



BANKING AND FINANCE

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

Fields marked with \* are mandatory.

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

## Introduction

### The Regulation

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

EMIR responded to the [commitment by G-20 leaders in September 2009](#) that: "All standardised OTC derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at latest. OTC derivatives contracts should be reported to trade repositories".

The core requirements set out under EMIR are:

1. Clearing and risk mitigation obligations for OTC derivative contracts;
2. Reporting obligations for derivative contracts;
3. Requirements for Central Counterparties;
4. Requirements for Trade Repositories.

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

## **Report on the Regulation**

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

The Commission must in particular:

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

*(b) Assess, in coordination with ESMA and the relevant sectoral authorities, the systemic importance of the transactions of non-financial firms in OTC derivatives and, in particular, the impact of this Regulation on the use of OTC derivatives by non-financial firms;*

*(c) Assess, in the light of experience, the functioning of the supervisory framework for CCPs, including the effectiveness of supervisory colleges, the respective voting modalities laid down in Article 19(3), and the role of ESMA, in particular during the authorisation process for CCPs;*

*(d) Assess, in cooperation with ESMA and ESRB, the efficiency of margining requirements to limit procyclicality and the need to define additional intervention capacity in this area;*

*(e) Assess in cooperation with ESMA the evolution of CCP's policies on collateral margining and securing requirements and their adaptation to the specific activities and risk profiles of their users.*

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

## **Feedback**

The purpose of this document is to consult all stakeholders on their views and experiences in the implementation of EMIR to date. Interested parties are invited to send their contributions by 13 August 2015 through the online questionnaire below. Only responses received through the online questionnaire will be included in the report summarising responses. The responses to this consultation will provide important guidance to the Commission services in preparing their final report.

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

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

Nonetheless, the Commission services welcome the views of stakeholders as to any identified issues with respect to the implementation of upcoming requirements. However, this consultation does not seek views on any regulatory technical standards that have not yet been adopted by the Commission. This includes the proposed regulatory technical standards on the mandatory clearing of certain interest rate products in accordance with Article 5 of EMIR, delivered to the Commission by ESMA on 3rd October 2014 and the joint draft regulatory technical standards of the ESAs on margin for uncleared OTC derivatives transactions mandated in accordance with Article 11(3) of EMIR.

Further, with respect to the regulatory and implementing technical standards on trade reporting adopted by the Commission in accordance with Article 9 of EMIR (Regulation No. 148/2013 and Regulation No. 1247/2012) the Commission services note that ESMA recently conducted its own consultation on amended versions of these standards. This consultation does therefore not seek any views with respect to the content of either [Regulation No. 148/2013](#) and [Regulation No. 1247/2012](#) nor the amended versions proposed by ESMA.

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

**Please note:** In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact [fisma-c2@ec.europa.eu](mailto:fisma-c2@ec.europa.eu).

More information:

- [on this consultation](#)
- [on the protection of personal data regime for this consultation](#) 

## 1. Information about you

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\*Are you replying as:

- a private individual
- an organisation or a company
- a public authority or an international organisation

\*Name of your organisation:

Eurex Clearing AG

Contact email address:

The information you provide here is for administrative purposes only and will not be published

patrick.deierling@eurexclearing.com

\*Is your organisation included in the Transparency Register?

(If your organisation is not registered, [we invite you to register here](#), although it is not compulsory to be registered to reply to this consultation. [Why a transparency register?](#))

- Yes  
 No

\*If so, please indicate your Register ID number:

20884001341-42

\*Type of organisation:

- |   |   |
|---|---|
| <input type="radio"/> Academic institution          | <input type="radio"/> Company, SME, micro-enterprise, sole trader |
| <input type="radio"/> Consultancy, law firm         | <input type="radio"/> Consumer organisation                       |
| <input type="radio"/> Industry association          | <input type="radio"/> Media                                       |
| <input type="radio"/> Non-governmental organisation | <input type="radio"/> Think tank                                  |
| <input type="radio"/> Trade union                   | <input checked="" type="radio"/> Other                            |

\*Please specify the type of organisation:

Central Counterparty

\*Where are you based and/or where do you carry out your activity?

