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## ECB response to the European Commission's consultation on the review of the European Market Infrastructure Regulation (EMIR)

### Executive Summary

The ECB welcomes the opportunity to provide its views on the review of EMIR. While it should be recognised that many EMIR requirements have been in force for only a limited period of time, and that others have not yet entered into force, the ECB believes that certain important conclusions can already be drawn. This response puts forward the ECB's proposals for a future revision of the Regulation, with the main points in this regard summarised below. As a general point, it is recalled that international standard-setting bodies (namely the Committee on Payments and Market Infrastructures (CPMI), the International Organization of Securities Commissions (IOSCO) and the Financial Stability Board) are currently undertaking significant work on the standardisation of central counterparty (CCP) requirements to foster international convergence and identify whether additional guidance is required. The inclusion of any additional requirements in EMIR should, therefore, be consistent with the outcome of this work.

Regarding the *impact of the Regulation on non-financial counterparties* (NFCs), the ECB recommends that the question of the use of, or access to, over-the-counter (OTC) derivatives by NFCs be studied further, and mitigants identified if the views expressed by a number of market participants are confirmed, i.e. that the current framework causes specific undue restrictions on NFCs accessing the OTC derivatives market to support their regular business.

The ECB believes that the *collegial supervisory process for CCPs* is a key feature of the EMIR framework. However, it is concerned that authorities are not always being provided with sufficient time to fully assess the proposals for extensions of services or significant model changes put forward by CCPs, and has accordingly suggested adjusting the timeline for delivering college joint opinions. Moreover, it is the opinion of the ECB that the procedure for approving significant changes to CCP risk management (including the criteria for identifying significant changes) under Article 49 EMIR could be further specified. In addition, the ECB strongly believes the Regulation should be revised to reflect the specific role of the Single Supervisory Mechanism (SSM).

Regarding margin requirements, the ECB recognises that little evidence of *excessive procyclicality* has been observed during the relatively short time-span over which EMIR has been in force. Nonetheless, and taking a forward-looking approach, the ECB proposes further enhancing the requirements for mitigating procyclicality. Potential avenues to explore include enhancing the transparency (predictability) and flexibility of margin frameworks, and ensuring margin methodologies directly account for the economic or financial cycle. The ECB also supports the inclusion of macro-prudential intervention tools in EMIR, in order to prevent the build-up of systemic risk resulting, in particular, from excessive leverage,

and to further limit the procyclicality of margins and haircuts. Such tools, however, would be applied at transaction level and not at CCP level, after due consultation between relevant EU authorities.

On the issue of **margining models**, the ECB recommends additional requirements which would guarantee the resilience of portfolio margining models in times of stress. For example, the ECB would favour more granular requirements regarding the reliability and robustness of correlations, and the disclosure of the underlying economic rationale justifying such correlations.

The ECB recommends clarifying the **definitions and scope of EMIR**. In order to ensure that central banks can continue to perform their statutory tasks effectively, it is important that central bank transactions are fully exempt from the reporting obligations. This is also relevant with regard to the exemption for European System of Central Banks (ESCB) members from other provisions of EMIR, such as the exemption from the clearing obligation and from risk-mitigation techniques. While the European Securities and Markets Authority (ESMA) has provided clarification in its Q&A document that ESCB transactions are exempt, this should be clear from the Level 1 text of EMIR itself.

In addition, the ECB believes it is of key importance **to foster international convergence** regarding the standards for transaction reporting. This requires mandating the use of globally accepted standards for efficient and consistent reporting of financial transactions in a multi-jurisdictional environment. Within the EU, consistency should be ensured regarding the definitions of the instruments subject to the reporting obligation. Lastly, consistency should be ensured between the various reporting requirements defined in EU legislation (e.g. between EMIR and the Securities Financing Transactions Regulation, regarding collateral swaps). The ECB strongly supports defining harmonised, detailed reporting specifications for EMIR data, as opposed to the current situation in which each authorised trade repository defines its own reporting formats.

Regarding the **clearing obligation**, the ECB wishes to reiterate and support the points made by the European Systemic Risk Board in its own response to the public consultation, namely that a swift process to remove or suspend the clearing obligation should be established when the relevant market situation so requires (e.g. certain instruments become illiquid; a CCP is under recovery or resolution procedures), and that systemic risk issues should be more explicitly taken into account when identifying the categories of products suitable for mandatory clearing.

Regarding **cross-border activity** in the OTC derivatives market, the ECB is concerned that differences in scope and implementation timelines across jurisdictions have created uncertainty and inefficiency for market participants. Such inconsistencies should be avoided as far as possible, as they may lead to competitive disadvantages and level playing field issues.

On the issue of **transparency**, the ECB believes there are currently several impediments to ensuring that authorities have adequate and comparable access to the data reported. Overall, the regulatory technical standards which aim to address this issue are not detailed and comprehensive enough, leading to heterogeneous data provision by trade repositories. In addition, consistency in data reporting and aggregation would be greatly improved by requiring the harmonised use of international identifiers and

international standards for key data and messaging formats. Lastly, in the interest of legal certainty, the ECB believes that the SSM and banking supervisors should explicitly be granted access to EMIR data.

