question the usefulness of the data.

We believe the reported fields are too many, and the precision of reporting is excessive (for example: time stamping in seconds for NFCs which otherwise have no reason to time stamp with such precision).

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Field specifications changed during the early period of input, banks re-issued UTIs, inconsistent blank character packing was used, there has been confusion over the use of Buy and Sell indicators, and random use of negative value indicators.

Field use and format vary from one financial counterparty to another.

These field inconsistencies should be addressed by a single field specification being issued by ESMA. We note that single reporting would remove NFCs from reporting transactions and would simplify reconciliation processes between FCs who as a factor of their existing MiFID implementations are better placed to manage the data entry processes.

Risk Mitigation Techniques

Risk mitigation techniques are provided for under Articles 11(1) and 11(2) of EMIR [Regulation 648/2012] and further defined in Commission Delegated Regulation (EU) No 149/2013. Risk mitigation techniques began entering into force in March 2013 and apply to OTC derivative transactions that are not centrally cleared. They include obligations with respect to transaction confirmation, transaction valuation, portfolio reconciliation, portfolio compression and dispute resolution.

Question 2.4

i. Are there any significant ongoing impediments or unintended consequences with respect to meeting risk mitigation obligations in accordance with Articles 11(1) and (2) of EMIR?

   We repeat our call for the reporting obligation to be removed from NFCs which are not a systemic risk to the financial markets, do not have the benefit of central bank support during financial crisis, are end users of derivatives to control cost, and incur a compliance cost although neither part of the FC regulating authority nor a cause of financial distress during the 2008 financial crisis.

   NFCs hedge to manage their commercial risk and clearing obligations undo that risk management which is undertaken to control price of output to retail consumers.

   We repeat our assertion that clearing requiring posting of collateral creates procyclical risk when applied to financial markets where price movements have been known to be extreme and ultimately de-stabilise the markets they are intended to protect.

ii. If your answer to (i) is yes, please provide evidence or specific examples. How could these be addressed?

   We advocate the use of market circuit breakers and other techniques to limit systemic risk.

Exchange of Collateral

Article 11(3) of EMIR [Regulation 648/2012] mandates the bilateral exchange of collateral for OTC derivative contracts that are not centrally cleared. Article 11(15) mandates the ESAs to further define this requirement, including the levels and type of collateral and segregation arrangements required. The ESAs consulted publically on their draft proposals in the summer of 2014.

The ESAs are now in the process of finalising these draft Regulatory Technical Standards. It is therefore recognised that the final requirements are not fully certain at this stage. The Commission services are not seeking comment on the content on the proposed rules published by the ESAs. Nonetheless the Commission services welcome any views from stakeholders on implementation issues experienced to date.

Question 2.5

i. Are there any significant ongoing impediments or unintended consequences anticipated with respect to meeting obligations to exchange collateral in accordance with Article 11(3) under EMIR?

   Yes

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

   Our members' employers tend to place their funding hedges on open credit with their bank. Pilot Credit Support Annexes (CSAs) have demonstrated that it would be a substantial project to build the necessary processes, capability and resources for collateral management within corporate treasury functions to meet the new regulations and mitigate a risk which the regulations were not intending to capture.

Cross-Border Activity in the OTC derivatives markets

OTC derivatives markets are global in nature, with many transactions involving Union counterparties undertaken on a cross-border basis or using third country infrastructures. EMIR provides a framework to enable cross-border activity to continue whilst ensuring, on the one hand, that the objectives of EMIR are safeguarded and on the other hand that duplicative and conflicting requirements are minimised.

Question 2.6

(a)

i. With respect to activities involving counterparties established in third country jurisdictions; are there any provisions or definitions within EMIR that pose challenges for EU entities when transacting on a cross-border basis?

Yes

ii. If your answer to (i) is yes, please provide evidence or specific examples. How could these be addressed?

Please see the response to Question 1.2.
When placing group funding hedges with US banks, an EU based commodity multi-national can benefit from an End-User Exemption from mandatory clearing under Dodd Frank. However, if these hedges must be cleared under EMIR, this will make the End-User Exemption granted under Dodd Frank redundant and may result in increased commodity sector costs and complexity, reduced prudent risk management, increased cash volatility, reduced liquidity and availability of choice.

We propose that group funding activities which do not fall under Article 10.3 of EMIR and are therefore "hedging" of group debt and foreign exchange needs should be exempt from the requirements of central clearing and bilateral collateralisation under EMIR.

(b)

i. Are there any provisions within EMIR that create a disadvantage for EU counterparties over non-EU entities?

Yes

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Please see response to Question 2.6(a) ii. The EU commodity sector could face a disadvantaged cost of capital relative to other sectors, and relative to commodity sectors in other regions, for example, the US where they benefit from the End-User Exemption.

We propose that group funding activities which do not fall under Article 10.3 of EMIR and are therefore "hedging" of group debt and foreign exchange *needs should be exempt from the requirements of central clearing and bilateral collateralisation under EMIR.*

Transparency

Question 2.7

The overarching objective of the trade reporting requirement under EMIR is to ensure that national competent authorities and other regulatory bodies have data available to fulfil their regulatory mandates by monitoring activity in the derivatives markets.

i. Have any significant ongoing impediments arisen to ensuring that national competent authorities, international regulators and the public have the envisaged access to data reported to trade repositories?

   No comment

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

   No comment

Requirements for CCPs

Titles IV and V of EMIR set out detailed and uniform prudential and business conduct requirements for all CCPs operating in the Union. CCPs operating prior to EMIR's entry into force are required to obtain authorisation in accordance with the new requirements of EMIR, through the EU supervisory college process.

Question 2.8

(a)

i. Are there any significant ongoing impediments or unintended consequences with respect to CCPs' ability to meet requirements in accordance with Titles IV and V of EMIR?

No comment

ii. If your answer to (i) is yes, please provide evidence or specific examples. How could these be addressed?

No comment

(b)

i. Are the requirements of Titles IV and V sufficiently robust to ensure appropriate levels of risk management and client asset protection with respect to EU CCPs and their participants?

No comment

ii. If your answer to i. is no, for what reasons? How could they be improved?

No comment

(c)

i. Are there any requirements for CCPs which would benefit from further precision in order to achieve a more consistent application by authorities across the Union?

No comment

ii. If your answer to i. is yes, which requirements and how could they be better defined?

No comment

Requirements for Trade Repositories

Titles VI and VII of EMIR set out detailed and uniform requirements for all trade repositories operating in the Union. Trade repositories operating prior to EMIR's entry into force are required to obtain authorisation by ESMA in accordance with the requirements of EMIR. To date, ESMA has authorised six trade repositories. ESMA is the primary supervisor for Union trade repositories and has the power to issue fines for non-compliance with the requirements of EMIR.

Question 2.9

1. Are there any significant ongoing impediments or unintended consequences with respect to requirements for trade repositories that have arisen during implementation of Titles VI and VII of EMIR, including Annex II?

   No comment

2. If your answer to 1. is yes, please provide evidence or specific examples. How could these be addressed?

   No comment

Additional Stakeholder Feedback

In addition to the questions set out above, the Commission services welcome feedback from stakeholders on any additional issues or unintended consequences that have arisen during the implementation of EMIR which are not covered by those questions.

Question 2.10

i. Are there any significant ongoing impediments or unintended consequences with respect to any requirements or provisions under EMIR and not referenced in the preceding questions that have arisen during implementation?

No comment

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

No comment

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