

# Public consultation on Regulation (EU) no 648/2012 on OTC derivatives, central counterparties and trade repositories

Deadline to respond 13<sup>th</sup> August 2015

## Part I - Questions on elements of EMIR to be reviewed according to Article 85(1)(a)-(e)

### 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.

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

**5,000 character(s) maximum**

**If your answer is yes, what are the measures that should be considered and why?**

**5,000 character(s) maximum**

### 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) 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?

5,000 character(s) maximum

If your answer 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?

5,000 character(s) maximum

- 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?

5,000 character(s) maximum

- 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 if so.

5,000 character(s) maximum

**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?

5,000 character(s) maximum

- 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?

5,000 character(s) maximum

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

5,000 character(s) maximum

If your answer is no, how could they be improved?

5,000 character(s) maximum

b) Is there a need to define additional capacity for authorities to intervene in this area?

5,000 character(s) maximum

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

5,000 character(s) maximum

**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) Have CCPs' policies on collateral and margin developed in a balanced and effective way?

5,000 character(s) maximum

If your answer is no, for what reasons? How could they be improved?

5,000 character(s) maximum

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

5,000 character(s) maximum

If your answer is no, for what reasons? How could it be improved?

5,000 character(s) maximum

## Part II - General questions

### Question 2.1: 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.*

**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?**

**5,000 character(s) maximum**

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

**5,000 character(s) maximum**

### Question 2.2: 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.*

- a) 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?**

**5,000 character(s) maximum**

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

5,000 character(s) maximum

b) 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?

5,000 character(s) maximum

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

5,000 character(s) maximum

### Question 2.3: 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.*

Are there any other significant ongoing impediments or unintended consequences with respect to meeting trade reporting obligations in accordance with Article 9 of EMIR?

5,000 character(s) maximum

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

5,000 character(s) maximum

**Question 2.4: Risk Mitigation Techniques**

*Risk mitigation techniques are provided for under Articles 11(1) and 11(2) of EMIR 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.*

**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?**

**5,000 character(s) maximum**

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

**5,000 character(s) maximum**

**Question 2.5: Exchange of Collateral**

*Article 11(3) of EMIR 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 ESA 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.*

**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?**

**5,000 character(s) maximum**

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

5,000 character(s) maximum

**Question 2.6: 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.*

- a) 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?

5,000 character(s) maximum

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

5,000 character(s) maximum

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

5,000 character(s) maximum

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

5,000 character(s) maximum



**Question 2.7: Transparency**

*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.*

**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?**

**5,000 character(s) maximum**

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

**5,000 character(s) maximum**

**Question 2.8: 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.*

**a) 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?**

**5,000 character(s) maximum**

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

**5,000 character(s) maximum**

**b) 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?**

**5,000 character(s) maximum**

If your answer is no, for what reasons? How could they be improved?

5,000 character(s) maximum

- c) 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?

5,000 character(s) maximum

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

5,000 character(s) maximum

#### Question 2.9: 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.*

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?

5,000 character(s) maximum

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

5,000 character(s) maximum

#### Question 2.10: 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.*

**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?**

**5,000 character(s) maximum**

Yes

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

**5,000 character(s) maximum**

FESE urges the European Commission to consider the overall impact that its work on the EMIR Clearing Obligation has on the final implementation of the MiFIR Trading Obligation. Critically, because of the way the trading obligation is designed, any instrument which does not fall under the scope of the EMIR clearing obligation will not be eligible for the trading obligation.

We have two fundamental points to make in our response to this consultation:

Firstly, FESE would like to reiterate its rejection of the conclusions reached in ESMA's Consultation Paper on the Clearing Obligation under EMIR N°1 (Section 6) as regards the exclusion of OTC equity derivatives from the clearing obligation. We would like to see a more regional/national approach taken to the assessment of the relative relevance of derivative contracts;

Secondly, FESE would like to highlight that the EMIR framework is silent on the risk of seeing exchange traded derivatives which have been historically cleared and traded on transparent venues shifting from those regulated venues to OTC environments.

FESE considers that both ESMA's decision regarding equity derivatives in respect of the above cited consultation and the risk of a shift from a regulated market to an OTC trading environment are completely at odds with the objectives set out by the G20 and implemented by EMIR and MiFID II.

In respect of the second risk, while all derivative instruments traded on a Regulated Market will be subject to an obligation to clear pursuant to MiFIR Article 29, look-alike contracts traded OTC (as defined in EMIR) would only be subject to a requirement to clear if ESMA subsequently were to mandate the products for clearing. This leaves open the potential for a loophole in the short-term.

For instance, certain FESE members offering trading in securitised derivatives, foreign exchange derivatives, and contracts for difference (CFDs) (classified as derivatives under Annex I Section C of MiFID II) on their regulated markets are currently observing a significant shift of trading in these products to OTC platforms as defined under EMIR. This shift to OTC means that clearing which was hitherto applied to these products on regulated markets will not be required automatically in an OTC environment. Similar dynamics could easily be replicated across other products such as equity derivatives.

While ESMA could proceed with an assessment as to whether such look-a-like contracts should be subject to the clearing mandate under EMIR, FESE would strongly suggest that a simpler and more

effective route would be to automatically require clearing for a look-a-like products where clearing is already required for that class of products on the Regulated Market.

Therefore, FESE believes that the European Commission and ESMA should consider an automatic clearing obligation for lookalike OTC equity derivatives, securitised derivatives, foreign exchange derivatives, and contracts for difference (CFDs). Failing that, the integrity of some exchange-traded derivatives markets may be threatened, especially at regional level, as these markets would be presented with a non-cleared alternative. For these products to fall outside the clearing obligation would also cause them not to fall within the trading obligation under MiFID and would therefore exacerbate fragmentation of these markets, which cannot be in the regulatory interest.

Leaving exchange-traded derivatives outside of EMIR's and MiFIR's clearing, trading, and transparency obligations would also encourage trading on venues which are not subject to any clearing requirements. For investors, this would translate into a perverse incentive to shift trading from transparent and cleared venues to the OTC space. It would certainly seem counter-intuitive that the implementation of EMIR and the MiFID Review should result in a less transparent framework for instruments which are already available to trade on transparent and multilateral markets. As a matter of fact, we are already witnessing significant shifts in trading of these products from regulated venues to OTC platforms in several Member States.

While these products may not be as systematically important as others on a global scale, such a scenario would be a perverse outcome and completely at odds with the political ambitions of the G20, EMIR and the MiFID Review in respect of OTC derivatives.

In addition to harming overall transparency levels, this raises important investor protection issues, both because OTC trading in these instruments is not subject to central counterparty clearing and due to the predominantly retail nature of these markets. Investor warnings have already been issued by a number of securities regulators in Europe for forex derivatives and CFDs.

### **3. Additional information**

*Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s).*

<https://ec.europa.eu/eusurvey/runner/emir-revision-2015?surveylanguage=en>