Regarding the **requirements applicable to CCPs**, the ECB recommends defining more granular requirements for indirect clearing and segregation and portability arrangements, in order to reflect recent market developments and the systemic importance of tiered arrangements. In addition, more safeguards could be provided to mitigate the risks of settlement in commercial bank money. Lastly, it is suggested that the requirements regarding the measurement, monitoring and management of exposures to entities other than clearing members be strengthened.

The ECB believes additional **requirements for trade repositories** are needed to ensure they are adequately fulfilling their role under EMIR. Most importantly, trade repositories need to be provided with clear rules regarding the treatment of data as well as the outputs to be produced, as they currently provide different types of files which vary in terms of content and format.

Finally, the ECB considers that certain **other requirements or provisions under EMIR** could be further improved. One such improvement could be to address the gaps between EMIR and international guidance adopted by CPMI-IOSCO.

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## Introduction

In accordance with Article 85(1) of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR)<sup>1</sup>, the European Commission is required to prepare a general report on EMIR which will be submitted to the European Parliament and the European Council, together with any appropriate proposals. For that purpose, on 21 May 2015 the Commission opened a public consultation on the review of EMIR, and invited respondents to submit their views by 13 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?**

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

The ESCB response to this question is set out in a separate report<sup>2</sup>.

### 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**

<sup>1</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p. 1.

<sup>2</sup> <http://www.ecb.europa.eu/pub/pdf/other/genc-2015-escb-reporten.pdf?a9e9416bb391b8515616e4fb78570479>

**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?**

**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?**

Assessing the actual effects of the current “indirect” thresholds raises certain challenges, and there is uncertainty among non-financial counterparties (NFCs) about their ability to benefit from them. Therefore, the ECB suggests analysing whether a direct definition of the exempted NFCs through a classification by type of counterparty and trading activity would be more appropriate. This could allow a more direct and focused approach for the exemption of NFCs.

It could also be worthwhile to investigate how many NFCs of systemic importance exist. There may be only a small number within the EU, as the relevant business is mostly commodity driven and located outside the EU, and because they are often significantly smaller than financial firms and hence less systemically relevant.

**(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 if so.**

The ECB welcomes this question on the use of, or access to, OTC derivatives by NFCs. Indeed, to support their activity NFCs should continue to have such access at fair conditions in line with their needs for hedging exposures related to their regular business. Anecdotal evidence suggests that this access has been restricted or become more expensive over and beyond what may be justified in terms of enhanced financial stability, because NFCs may be significantly affected by (the combination of) the following requirements of EMIR:

- for the NFCs which have recourse to central clearing, it may prove costly or challenging to meet the restrictive set of eligible collateral defined by Article 46 EMIR (and the related Level 2 acts), as it is not the regular business practice of NFCs to hold such collateral in the required quantity on their balance sheet;
- when resorting to non-centrally cleared transactions, the cost of trading is also increasing, reflecting the decrease in liquidity which has resulted from the migration of business to central clearing;
- in addition, NFCs could be affected by the fact that counterparty banks have to measure and monitor their OTC exposure with their NFC customers and hold adequate equity capital for

regulatory purposes, especially if they do not request collateral from NFCs (see in particular Article 11(4) EMIR); these new regulatory costs will be charged to the NFC (e.g. via credit value adjustments).

Against this background, the ECB recommends that the question on the use of, or access to, OTC derivatives by NFCs be studied further, and mitigants identified if it were to be confirmed that the current overall framework (including banking regulation and market infrastructure regulation) causes specific undue restrictions for NFCs and their regular business.

### 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?**

*Deadlines for delivering a joint opinion of the college*

Under Article 19 EMIR, national competent authorities (NCAs) are required to organise a vote of the college within thirty calendar days of the submission of the risk assessment report. Increasingly, in the ongoing authorisations phase, NCAs are not providing the college with a full month to examine the NCA's risk assessment report. While it is understood that accelerating the college procedures provides CCPs with more business certainty when expanding their services, these tightened deadlines have had unfavourable consequences for the conduct of the assessment process for certain authorities, namely for authorities such as the Eurosystem which need to take a collective view on applications. Without the necessary time to fully examine extensions of services and significant model changes, there is a risk that authorities will not be able to appropriately discharge their responsibilities under EMIR.

EMIR should provide further guarantees that authorities will be given sufficient time to adequately assess applications submitted for a joint opinion of the college, while ensuring that CCPs are not unduly restricted in their ability to implement changes to their activities/frameworks. Such provisions could include, for example, the definition of a minimum delay between the submission of the NCA's risk assessment to the college and the college vote, while also defining a maximum delay between the CCP's

application and the college vote; and as regards Article 49.1 validations, a maximum delay between the CCP's application and the college vote, including all validations where relevant.