Germany

\*Field of activity or sector (*if applicable*):

*at least 1 choice(s)*

- Banking
- Insurance
- Pension provision
- Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)
- Market infrastructure operation (e.g. CCPs, Trade Repositories, CSDs, Stock exchanges)
- Trade Association
- Non-Financial / Corporate enterprise
- Governmental Organisation / Regulator
- Law firm / Consultancy
- Other
- Not applicable



## Important notice on the publication of responses

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\*Contributions received are intended for publication on the Commission's website. Do you agree to your contribution being published?

(see [specific privacy statement](#) )

- Yes, I agree to my response being published under the name I indicate (*name of your organisation/company/public authority or your name if your reply as an individual*)
- No, I do not want my response to be published

## 2. Your opinion

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### 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?

Eurex Clearing believes that there is a need for measures to be taken to facilitate access of CCPs to central bank liquidity facilities as well as access to a central bank account.

Central bank access for CCPs reduces systemic risk as it guarantees continuous access to unstressed liquidity sources. In contrast, today CCPs have also to rely on commercial bank access. While, in the normal course of business, CCPs are expected to fund themselves through other means, it is crucially important to have access to central bank liquidity as a last resort. In particular in crisis situations (that may be caused by the default of major commercial banks), commercial bank markets may turn dysfunctional, which makes central banks the only reliable source of liquidity.

Whereas access to central bank liquidity is a critical component of contingency planning, it is at least as important to have access to a central bank account to place excess cash. CCPs normally place their customer's and own cash through private arrangements mainly reverse repo. EMIR requires CCPs to place its funds collateralized. The capacity of the repo market, however, has declined significantly in the last years. Absent access to a central bank account, a CCP will have to leave all funds that cannot be invested through secured instruments unsecured with commercial banks, exposing the CCP to a potentially significant counterparty risk against these banks, which will likely also be clearing members of the CCP, and in addition potentially causing breaches to the EMIR requirement to place funds collateralized.

It is therefore of utmost importance for a CCP to be able to place excess funds in its core currencies with central banks.

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

In order to get access to central bank's liquidity the regulatory requirements for CCPs differ within the EU member states. In this context, we have observed the following constellations:

1. A CCP authorized under EMIR can obtain direct access to additional liquidity from a central bank without the need to hold an authorisation as a credit institution under the Capital Requirements Regulation (CRR).
2. A CCP authorized under EMIR can obtain direct access to additional liquidity from a central bank under the condition, that the CCP holds also an authorisation as a credit institution.

The Bank of England has recently widened its access possibilities also to CCPs authorized under EMIR and hence independently of a bank status. In contrast, the European Central Bank (ECB) still requires an additional authorization as credit institution under CRR to grant access to its overnight facilities. Eurex Clearing opted for bank status under CRR in addition to the authorization under EMIR.

Eurex Clearing believes the Commission should advocate that CCPs receive access to central banking facilities without the necessity of a bank status. This would be in line with Bank of England's policy also granting access to ECB for non-bank EMIR-CCPs.

This approach would avoid double regulation and provide a level playing field for CCPs because CCPs are not obliged to hold an authorisation as credit institution and the authorization as CCP under EMIR.

However, we recognise the need to harmonise and clarify the regulatory requirements at EU level, in order to facilitate the access to central banks liquidity in general (not only in stress or crisis situations), create a level playing field and to ensure an efficient functioning of the market.

Access to central banking facilities should not be limited to local jurisdictions, but also in other major jurisdictions. This is particularly true for non-Eurozone central banks within the EU.

## Question 1.2: Non-Financial Firms

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

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

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

Eurex Clearing has no comments to question 1.2.

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?

- (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.



### 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?

Eurex Clearing believes that the current EMIR provisions for colleges are well designed and need no change. The given structure with national competent authorities in charge of CCP supervision, coordinating among the national authorities in the college works out well.

However, with respect to the process for the introduction of new products and services as well as improvements in risk management models the existing EMIR requirements need to be streamlined.

(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?

Articles 15 EMIR (Extension of activities and services), 17 EMIR (Procedure for granting and refusing authorisation) and 19 EMIR (Opinion of the College) stipulate a clear framework and timeline for extending activities and services not covered by the CCPs authorization.

