EUROPEAN COMMISSION
Directorate-General for Financial Stability, Financial Services and Capital Markets Union

EMIR Review

Public Consultation 2015

Summary of contributions

This document provides a factual overview of the contributions to the public consultation. The content should not be regarded as reflecting the position of the Commission.

Contents

1. INTRODUCTION

With a view to delivering on commitments made at the September 2009 G20 Pittsburgh summit, in July 2012, the European Parliament and the Council adopted Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR). EMIR seeks to promote transparency and standardisation in derivatives markets as well as reduce systemic risk through the application of its core requirements on:

I. central clearing of standardised OTC derivative contracts;

II. margin requirements for OTC derivative contracts that are not centrally cleared;

III. operational risk mitigation requirements for OTC derivative contracts that are not centrally cleared;

IV. reporting of all derivative contracts;

V. requirements for Central Counterparties (CCPs);

VI. requirements for Trade Repositories.

To date, some of the elements of EMIR remain to be fully implemented as mandatory clearing for certain OTC derivatives classes has entered into application only recently and margins for uncleared OTC derivatives are not in force yet. However, in accordance with Article 85(1) of EMIR, the Commission is required to prepare a general report on EMIR which will then 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 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.*

As part of this review, the Commission undertook a public consultation to gather stakeholder feedback on the implementation of EMIR. The consultation took place between 21 May and 13 August 2015. This document presents a summary of the contributions to this consultation.

2. OVERVIEW OF RESPONDENTS AND RESPONSES

2.1. Who responded?

– Breakdown by type of organisation:

172 responses to the public consultation were received. The majority came from companies (79) and industry associations (64). In addition, 15 public authorities responded as well as 3 private individuals.

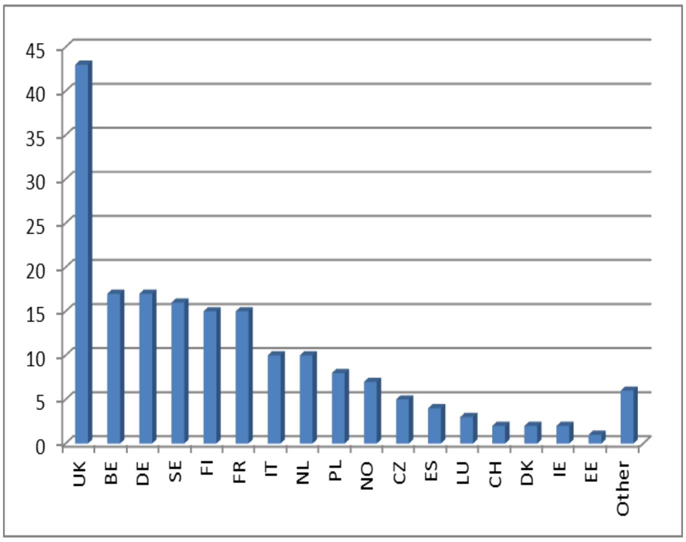
– Breakdown by field of activity:

Responses came from various sectors and some respondents indicated more than one area of activity. The majority of respondents which indicated only one area of activity were non-financial/corporate enterprises (46) and industry associations (28). There were also replies from governmental organisations/regulators (8), market infrastructure operators (17), banks (16), and investment managers (13).

– Breakdown by geographical region:

The vast majority of respondents were based in the EU and the European Economic Area, with only 6 coming from the rest of the world (2 were from the USA, 1 from Japan, 1 from Thailand, and 2 others declared themselves as covering multiple jurisdictions). A large number of respondents were based in either the UK or Belgium reflecting the importance of the financial centre of the City of London and Belgium as the home of many industry associations. A significant number of responses also came from Germany, Sweden, Finland, and France.

Figure 1 – Respondents by country



2.2. Overview of responses

Of the 15 pre-defined topics for consultation, most replies related to trade reporting (117), clearing obligations (85), non-financials (77), risk mitigation techniques (76), exchange of collateral (64), definition and scope (63), and CCP margins and collateral (63).