*Appropriately reflecting the role of the Single Supervisory Mechanism (SSM)*

The regulation establishing the Single Supervisory Mechanism (Regulation EU No 1024/2013<sup>3</sup>) was adopted more than a year after the adoption of EMIR. As a result, the existence of the SSM was not reflected in EMIR, whereas subsequent legislation (such as the Central Securities Depositories Regulation – CSDR<sup>4</sup>) has reflected the role of the SSM. Several issues have arisen regarding the appropriate involvement of the SSM in the regulatory architecture set up by EMIR, most notably voting modalities, which under their current interpretation grant the ECB a single vote and hence do not reflect the principle of separation. Furthermore, where a national central bank (NCB) is appointed as the single representative of the Eurosystem as central bank of issue, that NCB cannot cast a separate vote.

It is suggested that EMIR be amended in order to appropriately reflect the role of the SSM. This could involve explicitly recognising that, by virtue of the separation principle, two different votes should be expressed in CCP colleges where the ECB is represented both as the supervisor of the most important clearing members and as the central bank of issue. This includes appropriate amendments to Article 18 and Recital 54 of EMIR. Other topics related to the SSM's involvement could also be clarified (see below under Question 2.7 Transparency).

*Approval of significant changes to CCPs' risk management policies*

It is the view of the ECB that the procedures for the review of models set out in Article 49 EMIR could be clarified.

First, Article 49 does not establish criteria for determining which changes to models and parameters should be considered significant. This has the potential to create differences in the approaches followed across the colleges. It is therefore suggested to define the criteria for significant changes to models and parameters via a dedicated Level 2 Act, to be drafted by ESMA in close cooperation with the members of the ESCB. These regulatory technical standards should ensure an appropriate balance between fostering convergence and consistency across all CCP colleges, and providing authorities with a certain degree of flexibility to apply their judgment when considering whether changes to models and parameters should be declared significant.

Second, Article 49 does not provide for an efficient involvement of the college in the process of adopting significant changes to models and parameters. Under the terms of Article 49, adopted models and parameters are subject to an opinion of the college; college involvement therefore takes place on an ex post basis, which may call its effectiveness into question. It is suggested that the process be revised

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<sup>3</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63.

<sup>4</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, OJ L 257, 28.8.2014, p. 1.



under Article 49, in order to require an opinion of the college before the significant changes in models and parameters are adopted.

#### **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?**

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

There is scope for the requirements to be further improved.

EMIR currently addresses the potential procyclical implications of margin requirements through the three tools listed in Article 28 of Commission Delegated Regulation (EU) No 153/2013. While the Regulation has only been in force for a relatively short period of time, during which there has been little evidence that margins have raised concerns in terms of procyclicality, certain enhancements to the EMIR requirements could be proposed.

It is suggested that additional clarifications be provided in EMIR regarding the existing tools for mitigating procyclicality. EMIR provides a clear mandate to curb potential drastic changes in margin requirements during times of stress (see Article 28(1) Commission Delegated Regulation (EU) No 153/2013), but it does not indicate any precise solution. One potential avenue to explore would be to enhance the transparency (predictability) and flexibility of margin frameworks. While CCP margin models should account for increased volatility on the markets and changes in the credit-worthiness of clearing members, they should do so in a transparent manner. Indeed, on the one hand, CCPs should be sufficiently transparent towards their clearing members so as to allow the latter to anticipate future changes in margin requirements. If margin methodologies are predictable, clearing members are in a position to assume their responsibility in adjusting portfolios in view of a potential procyclical situation; in this sense triggers which are based on transparent criteria could generally be favoured. On the other hand, CCPs should be sufficiently flexible given unexpected market dynamics so as to react promptly and effectively. In this sense, margin methodologies should ensure a certain leeway for CCPs to intervene as they deem appropriate in order to counteract procyclicality in a timely manner. However, where discretionary interventions are preferred, these should not foster procyclicality (for example, discretion should be used to reduce margin pressure in particularly volatile market conditions).

Another proposal would be to ensure margin methodologies adopt a portfolio approach, and directly account for the correlation between the economic or financial cycle and aggregate margin requirements. EMIR partially addresses this issue when it considers portfolio margining (Article 27 Commission Delegated Regulation (EU) No 153/2013). However, the implementation of EMIR provisions is not uniform across CCPs and this heterogeneity could create uncertainty for clearing members and other market participants. Moreover, the effect of portfolio margining on aggregate requirements is difficult to assess, as it depends on how margin offsets interact through multiple risk channels. Additional measures (e.g. margin add-ons and restrictions in margin offsets) might further complicate the evaluation of aggregate effects, as numerous risk factors combine to determine margin requirements; also, stressed market conditions typically exacerbate this uncertainty. In order to facilitate the assessment of the ultimate net effect of various risk factors on margin requirements and promote a uniform implementation across CCPs, simplicity should inform any prescriptive standard aimed at countering procyclicality of margin methodologies. For instance, a simple approach would define aggregate margin requirements as positively related to a measure for the economic or financial cycle. In this way, aggregate margins would feature smaller increases during contractions of the business or credit cycle (as the opposite pressure given by risk factors would be offset) and exhibit lower procyclical dynamics.

Any additional requirements in terms of mitigating procyclicality should strike an appropriate balance between the limitation of procyclical effects and the sound management of financial risks.