In contrast, the provisions under Article 49 EMIR (Review of models, stress testing and back testing) deal with changes made to risk management services of CCPs but do not provide such guidance in terms of a framework and timeline.

In addition, Article 49 EMIR provides wording that might stipulate a duplication of efforts since it addresses the national competent authority (NCA) as well as ESMA. It would be beneficial if Article 49 EMIR is amended to consistently correspond with the process outlined in Articles 15, 17 and 19 EMIR.

In the context of Article 49 EMIR Eurex Clearing supports the proven structure with the NCA not only responsible for the supervision of the CCP but also being in charge for evaluating the severity of planned changes.

The College shall remain responsible for the consistent application of the EMIR rules.

Based on experience with the introduction of new product and services since authorization Eurex Clearing would like to highlight the following points in order to improve the process:

- It would be beneficial to publish a list with indicative criteria used for the evaluation of applications for new products and services under Articles 15 and 17 EMIR and/or to determine whether a change is deemed 'significant' according to Article 49 EMIR. Also, the factors considered by regulators when determining any material changes (Article 49 EMIR) should be disclosed.
- A maximum timeframe for the responsible authorities to evaluate and decide on changes deemed 'significant' covered under Article 49 EMIR should be introduced. The timeline should be consistent with Article 15, 17 and 19 EMIR. In addition to the defined responsibility as outlined above this will add certainty for CCPs.

## 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?

Eurex Clearing is of the opinion that the current rules on procyclicality are sufficient.

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

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

Eurex Clearing sees no need to define additional capacity for authorities to intervene.

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

## Question 1.5: CCP Margins and Collateral

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

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

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

In general, Eurex Clearing considers a complete review of EMIR as relatively early in light of the fact that not all elements of EMIR are fully implemented yet. EMIR is well thought through hence there should be only minor changes necessary. More broadly, the focus of the near term approach should be on international consistency in regulatory standards. The high standards stipulated in EMIR should serve as guidance.

With respect to the above, Eurex Clearing's policies on collateral and margin addresses the requirements of modern risk management and are compliant with internationally recognized standards. Overall the rules on collateral and margins are sufficient, however there is a need to improve wording for portfolio margining as further detailed in the answer below.

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

ESMA Article 27 on Portfolio Margining contains requirements around correlations between individual products and in particular terms like reliability of correlations are not well-defined from a mathematical point of view. Hence, ESMA Article 27 is not model neutral. We suggest amending this Article to make it model neutral but still ensure prudent, high minimum standards.

Tests of model performance are crucial and already described in the RTS for EMIR.

We also suggest that for the economic rationale, consistency with the default management process should be required, as only those offsets should be allowed which can be sustained in the default management process.

Wording proposal for ESMA Article 27:

1. A CCP may allow offsets or reductions in the required margin across the financial instruments that it clears if the price risk of one financial instrument or a set of financial instruments is significantly and reliably related with the price risk of other financial instruments. This can be demonstrated on the basis of a statistical parameter of dependence between the prices or by showing that margin reductions granted by portfolio margining can be sustained in the liquidation process.

2. The CCP shall document its approach on portfolio margining. The CCP shall demonstrate the existence of the economic rationale under which the group of financial instruments can be portfolio margined by

demonstrating consistency with the liquidation process. In addition it shall either:

- a) demonstrate that the statistical parameter of dependence between two or more financial instruments cleared is reliable over the lookback period calculated in accordance with Article 25, or
- b) demonstrate that the portfolio margining model is sufficiently robust by means of sound back- and stresstesting in accordance with Chapter XII;

3. All financial instruments to which portfolio margining is applied shall be covered by the same default fund and the same default management process. By way of derogation, if a CCP can demonstrate in advance to its competent authority and to its clearing members how potential losses would be allocated among different default funds and has set out the necessary provisions in its rules, portfolio margining may be applied to financial instruments covered by different default funds.

4. Where portfolio margining covers multiple asset classes (as agreed between the CCP and the participants involved in the default management), the amount of margin reductions between asset classes shall be no greater than 80 % of the difference between the sum of the margins for each asset class calculated on an individual basis and the margin calculated based on a combined estimation of the exposure for the combined portfolio. Where the CCP is not exposed to any potential risk from the margin reduction, it may apply a reduction of up to 100 % of that difference.