3. SUMMARY OF RESPONSES TO THE CONSULTATION

3.1. Questions on elements of EMIR to be reviewed

Feedback was sought on a number of specific elements of EMIR individually. The following sections present a summary of the contributions received in response to each particular question.

3.1.1. CCP liquidity

Most industry respondents supported the need for measures to facilitate the access of CCPs to central bank liquidity facilities in order to mitigate CCPs' exposure to commercial bank risk, to decrease their liquidity risk, to strengthen CCP resilience, and to safeguard the level playing field for CCPs. Most public authorities and regulators, however, opposed any such measure as they claimed it would undermine central bank independence and discretion, and stated that mandatory provision of central bank liquidity could create moral hazard.

3.1.2. Non-financial firms

a) Clearing thresholds for non-hedging transactions and the corresponding definition of 'hedging'

The majority of respondents considered that the clearing thresholds for non-hedging transactions and the corresponding definition of contracts objectively measurable as reducing risks directly relating the commercial activity or treasury financing activity adequately captures those non-financial counterparties that should be deemed as systemically important.

Some respondents, however, mainly from the industry but also including public authorities considered that some elements should be improved. In particular, they suggested excluding intragroup transactions from the calculation of the clearing threshold and treating each asset class separately in order to avoid that a breach of a clearing threshold in one asset class should not trigger obligations for clearing in all other asset classes. Some industry participants suggested increasing the clearing thresholds. In contrast, two public authorities considered the current approach too broad and stated that it did not capture all systemically important non-financials.

Some respondents, mainly from the industry, raised issues about the implementation of these thresholds suggesting that there was too much room for interpretation of the hedging definition resulting in supervisors taking inconsistent approaches. They further argued that it was difficult for counterparties of non-financial counterparties to ascertain whether they were above the clearing threshold, with a number of respondents from the industry and public authorities suggesting the establishment of a central register.

Finally, some industry participants and public authorities stated that ESMA's current interpretation of portfolio, macro or proxy hedging is problematic and that the treatment of these types of transactions should be clarified in a legally binding manner.

b) Elements of EMIR that created unintended consequences for non-financial counterparties.

Some industry participants pointed out disproportionate costs for non-financial counterparties, with some recommending excluding non-financial counterparties below the clearing threshold from the obligations of EMIR entirely in order to mitigate unintended consequences. Other respondents suggested an exemption from reporting for non-financial counterparties below the clearing threshold.

Finally, several respondents – almost all from the Nordic region – criticised the fact that EMIR does not allow the option of posting non-collateralised bank guarantees as collateral to CCPs.

c) Impact of EMIR on the use of, or access to, OTC derivatives by non-financial firms

Most non-financial firms and industry associations considered that EMIR impacts the use of, or access to, OTC derivatives by non-financial firms. A common impact observed by these respondents was a decrease in hedging activities. Nevertheless, a few respondents noted an increase in clearing of OTC derivatives as a result of the obligation, ahead of clearing obligations entering into force.

Other respondents, mainly non-financial firms, did not notice any particular change in the level of activity and some others noted that it was still too early to observe the impacts of the regulation.

3.1.3. CCP colleges

Respondents supported the introduction of supervisory colleges by EMIR as it ensures a strict level playing field amongst the European CCPs as well as homogeneity in the application of regulation across the European Union. They pointed out that colleges allow experience sharing and improve cooperation among relevant authorities, and are thus of importance for financial stability in the relevant Member States, striking the adequate balance between ensuring an appropriate role for the home national competent authorities. No respondents expressed objections to the establishment of supervisory colleges.

Respondents pointed out, however, that while colleges work well in general, there was still some room for improvement, in particular when it comes to the validation of models and parameters and the extension of services.

Some industry associations and one market infrastructure operator pointed out the need for more transparency in the functioning of colleges, in particular for the authorisation and extension of services processes towards CCPs but also towards CCPs' users in order to allow them to get more visibility of the authorisation process and its consequences (i.e. entry into force of EMIR requirements, potential clearing obligations, etc.). In particular, they suggested that EMIR should require the competent authority to publicly disclose when a CCP's authorisation application has been deemed complete.