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

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

Yes, it is suggested that macro-prudential intervention tools be included in Level 1 of EMIR. Macro-prudential tools are motivated by the need to prevent the build-up of system-wide leverage via derivatives and securities financing transactions (SFTs) and to further limit the procyclicality of margining and haircut-setting practices. Systemic risks can build-up in derivative and SFT markets, irrespective of whether these transactions are cleared or not, and authorities will need to have tailored instruments to address these risks. Two policy instruments that potentially could reduce or limit leverage through derivatives and SFTs and the pro-cyclicality of margins/haircuts are: (a) permanent minimum requirements, and (b) time-varying minimum requirements/buffers.

*(a) Permanent minimum margin requirements and haircuts*

Floors on margins and haircuts help to limit the build-up of leverage in a benign market environment and reduce the size of any “shock effect” of a sudden increase of margins and haircuts.

*(b) Time-varying minimum requirements/buffers*

Time-varying minimum margin and haircut requirements can either be applied by introducing minimum requirements that are varied over time or by applying a countercyclical add-on on top of existing minimum margin requirements. The aim is to reduce leverage in the expansionary part of the financial cycle, but it may also reduce the “shock effect” of sudden margin increases by ensuring that any increase in margins due to increased volatility happens from a higher level. It should be emphasised that recourse to such tools would not lead CCPs to be under-margined with respect to the financial risks they face. These

requirements would still allow CCPs to set margins and haircuts above the levels specified by the macro-prudential authority.

It is proposed that principles for macro-prudential tools be established in Level 1 of EMIR in the following way:

First, macro-prudential policy tools could only be applied after due consultation with other EU and national authorities (e.g. the European Systemic Risk Board (ESRB), the national competent and designated authorities).

Second, macro-prudential policy tools would be applied to counterparties at transaction level. In this way, all relevant transactions would be affected, including those contracted by non-banks, regardless of whether these transactions have been concluded in the centrally cleared market, the non-centrally cleared market, or by EU counterparties clearing their trades via a non-EU CCP. EMIR could be the appropriate legislative text through which to establish these requirements for all transactions, or only derivatives transactions. In the latter case, other texts (e.g. the proposed SFT Regulation) could provide a means to establish these requirements for other relevant types of transactions (e.g. un-cleared SFTs).

#### **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?***

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

Certain aspects of CCP policies on collateral and margin could be further improved.

##### *Portfolio margining*

There is currently a wide degree of diversity in the interpretation of the provisions of EMIR regarding portfolio margining, leading to doubts over the strength and resilience of CCP portfolio margining models in times of stress, and fostering uncertainty for clearing members.

It is suggested that requirements in EMIR be clarified regarding the significance and reliability of correlations, their resilience in times of stress, and the economic rationales used to justify them. It is also suggested that greater clarity be provided regarding the calculation of the cap on the percentage of the offset stemming from portfolio margining, as defined under Article 27 of Commission Delegated

Regulation (EU) No 153/2013 (at present, it is not made explicitly clear that this cap applies to gross margins, rather than the difference between gross margins and net portfolio margins). It should be ensured that any additional requirements regarding portfolio margining are applicable across different types of risk models. In addition, current international work and possible future guidance should duly be taken into account.

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

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

The ECB has not identified significant impediments with regard to this topic.

## 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?***

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

*Exemption for central bank transactions from EMIR*

The ECB notes that Article 1(4) of EMIR provides that the Regulation should not apply to: (a) the members of the ESCB; (b) other Member States' bodies performing similar functions; and (c) other Union public bodies charged with or intervening in the management of public debt. This exemption includes an exemption from both clearing and reporting obligations. The exemption takes into account the specific nature of central bank transactions (in contrast to transactions between private market participants as addressed by EMIR) which central banks undertake in order to fulfil their statutory tasks, having due regard to the guarantees of central bank independence set out by Article 130 of the Treaty on the Functioning of the European Union (or other equivalent provisions under national law).

However, requiring the counterparties of the members of the ESCB to report all data on their transactions to trade repositories has the unintended consequence of an indirect reporting obligation for central bank transactions, thus limiting the effectiveness of the above exemption. To prevent EMIR from limiting the power of ESCB members to perform their tasks of common interest, it is crucial that, in particular, the books of ESCB members are protected and that signalling based on central bank operations remains effective. In order to ensure this, it is not only necessary to exempt ESCB members from the obligation to report their derivatives transactions, but also to exempt the related transactions of their counterparties<sup>5</sup>.

This is also relevant with regard to the exemption for ESCB members from other provisions of EMIR, such as the exemption from the clearing obligation and from risk-mitigation techniques (including exchange of collateral) for OTC derivative contracts not cleared by a CCP. While ESMA has provided clarification in its Q&A document on EMIR that such transactions are exempt from clearing and from risk mitigation requirements, this should be clear from the Level 1 text of EMIR itself.

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<sup>5</sup> See ECB Opinion CON/2012/95; ECB Opinion CON/2012/21; and ECB Opinion CON/2014/49.

Thus, in the interest of legal certainty, the exemption in Article 1(4) should be drafted as a transaction-based exemption. For this purpose a new Article 1(4)(a) EMIR should be added, and should read: “This Regulation shall not apply to transactions to which the bodies listed in paragraph 4 are counterparty.”