Paragraph 5 is integrated into paragraph 2.

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

Eurex Clearing is of the opinion that the spectrum of eligible collateral is appropriate.

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

## 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?

Eurex Clearing propose to align the definitions of 'capital' (defined in point (25) of Article 2 EMIR) and 'reserves' (defined in point (26) of Article 2 EMIR) in order to determine the (regulatory) capital requirements in Article 16 EMIR with the capital requirements of Regulation (EU) No 575/2013.

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

Please see answer above.

## 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?

Eurex Clearing has no comment to question 2.2.

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?

### **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?**

Eurex Clearing understands that the purpose of EMIR trade reporting is to ensure that the information on risk positions in the derivative market are centrally stored and accessible to the respective regulatory bodies if deemed necessary. Based on our experience with the implementation and maintenance of the reporting there are still some issues which need to be addressed to achieve the purpose more efficiently.

Eurex Clearing considers the technical guidance given by ESMA beneficial to address ongoing reporting issues in order to significantly improve the trade reports of various market participants subject to the reporting obligation set forth in Article 9 EMIR.

However, Eurex Clearing also observed several changes in ESMA's Q&A many of them requiring software changes leading to ongoing high efforts for implementation. As market participants are constantly required to revise complex reporting solutions and operating reporting systems for establishing the needed sources we would advocate to develop a final and precise set of reporting requirements through RTS.

Also reporting requirements for overlapping Regulations e.g. EMIR, REMIT, MiFIR, SFTR should be aligned in a way that the field definitions are consistent across those different regulations. As a result there should only be one standard for a transaction.

Eurex Clearing believes that it would be advantageous if ESMA establishes a working group including industry representatives to define the necessary standards.

Given the complexity and dynamic of changes sufficient time should be allowed to adapt and implement any changes.



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

Eurex Clearing identified the following areas where reporting requirements are considered as too complex and where we would advocate a review.

- The recent ESMA proposal asks for differentiating initial margin and variation margin. We challenge that this approach will achieve the aim of the reporting requirement. In our view, the risk perspective should be to compare total posted collateral with the replacement value of the positions and its potential change during the liquidation period, i.e. compare posted collateral against mark-to-market value + initial margin requirements. Posted collateral is not differentiated by margin requirements. Therefore ESMA's proposal to replace posted collateral by initial margin posted and variation margin posted is not feasible. Instead ESMA should keep the existing fields and add initial margin required to be able to evaluate the risk against posted collateral.
- ESMA requires defining buyer/seller even for swaps where there is no buyer/seller. We would propose allowing flexibility by asking trade repositories for a simple intelligent reconciliation mechanism instead of proposing complex rules to determine buyer/seller for different swap configurations.
- The market standard used for trade confirmations for OTC derivatives is FpML. Using this market standard would virtually eliminate reconciliation issues, since FpML messages are exchanged between counterparties to match their confirmations. Introducing new standards and concepts requires unnecessary translation of existing clear trade confirmation data into those new concepts without increasing data quality.
- Reporting entities might not be able to obtain an LEI code. In this case it should be possible to use BIC codes or other internal identifiers.

## 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?

Eurex Clearing has no comment to question 2.4.

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

### 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?

Eurex Clearing has no comment to question 2.5.

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

### 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?

Eurex Clearing supports mutual recognition of regulatory standards; however we note that the mutual recognition of CCPs fails to operate as intended. Third country CCPs from several jurisdictions have been recognized and can accordingly operate without a European license whilst European CCPs are still subject to local regulatory approval and oversight to offer services in most foreign jurisdictions. The EMIR framework gives rise to competitive disadvantages for European infrastructure providers bound by higher standards in the global market and creates an uneven playing field for services offered in Europe. EMIR should apply full reciprocity by directly supervising CCPs from those jurisdictions that do not allow mutual recognition and apply local supervision of European CCPs in their home market as well.