Some authorities, industry participants, and market infrastructure operators suggested that EMIR should clarify the modalities for the college process, in particular the roles and responsibilities of different college members. Several authorities and industry participants, and market infrastructure operators also asked for more clarity in the process and timeframe for the authorisation and extension of services provided by CCPs.

In addition, two investment managers expressed the view that the number of national competent authorities (NCAs) within the college should be large, as many countries are concerned with the cross-border activities of CCPs.

3.1.4. Procyclicality

a) Adequacy of EMIR requirements to limit procyclical effects on CCPs' financial resources

The views of respondents to this question were split. About half of the respondents that expressed a clear view (mainly public authorities and market infrastructure operators) considered that the current requirements of EMIR were adequate to limit procyclical effects on CCPs' financial resources, even if some of them recognised that there was room for improving the anti-procyclicality requirements.

The other half (in particular investment managers and industry associations) considered that the current anti-procyclicality tools were not optimal to manage some specific products and suggested that EMIR allow some flexibility in the tools either by allowing additional tools or by adopting an outcome based approach.

Some public authorities and industry associations asked for more transparency in a CCP anti-procyclicality requirements notably in order to allow clearing members to anticipate changes and corresponding liquidity needs. Some of them suggested CCPs to have documented policies on their overall anti-procyclicality framework. Furthermore, some industry participants expressed concerns about sudden changes by a CCP of its eligibility criteria/margin levels and the need to avoid a sudden material increase of initial margin (or haircuts).

As to the range of collateral accepted, some industry associations pointed out that any limitation in the list of assets which are defined as eligible should be avoided and that a wider range of financial instruments should be allowed to be posted in addition to cash. Some of these respondents added that some of the pro-cyclical effects were caused by clearing members and brokers themselves, as they often require higher margins than specified in the policies of the CCPs and increase haircuts and eligibility criteria at discretion. They suggested that the relationship between clearing and their clients should be managed by EMIR.

Finally, some respondents pointed out the need for an internationally consistent framework in order to avoid regulatory arbitrage and competitive distortions.

b) Need to define additional capacity for authorities to intervene in this area

Views of the respondents were split on the need to define additional capacity for authorities to intervene in this area.

Around half of the respondents to this question including public authorities, investment managers, and industry associations supported the need for additional capacity for authorities to intervene in the area of the anti-procyclical effect of margining. Some of them pointed out that the collateral requirements imposed by clearing members in addition to those of CCPs maintain some form of procyclicality in the system. Others pointed out the need to allow ESMA to suspend the clearing obligations, to adopt a proposal for solid and clear recovery and resolution rules, or to coordinate macroprudential policies at EU level, including the potential introduction of time-varying minimum margin requirements and haircuts in order to address systemic risks.

The remainder of the respondents, including public authorities, industry associations and market infrastructures, were not in favour of introducing any additional capacity for authorities to intervene further as the current standards were already restrictive and did not allow for CCPs to have the necessary flexibility to efficiently address the procyclical nature of the products they clear and markets they serve. They insisted that CCPs should remain responsible for the establishment and application of their risk management process. Some respondents pointed that there was no evidence, at this stage, that existing requirements were insufficient to adequately limit procyclicality.

3.1.5. CCP margins and collateral

a) CCPs' policies on collateral and margin

The majority of respondents, mainly trade associations, investment managers, and market infrastructures, considered that CCPs' policies on collateral and margins were not developed in a balanced and effective way. The most commonly noted issues were the following:

- Non-financials from Nordic Member States and some industry associations pointed out that non-collateralised bank guarantees should be permitted as eligible collateral.

- Industry associations and banks asked for more transparency in the way that CCPs calculate margins and default fund contributions and asked CCPs to facilitate the use of non-cash variation margin.