#### *International consistency of the scope of EMIR regarding the reporting obligation*

While the scope of application of EMIR is the EU, the market for derivatives is global. The absence of equivalent definitions, the lack of harmonised reporting obligations and differing requirements are a significant impediment to consistent reporting of transactions across jurisdictions. Comparing data collected by different trade repositories in the EU continues to prove extremely challenging (please see also answer to Question 2.7) – these challenges are even greater when the data is provided under different reporting regimes. As a result, the G20/Financial Stability Board (FSB) objectives of “consistent and consolidated supervision” cannot yet be met.

The mandate set by the G20 requires the establishment of a framework for the global aggregation of data. This explicitly requires the use of existing or envisaged globally accepted standards for efficient and consistent reporting of financial transactions in a multi-jurisdictional environment.

This is also important in order for the data to be used by authorities to fulfil their responsibilities and mandates, including for the monitoring of financial stability and macro-prudential risks. For example, details of derivative contracts entered into by subsidiaries of EU counterparties but residing outside the EU are not available to authorities in the EU, making it challenging for them to assess risks to the financial group as a whole. In addition, financial market associations and reporting agents that have a global presence have alerted authorities about the significant costs of carrying out multiple types of reporting for the same information. It is thus important for the reporting of derivatives transactions to be based on harmonised frameworks that require the use of global standards, such as the Legal Entity Identifier (LEI).

Moreover, within the EU there are also circumstances where there is a need to achieve consistency of definitions. This is particularly the case with regard to the definition of “derivative” and “derivative contract” under Article 2(5) EMIR, which is dependent on the definition under a directive, namely the Markets in Financial Instruments Directive (MiFID) (until 3 January 2017) and MiFIDII thereafter. Efforts by the European Commission and by ESMA should continue in order to achieve consistency across the EU.<sup>6</sup>

#### *Collateral swaps*

Collateral swaps that are performed under master agreements for SFTs are covered under the SFT Regulation. Information on these transactions is important from a macro-prudential perspective, as they can contribute to the build-up of systemic risk. Collateral swaps could, however, be constructed as derivatives, and would therefore fall under EMIR.

The reporting under EMIR does not include all the information relevant from the SFT perspective as a few additional data items (e.g. re-used collateral) are missing. The relevant data items could be added to the EMIR requirements to ensure that the relevant information is available.

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<sup>6</sup> See ESMA Consultation Paper on Guidelines on the application of C6 and C7 of Annex I of MiFID of 29 September 2014 and ESMA Consultation paper on MiFIDII/MiFIR of 22 May 2014.

For that reason, the Commission should provide consistency between the final text of the proposed SFT Regulation and the revised text of EMIR to ensure all relevant details of collateral swaps – including details on re-use activities – are adequately reported and available to the relevant authorities.

## 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?***

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

***(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?***

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

Certain aspects of the framework for establishing clearing obligations could be further improved. The ECB wishes to reiterate and support the points made in this regard by the ESRB in its own response to the public consultation on EMIR. The ESRB raised two issues for the European Commission's consideration:

*Swift process for removal or suspension of mandatory clearing obligations*

The EMIR provisions should also include the possibility and the conditions to be fulfilled for a swift removal or suspension of the clearing obligation for certain classes of OTC derivatives, when the relevant market situation so requires, or if a CCP is in a recovery or resolution procedure. This will ensure that CCPs' exposures through financial instruments that have become illiquid will not continue to increase as fast (or will decrease), thus limiting the potentially pro-cyclical implications that follow from such exposures.

*The evaluation of systemic risks for mandatory clearing purposes*

For the sake of clarity and consistency with the legislation establishing the ESRB, as well as for financial stability, it should be clear that the evaluation of systemic risk for mandatory clearing purposes should be conducted by ESMA both at the EU and national level.

## 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?***

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

Reporting agents with which the ECB has regular contact, for example in the context of the Money Market Statistical Regulation (Regulation No 1333/2014 of the European Central Bank), have expressed their wish for the definition of harmonised, detailed reporting specifications for EMIR data that are independent of the trade repository. Today, this is not the case, as the specific reporting formats established by each trade repository require a reporting agent to significantly adapt its reporting systems to the specific formats of the trade repositories in the event that it wishes to report its transactions to a different trade repository. Harmonised reporting specifications would allow reporting agents to use the services of different trade repositories without the additional cost of having to modify their respective reporting applications.

Regarding the impediments and unintended consequences for regulatory authorities, please see the answer to Question 2.7.

#### **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?***

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

At the current juncture, the ECB has not identified significant impediments with regard to this topic.

#### **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?*

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

At the current juncture, the ECB has not identified significant impediments with regard to this topic.

#### **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?*

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

Yes. The lack of alignment in the scope and calendar for implementing global regulatory requirements on reporting and risk mitigation across various jurisdictions has created uncertainty regarding the procedures to be applied, and inefficiencies for market participants, which should be addressed. This is the case for the differences between the product scope of the Dodd-Frank Act (DFA) and EMIR reporting requirements.

