



EUROPEAN COMMISSION

Directorate General Financial Stability, Financial Services and Capital Markets Union

Financial markets infrastructure

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

Important comment: this document is a working document of the Financial Stability, Financial Services and Capital Markets Union Directorate General of the European Commission for discussion and consultation purposes. It does not purport to represent or pre-judge any formal proposal of the Commission.

INTRODUCTION

The Regulation

On 4 July 2012 the Council and the European Parliament adopted Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

EMIR responded to the commitment by G-20 leaders in September 2009¹ that: "*All standardised OTC derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at latest. OTC derivatives contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements*".

The core requirements set out under EMIR are:

- I. Clearing and risk mitigation obligations for OTC derivative contracts;
- II. Reporting obligations for derivative contracts
- III. Requirements for Central Counterparties;
- IV. Requirements for Trade Repositories:

EMIR has been further supplemented by a number of **delegated and implementing acts, some of which are adopting regulatory and implementing technical standards** developed by the European Supervisory Authorities (ESAs) in accordance with their mandates under the Regulation. Unless otherwise specified, references to EMIR should therefore be considered to include both the primary Regulation (Regulation (EU) No 648/2012) and relevant delegated and implementing acts.

Report on the Regulation

In accordance with Article 85(1) of EMIR, the Commission is required to prepare a general report on EMIR which shall be submitted to the European Parliament and the Council, together with any appropriate proposals.

The Commission must in particular:

(a) Assess, in cooperation with the members of the ESCB (the European System of Central Banks), the need for any measure to facilitate the access of CCPs to central bank liquidity facilities;

(b) 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

¹ http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf

particular, the impact of this Regulation on the use of OTC derivatives by non-financial firms;

(c) 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;

(d) 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;

(e) 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.

The Commission services will also take into account when preparing the report any other key issues that have been identified during the implementation of EMIR to date. In particular, the Commission services will take into account the findings of reports submitted by ESMA in accordance with Article 85(3) of EMIR.

Feedback

The purpose of this document is to consult all stakeholders on their views and experiences in the implementation of EMIR to date. Interested parties are invited to send their contributions by 13 August 2015 through the online questionnaire available at <http://ec.europa.eu/eusurvey/runner/emir-revision-2015?surveylanguage=en>. Only responses received through the online questionnaire will be included in the report summarising responses. The responses to this consultation will provide important guidance to the Commission services in preparing their final report.

Responses to this consultation should relate to the legislative text of EMIR. Responses are expected to be of most use where issues raised in response to the questions are supported with data or detailed narrative, and accompanied by specific suggestions for solutions to address them. Such suggestions may relate to either the primary Regulation or to relevant delegated and implementing acts. Supplementary questions providing for free text responses may appear depending on the response to a multiple choice question.

The Commission services recognise that certain core requirements and procedures provided for under EMIR are yet to be implemented or completed. In particular, at this stage clearing obligations and obligations to exchange collateral in respect of non-cleared OTC derivatives transactions are not yet in force. It is therefore envisaged that the report required under Article 85(1) will focus primarily on those aspects of EMIR which have been implemented.

Nonetheless, the Commission services welcome the views of stakeholders as to any identified issues with respect to the implementation of upcoming requirements. However, this consultation does not seek views on any regulatory technical standards that have not

yet been adopted by the Commission. This includes the proposed regulatory technical standards on the mandatory clearing of certain interest rate products in accordance with Article 5 of EMIR, delivered to the Commission by ESMA on 3rd October 2014 and the joint draft regulatory technical standards of the ESAs on margin for uncleared OTC derivatives transactions mandated in accordance with Article 11(3) of EMIR.

Further, with respect to the regulatory and implementing technical standards on trade reporting adopted by the Commission in accordance with Article 9 of EMIR (Regulation No. 148/2013 and Regulation No. 1247/2012) the Commission services note that 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 amended versions proposed by ESMA.

The Commission services will publish all responses received on the Commission website unless confidentiality is requested.

QUESTIONS FOR STAKEHOLDERS

PART I

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

Introductory Comments

The questions in this section are targeted at gathering stakeholder views on the elements of EMIR that the Commission is mandated to consider in its report.

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

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?
 - 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?
- (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?
- (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.

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?

- (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?

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?

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

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

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

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?

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

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

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

PART II

General Questions

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?

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

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?

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

- (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?

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

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?

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

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.

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?

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

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 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?

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

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?

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

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

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

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?

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

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?

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

- (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?

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

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

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

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

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?

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