- CCPs and industry associations asked for a revision of the provisions on portfolio margining. In particular, respondents asked for these provisions to be more model neutral and to ensure that the scope of instruments is less reliant on statistical criteria.

b) Spectrum of collateral eligible to be posted with CCPs

The majority of respondents, mainly CCP users (non-financials, trade associations, investment managers, pension companies, energy companies, banks) considered that the spectrum of eligible collateral did not strike the right balance between the liquidity needs of the CCP and its participants. The most commonly raised issue was that the variety of eligible collateral should be as wide as possible, with one common reason being that it is difficult for UCITS to access liquidity. More specifically, some respondents requested that warrants used for metal trading be added to the list of highly liquid financial instruments.

3.2. General questions

3.2.1. Definitions and scope

Most respondents, including mainly industry associations, companies, and public authorities, considered that some of the provisions and definitions contained within Article 1 and 2 of EMIR had created unintended consequences in terms of the scope of contracts or entities that are covered by the requirements. In particular, they pointed out the absence of a definition of an 'undertaking' for the determination of a non-financial counterparty, the external reference to MiFID for the definition of derivatives, the absence of clarity of the EMIR exemption for a "public sector entity", the application of EMIR to small non-financial and financial counterparties with the special consideration of Alternative Investment Funds, the absence of clarity of the definition of a 'group' (e.g. special treatment for securitisation special purpose vehicles), and the need for additional exemptions, in particular for the exemption of counterparties' transactions with exempted entities.

3.2.2. Clearing obligations

With respect to access to clearing for counterparties, a number of industry associations, companies and public authorities indicated that unforeseen difficulties had arisen with respect to establishing client clearing relationships in accordance with EMIR. In particular, respondents pointed out the absence of a sufficient and good offer for indirect clearing, amongst other things due to the leverage ratio. They questioned the necessity of the so-called frontloading requirements. They also mentioned the need to introduce exemptions from clearing and margining requirements for transactions resulting from risk reducing processes as well as for counterparties which are not systemically important, in particular small financial counterparties. Finally, they indicated that there was a need to introduce a process to allow for a swift withdrawal or suspension of the clearing obligation.

3.2.3. Trade reporting

Trade reporting received a lot of attention. Most of the respondents considered that there were significant ongoing impediments or unintended consequences with respect to meeting trade reporting obligations. Respondents to this question were diverse and included industry associations, companies, public authorities, consultancies, NGOs, and a trade union. A large number of them asked to have double-sided reporting – which is considered as costly and burdensome – replaced with single sided reporting. They consistently asked for a reduction in the reporting requirements for non-financials. Both of these issues were raised by all categories of respondents.

In addition, industry associations and companies requested the removal of the requirement to report expired trades ('backloading'), as well as an exemption of exchange-traded derivatives and intragroup transactions from the reporting requirements.

Respondents identified several other points to be considered:

- simplification, reduction of the number, and improvement in the definitions of the reporting fields;
- resolution of problems with the use of the LEI ;
- alignment of reporting regimes and standardisation of data reporting formats;
- finalisation of work on the Unique Trade Identifier (UTI) and the Unique Product Identifier (UPI);
- improvement in trade reconciliation within trade repositories.

3.2.4. Risk mitigation techniques

Most respondents did not take a clear position on this question. However some companies and industry associations, mainly in banking, considered that there were significant ongoing impediments or unintended consequences with respect to meeting risk mitigation obligations. They indicated that longer timeframes should be provided for counterparties to confirm bespoke trades and to a lesser extent small transactions. In addition, some respondents in the field of investment management and banking indicated that EMIR should expressly recognise that not all gaps in portfolio reconciliation are disputes.

3.2.5. Exchange of collateral

Industry associations and companies considered the most significant ongoing impediments or unintended consequences with respect to meeting obligations to exchange collateral to be the treatment of transactions with third country jurisdictions that do not recognise netting[1]. Some also called for the scope of affected entities to exclude non-financial and small financial counterparties.

3.2.6. Cross-border activity in the OTC derivatives markets

The majority of respondents to this question, including companies, industry associations, and public authorities considered that there were provisions or definitions within EMIR that pose challenges for EU entities when transacting on a cross-border basis.

[1] This summary does not take into account responses related to draft technical standards proposed by the European Supervisory Authorities.