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

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

Yes. For example, EMIR includes foreign exchange derivatives in the instruments potentially subject to the clearing obligation and imposes risk mitigation requirements on non-cleared equity options in line with the G20 commitment of 2009, while the DFA does not. Also, the scope of the reporting requirements

under EMIR is broader than under the DFA, by requiring exchange-traded derivatives to be reported. The ECB supports the level of ambition of EMIR and recommends that such inconsistencies in a globally active market should be avoided as they may lead to competitive distortions and level playing field issues. It is therefore key that further work be carried out on ensuring a consistent framework internationally. The ECB would support EU-led efforts in this direction being taken internationally, also in the context of the FSB. A “race to the bottom” regarding clearing and reporting requirements should be avoided.

### **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?***

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

*Impediments regarding access to data reported to trade repositories*

Article 81(5) EMIR gives ESMA the mandate to “develop draft regulatory technical standards (RTS) specifying the frequency and the details of the information referred to in paragraphs 1 and 3 [i.e. aggregate position-level data] as well as operational standards required in order to aggregate and compare data across repositories and for the entities [i.e. authorities; ...] to have access to information as necessary”. The related RTS (i.e. Commission Delegated Regulation No 151/2013<sup>7</sup>) are, however, not sufficiently detailed and comprehensive to ensure that authorities have the level of access to data reported to trade repositories intended by the Regulation. In particular, heterogeneous data provision by trade repositories (e.g. procedures for obtaining access, technical connections, and particularly the different types and content of data files provided) poses significant impediments to access by authorities. These impediments concern the provision of data by trade repositories to authorities, both at the transaction and position levels.

In particular, Article 2(10) of Commission Delegated Regulation No 151/2013 states that “a trade repository shall provide a relevant ESCB member with access to position data for derivatives contracts in the currency issued by that member”. However, the only definition of position data is provided in Recital 13 (“position data should regard aggregate position data by underlying/product for individual

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<sup>7</sup> Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data, OJ L 52, 23.2.2013, p. 33.

counterparties”) and leaves significant room for interpretation<sup>8</sup>. Consequently, ESCB members are provided with inconsistent position data across the different trade repositories, which cannot be meaningfully combined and aggregated. Thus, in practice, ESCB members do not have appropriate access to the data referred to in Article 2(10), despite being entitled to such access (note also that those data cannot be derived by ESCB members themselves from the data referred to in Article 2(9) of Commission Delegated Regulation No 151/2013). Given that there are a variety of ways in which transaction-level data can be aggregated into position data, and that the type of aggregation depends on the specific purpose of the analysis, it would be challenging to establish fixed guidelines to calculate position data which would fulfil the various objectives of ESCB members.

Consequently, to ensure appropriate access to this subset of information, it is suggested that derivatives contracts in the currency issued by the member of the ESCB should be provided at transaction level. Aligning the granularity of the provided information with other subsets of information would also increase the clarity and efficiency of reporting by the trade repositories to the relevant regulators.

Moreover, the reference in Article 2(9) to the “jurisdiction” of the ESCB member could lead to undue restrictions on ESCB members’ access to transaction-level data, which is necessary for monitoring financial stability and macro-prudential risks. In a highly integrated financial market, the ability to effectively monitor cross-border activities of counterparties, their groups and subsidiaries (also when located out of their jurisdiction) is vital. Under the current reporting regime, however, transactions carried out by a branch are generally assigned to its headquarters, which stems partially from the lack of a branch identifier, similar to the LEI. In addition, in order to have an overview of whole banking groups, including the subsidiaries located outside Europe, it is important to establish an efficient mechanism for the exchange of information with other jurisdictions. This is also a prerequisite for global data aggregation, in order to achieve the objectives set by the G20 leaders in 2009 (i.e. to increase transparency and mitigate systemic risk stemming from the OTC derivatives market).

#### *Impediments stemming from insufficient standardisation of reporting*

Article 9 EMIR, Commission Delegated Regulation (EU) No 148/2013<sup>9</sup> and Commission Implementing Regulation (EU) No 1247/2012<sup>10</sup> are not sufficiently detailed or comprehensive, and provide room for interpretation by market participants, as also acknowledged by ESMA in the context of the ongoing review of these standards.

As a result, the data currently collected by trade repositories are non-standardised and raise issues in terms of quality, which in turn represents a significant impediment to the use of the data by authorities. In the view of the ECB, the ongoing review undertaken by ESMA is a step in the right direction towards

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<sup>8</sup> Among the issues to be clarified are: what is the underlying, what is the product, whether this covers the position between two counterparties or the position of one counterparty vis-à-vis all other counterparties, what is the “aggregate position” and how to calculate aggregate positions from transactions.

<sup>9</sup> Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories, OJ L 52, 23.2.2013, p. 1.

<sup>10</sup> Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, OJ L 352, 21.12.2012, p. 20.

harmonising derivatives reporting; however, more granular changes would be required in order to reach this objective. In this respect, direct involvement of the ECB and other ESCB members would provide more efficiency to support the revision process.