Additionally, conflicts between EU regulation and local regulation of a Clearing Member create difficulties for non-EU clients to use EU regulated CCPs when they cannot fulfil their local regulations. In particular, an example of this is, EU regulation requires affiliated entities to be treated as client business, whereas some non-EU regulation requires affiliated entities to be treated as proprietary business.

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

In order to address the conflict of EU and non-EU regulations related to the treatment of affiliated entities, it would be beneficial to allow European CCPs to directly collateralize affiliated business of non-EU entities as proprietary business. This would enable non-EU entities which service non-EU affiliated entities to fulfil also non-EU regulations.

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

Please see answer above.

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

*5000 character(s) maximum*

### **Question 2.7: Transparency**

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

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

*5000 character(s) maximum*

Eurex Clearing identified certain unclear definitions of reportable fields posing a challenge for achieving data quality and access and therefore imping the aim of the reporting requirements. It would be advantageous if ESMA establishes a working group including industry representatives to define the necessary standards.

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

Eurex Clearing identified examples of important economic terms and data fields (like notional, interest rate, mark-to-market, collateral) where a common understanding on how to populate these fields for different types of derivative contracts and life-cycle events is still missing. In addition, there are different market standards for many of these fields for Exchange traded derivatives and OTC markets.

### **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) 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?

(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?

Eurex Clearing sees no 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?

Eurex Clearing believes the current client asset segregation options are sufficient, and provide adequate choice and protection for clients. We do not recommend changes/re-examination of the majority of articles 39 and 48, as the industry has developed well understood individual and omnibus segregation models. There are no compelling arguments that alternative segregation methods will provide better protection.

Furthermore, the implementation has proven that individually segregated accounts were rightfully included in EMIR, since they are the superior model in terms of portability and bankruptcy protection for clients. In light of the current take-up of individually segregated accounts by clients, the EMIR review should consider to create further incentives for clients and clearing members to use individually segregated accounts to strengthen investor protection and systemic stability in Europe.

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

(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?

*5000 character(s) maximum*

Eurex Clearing considers EMIR as a well thought-through regulation not requiring further precision. More broadly, regulatory standards for CCPs would greatly benefit from global consistency. The high standards stipulated in EMIR should serve as guidance.

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

In terms of stress tests, the target should be to harmonize standards on a global level. EMIR set high and prudent standards which in turn should be reflected in the global standards set by CPMI/IOSCO. Hence, the CPMI/IOSCO initiative on stress testing is much appreciated.

### **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?

Eurex Clearing has no comments to question 2.9.

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

### **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?

The Questions and Answers (Q&A) on the implementation of EMIR published by ESMA serve as guidance when interpreting EMIR as well as the associated Regulatory Standards. However, Eurex Clearing is of the opinion that the process reaching from the initial question to the provided answer through the Q&A could be improved. The current process of developing and deciding on the answers should be amended to include an impact assessment and a prior industry consultation. This process should also include the publication of the questions under review.

Also, the spectrum of eligible collateral locations is primarily limited to available securities settlement systems. This is appropriate for the developed structures of derivatives or cash equity markets, in particular in relation to the available liquidity of eligible collateral. However, the current interpretation of regulatory bodies seems to limit the opportunity for CCPs and its participants to connect to the liquidity of the equity collateral market in particular for the securities lending market. A more appropriate balance would be achieved if - based on the interpretation of regulatory bodies - CCPs may use alternative highly secure arrangements providing the necessary liquidity for the securities lending market. This would allow CCPs to offer successfully clearing services for this market and support the objective of international law makers and regulators to develop markets from a bilateral structure to a more transparent centrally cleared structure.

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

### 3. Additional information

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

#### Useful links

Consultation details ([http://ec.europa.eu/finance/consultations/2015/emir-revision/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/emir-revision/index_en.htm))

Consultation document

([http://ec.europa.eu/finance/consultations/2015/emir-revision/docs/consultation-document\\_en.pdf](http://ec.europa.eu/finance/consultations/2015/emir-revision/docs/consultation-document_en.pdf))

Specific privacy statement

([http://ec.europa.eu/finance/consultations/2015/emir-revision/docs/privacy-statement\\_en.pdf](http://ec.europa.eu/finance/consultations/2015/emir-revision/docs/privacy-statement_en.pdf))

More on the Transparency register (<http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en>)

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