Specifically, industry associations considered that the European Commission was taking too long to complete its equivalence assessments under EMIR. The same industry associations, as well as companies, indicated that further harmonisation of EMIR with regulations in third countries was needed, noting the possibility of liquidity fragmentation as a result of differing rules.

Most respondents, mainly companies from the financial sector and industry associations, considered that some provisions within EMIR created a disadvantage for EU counterparties over non-EU entities. They principally indicated that the stringency of some EU requirements compared to requirements in other jurisdictions could lead to regulatory arbitrage.

3.2.7. Transparency

Most respondents to this question considered that there were significant ongoing impediments to ensuring that national competent authorities, international regulators, and the public have the envisaged access to data reported to trade repositories. The respondents were mainly companies, industry associations, and public authorities.

The main issues raised in response to this question (and the category of respondents which raised them) are as follows:

i) companies and industry associations pointed out problems with or lack of consolidated / aggregated reporting by trade repositories;

ii) public authorities indicated that EMIR should allow access to reported data by a broader range of authorities;

iii) companies suggested that trade repositories should provide spreadsheet to highlight mismatches;

iv) industry associations brought up difficulties with confidentiality/ bank secrecy rules;

v) some companies and industry associations suggested that the use of UTI/UPI should become mandatory in line with the suggestion in response to finalise work on the development of the UTI and UPI.

In addition to the above, respondents raised several issues individually, such as: the need to oblige trade repositories to disclose data automatically and without restriction; allow access to more data; create a centralised data point for trade repositories; introduce controls and safeguards on trade repositories' pricing; clarify or standardise access requirements to trade repositories for public authorities; relax access requirements/withdraw the requirement for an international agreement; provide better guidance; or establish a single pan-European trade repository.

3.2.8. Requirements for CCPs

Most respondents considered there were significant ongoing impediments or unintended consequences with respect to CCPs’ ability to meet EMIR requirements. In particular, some non-financials and industry associations from the Nordic Member States repeated their call for the acceptance of non-collateralised bank guarantees.

Investment managers called for more transparency or homogeneity on the different levels of client segregation available. CCPs asked not have to make additional contributions to loss absorbing resources, and some industry associations called for a mechanism to allow suspension of the clearing obligation.

Concerning the issues of risk management and client asset protection, respondents' views were split as to whether the EMIR requirements were sufficiently robust to ensure appropriate levels of risk management and client asset protection with respect to EU CCPs and their participants.

Some respondents called for further precision of CCP requirements to achieve a more consistent application by authorities across the Union. Public authorities called for more precision in how significant changes to CCPs' risk models are validated and on how limits to portfolio margining are applied. Industry associations requested a greater role in the risk committee's oversight of CCPs' risk management standards.

3.2.9. Requirements for trade repositories

Most respondents, mainly companies, industry associations and public authorities, considered that requirements for trade repositories raised significant ongoing impediments or unintended consequences. The respondents pointed to a very wide variety of issues, with none predominating.

Some companies and industry associations requested that access by end users to data reported on their behalf should be ensured. They also suggested that EMIR should ensure effective interoperability between trade repositories and that homogeneous validation rules between trade repositories are rigorously enforced. Several public authorities suggested that ESMA should validate and have the right to oppose material changes to the conditions for registration of a trade repository.

Additionally, there were a large number of items identified by one or two respondents. These include: introducing a requirement for trade repositories to rectify breaches within a specific time; modification of the method of trade repositories' fee calculation; making trade repositories more transparent; provision of a mandate to ESMA to harmonise trade repositories operations; improve the communication by trade repositories on key issues; making trade repositories subject to a periodic license renewal; and requiring porting.

3.2.10. Additional stakeholder feedback

Some respondents indicated that there were impediments or unintended consequences with respect to requirements or provisions under EMIR not referenced in the preceding questions. The range of issues noted included the interaction of EMIR with other legislation (including CRR and MiFIR), possible financial stability risks introduced by the concentration of exposures in a small number of CCPs, and overreliance on Q&As published by ESMA to offer clarity on EMIR requirements.