Moreover, in order to ensure a sufficient level of standardisation and to facilitate the use of such information for the ESCB's tasks, it is necessary to clearly specify – both in the Level 1 and Level 2 texts – a number of issues related to the content and format of the reports to trade repositories. For example, the use of international identifiers, such as LEIs and International Securities Identification Numbers (where applicable), and international standard messaging formats such as FpML or ISO 20022 for reporting messages, should be mandatory. This will help ensure that such data is reported to trade repositories, and that authorities receive transaction details with the necessary data attributes, in appropriate transmission formats. Moreover, Level 2 acts should take into account the development of further identifiers at international level, such as the Unique Transaction Identifier and the Unique Product Identifier.

These initiatives should be consistent with the framework currently being developed at international level, such as the work undertaken by the Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) to harmonise key OTC derivatives data elements.

#### *Consequences for the ESCB and market participants of the aforementioned impediments*

Given the impediments listed above, the objective of transparency has not yet been achieved and the ESCB does not have access to high quality data on the derivatives market, despite the fact that this information is needed for it to fulfil its responsibilities and mandates. As the ESCB is also not directly involved in drafting the related technical standards, it remains unclear whether any revision of these standards could help deliver data needed for the purposes of the ESCB. This situation creates significant inefficiencies in the regulatory landscape. For instance, the recently introduced Money Market Statistical Regulation (MMSR) (Regulation No 1333/2014 of the ECB) will require (at least in its initial phase) the reporting agents to report under the MMSR a small subset of similar transactional data to those already reported under EMIR, thus creating a double-reporting obligation for some reporting agents, although this would be limited in scope (MMSR is focused on large banks in the first wave starting on 1 April 2016, and only two categories of derivatives). However, in the course of 2017, the implementation of MMSR will be broadened to a larger set of banks, which will further increase the double-reporting obligations for the industry. Similarly, not all the reporting concepts seem equivalent between MMSR and EMIR.

It is, therefore, proposed that new unambiguous technical standards – more detailed and significantly wider in scope than the current ones – should be enforced, such that trade repositories are in a position to provide authorities with fully standardised EMIR data on the EU derivatives market, enabling them to compile, aggregate and compare data across trade repositories. Moreover, the Level 1 text of EMIR should specify that technical standards are developed by ESMA “in close cooperation with the members of the ESCB”.

#### *Addressing legal certainty regarding access by the Single Supervisory Mechanism (SSM)*

With respect to access to records maintained by trade repositories, the ECB notes that the EMIR RTS set out in Commission Delegated Regulation (EU) No 151/2013<sup>11</sup> do indeed state “[...] access by the relevant ESCB members serves to fulfil their basic tasks [...] and in some cases prudential supervision over some counterparties [...] they should be granted access to data in accordance to the different mandates listed in Article 81(3) of Regulation (EU) No 648/2012<sup>12</sup>”. While the ECB would be covered by the term “ESCB”, for the purposes of legal certainty, explicit reference should be made to the ECB’s role within the SSM. In particular, Article 81(3) of EMIR states that a trade repository “shall make the necessary information available to the following entities”, which include the “relevant members of the ESCB”, but not banking supervisors. The ECB believes that, in carrying out its tasks within the SSM, it should expressly be referred to in Article 81(3). Moreover, Article 81(3) EMIR should expressly ensure that all EU banking supervisors are granted direct access to data collected under EMIR in order to fulfil their respective mandates, which includes, inter alia, prudential supervision of counterparties.

### **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?***

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

***(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?***

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

Certain aspects of the requirements of Titles IV and V could be further improved.

#### *Client clearing and tiering*

Although the risks related to indirect clearing and segregation and portability are addressed by EMIR, market developments may raise questions with regard to the granularity of these requirements, including whether new services would constitute central clearing services and should thus offer the full range of guarantees provided by EMIR for central clearing and for segregation and portability.

<sup>11</sup> Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data (OJ L 52, 23.2.2013, p. 33).

<sup>12</sup> Recital 6 of Commission Delegated Regulation (EU) No 151/2013.

It is suggested that the possibility of more granular requirements regarding the mitigation of risks related to indirect clearing and segregation and portability arrangements be considered, in order to reflect recent market developments and the systemic importance of tiered arrangements. One issue to be further explored is whether current segregation requirements adequately protect client positions (for example, whether the positions and assets of clients are sufficiently protected from potential losses incurred by their clearing member's affiliated companies). It is also suggested that an analysis be carried out as to whether current requirements regarding porting strike the right balance between facilitating the transfer of positions, while guaranteeing the rights of clients (one potential issue to explore is whether the process for obtaining the approval for porting from a defaulting clearing member's clients in an omnibus account should be made more flexible).

**(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?**

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

Certain requirements for CCPs could benefit from further precision.

*Requirements applicable to settlement*

Issues related to payment and settlement are only briefly mentioned in EMIR (Article 50). While the Regulation expresses a preference for settlement in central bank money, it allows CCPs to make use of commercial bank money settlement if central bank money is not practical and available. There is currently a degree of diversity regarding the safeguards implemented by CCPs to limit cash settlement risks in commercial bank money. It is suggested that the possibility of implementing more granular requirements regarding the safeguards for settlement in commercial bank money should be considered.

*Measuring, monitoring and managing exposures to entities other than clearing members*

At present, EMIR RTS Article 32(4) requires a CCP's risk management framework to take into account its liquidity exposures towards entities other than clearing members (including, inter alia, concentration banks, settlement banks, investment counterparties and liquidity providers). However, these requirements have been implemented differently across the CCP landscape, and exposures to entities other than clearing members have not been incorporated into liquidity risk management frameworks in a consistent way.

It is suggested that the requirements regarding the measurement, monitoring and management of exposures to entities other than clearing members be strengthened, by providing more detailed guidance on how CCPs should consider these exposures in their risk management framework (namely, how these exposures should be included in the total stressed liquidity losses calculated by CCPs). Such entities include, but are not limited to, the ones listed in Article 32(4). Current international work and possible future guidance should be taken into account.

## 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?***

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

As explained in the answer to Question 2.7, the current requirements for trade repositories with regard to reporting standards are not sufficiently detailed or comprehensive. This creates significant data quality problems which prevent the provision of meaningful information to authorities. The steps being undertaken by ESMA (e.g. Level 1 and Level 2 validations to be run by trade repositories) are in the right direction, but more is needed. The Level 1 text should empower ESMA to define procedures for trade repositories to verify the completeness and correctness of the data reported to them.

Furthermore and more importantly, trade repositories need to be provided with clear rules regarding the treatment of the data as well as the outputs to be produced as they currently provide different numbers of data files, and different types of files, which vary in content and format. This concerns data on all levels, i.e. transaction, position and other aggregate data. The requirements for trade repositories regarding the output files to be provided to authorities should be developed in close cooperation with the ESCB. For instance, the ESCB has a strong interest regarding the de-duplication of data (given the double-reporting obligation) and the derivation of data on all outstanding trades ("trade state reports"). It is suggested that trade repositories be required to perform this de-duplication in the context of the reconciliation exercise and to derive data on outstanding trades at the end of each day.

More specifically, regarding transaction data provided to authorities in accordance with Article 81(2) EMIR, trade repositories should be provided with compulsory technical specifications – in either the Level 1 or Level 2 text – detailing the content of data files, such as:

- (i) variable names, format of each variable, allowed values in each variable;
- (ii) whether different files are to be provided for each asset class, and for OTC derivatives and exchange traded derivatives;
- (iii) how the outcome of the validations and trade reconciliation exercise run by trade repositories are to be recorded in the data

Furthermore, the naming convention and format of the data files should also be prescribed.

Regarding position data provided to authorities and aggregate data publicly released (in accordance with Article 81(1) EMIR), trade repositories should be provided with compulsory technical specifications detailing the same aforementioned items as for transaction data. In addition, they should be provided with

detailed instructions regarding the derivation of positions and aggregate data from transactions. Such technical specifications would need to be provided and distributed to all relevant stakeholders; in particular, concerning aggregate data which are made available to the general public, such instructions should also be publicly released. Beyond this, the practical implementation of these instructions in each trade repository should be closely monitored by ESMA in its supervisory role to ensure that the calculation process is consistently implemented across all trade repositories.

A final proposal of key importance is that certain minimum standards regarding the features of the data transmission channel from trade repositories to authorities (e.g. sFTP connection versus web portal; pull versus push approach) should be developed by ESMA, taking into account the needs of all regulatory authorities accessing the data.

#### **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?***

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

Certain additional requirements or provisions under EMIR could be further improved.

*Reflecting the guidance adopted at international level*

Although, as confirmed by Recital 90 of EMIR, it was the intention to follow the existing recommendations developed by CPSS-IOSCO, in particular the Principle for Financial Market Infrastructures (PFMI), the CPMI-IOSCO Implementation Monitoring exercise has identified certain gaps between the PFMI and the provisions of EMIR: the EMIR review process represents an opportunity to address these gaps. In addition, there is ongoing work at international level in several areas relevant for CCP risk management (including, inter alia, CPMI-IOSCO work on assessing stress testing practices and margin requirements across the global CCP landscape).

It is suggested that EMIR be amended to address the identified gaps with the PFMIs. It is also suggested that it should reflect any international guidance resulting from the current work being carried out at international level (e.g. the qualitative and quantitative requirements for disclosure adopted via the CPMI-IOSCO *Disclosure framework and Assessment methodology* and subsequent *Public Quantitative Disclosure Standards for Central Counterparties*, and any further guidance in the areas of stress testing and margin requirements).



*Assessing the adequacy of recovery plans in the process for third country CCP recognition*

The process for recognising third country CCPs under Article 25 EMIR involves the adoption by the European Commission of an implementing act which determines that the legal and supervisory arrangements of a third country ensure that CCPs authorised in that third country comply with legally binding requirements which are equivalent to the requirements in EMIR. These requirements do not include the adoption of adequate recovery plans, as EMIR does not address aspects related to recovery.

It is suggested that the assessment of recovery plans be included in the process for recognising third country CCPs under Article 25 EMIR. This assessment will be carried out on the basis of the future EU rules on CCP recovery and resolution. Once these rules enter into force, it is further proposed that the Commission reassess the legal and supervisory arrangements of third countries, and that ESMA reassess the compliance of third country CCPs in the light of the new EU standards on recovery and resolution.