Frankfurt am Main,
13 August 2015

BVI`s response to the Consultation on Regulation (EU) NO 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories

BVI[1] appreciates the opportunity to comment on the consultation on Regulation (EU) NO 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories.

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.

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

Yes. CCPs should have access to central bank liquidity facilities, especially in times of market stress. CCP access to central bank liquidity facilities will bolster the resilience/robustness of central counterparties and strengthen the confidence in central clearing by the end user (e.g. UCITS/AIFs).

Investment management companies, acting as fiduciary on behalf of highly regulated investment funds (UCITS/AIFs), post the margins through a clearing member to the CCP. According to EMIR, CCPs and clearing members are required to provide asset and position segregation to the market participants (e.g. end users (UCITS/AIFs)), thereby binding central counterparties and CMs to also separate the posted margins of the investment funds from other end user assets and collaterals.

Many EU-CCPs have established clearing funds contributed by direct clearing members in the event of a member default. Every clearing member is required to contribute to the clearing fund. However, an important risk for end users (e.g. UCITS/AIFs) could be the fact that they might face significant problems to meet cash variation margin (VM) calls from (surviving) clearing members as well as other counterparties should the collateral that they deposited be used in a waterfall CCP-default situation.

[1] BVI represents the interests of the German investment fund and asset management industry. Its 90 members manage assets in excess of EUR 2.6 trillion in UCITS, AIFs and assets outside investment funds. As such, BVI is committed to promoting a level playing field for all investors. BVI members manage, directly or indirectly, the assets of 50 million private clients over 21 million households. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

In this context, the investment management company could contribute to the default fund only the assets of the investment funds they manage. The relevant "proportional exposure" as part of the contribution to the default fund will differ between the investment funds.

An investment fund management company is not allowed to use assets of an investment fund for securing obligations of a third party. It is therefore not acceptable, that CCPs may require end users (UCITS/AIFs) to provide additional funds in the event of a default of a clearing member. Central Banks should play a key role in providing emergency liquidity assistance in the event of a CCP default scenario. CCPs should have access to a central bank facility/liquidity in case that the financial resources of a central counterparty (e.g. margin requirements, initial capital, defaults fund) are not sufficient in order to meet the obligations arising from the default of a clearing member. Such central bank liquidity assistance should be provided in all cleared currencies which CCPs clear. Central Banks should develop a harmonized approach for CCP support at the global level fostering the stability of the global financial industry. In this respect, we support the ESRB view[2] that a regulatory framework could provide further clarity on the timing and procedures to be followed for the replenishment of the funds should it prove insufficient in the case of a default of a major clearing member. The enhanced legal clarity could be provided either in the EMIR review or in the forthcoming CCP recovery and resolution framework.

In contrast to credit institutions, investment fund management companies do not have access to central bank liquidity. In cases of severe market stress/shock scenarios where CCPs possibly could be forced to significantly enhance the margin requirements for end users (UCITS/AIFs), credit institutions always have the possibility to access central bank liquidity (e.g. via repos) in order to be able to provide the additional margins in cash to the CCPs. In such circumstances, however, management companies only have the possibility to create additional cash by selling fund assets in the market or borrowing up to 10% of the fund`s NAV. Repos as UCITS main access to liquidity for the purpose of collateralising derivative transactions are currently inhibited due to the ESMA Guidelines on ETFs and other UCITS issues[3]. According to these Guidelines, the purchase price of a repo contract shall be treated as collateral and may not be reused or reinvested by the fund (please see also our answer to question 1.5 (b) ii).

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

Whenever possible, either CCPs authorised and supervised by the National Competent Authorities (NCAs) or recognised by ESMA should obtain bank status and have direct access to central bank liquidity. The CCP authorisation process combined with a bank status should be developed on a global level in order to ensure a consistent and worldwide equivalent CCP regime.

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;"

[2] http://www.esrb.europa.eu/pub/pdf/other/150729_report_other_issues.en.pdf?847925b0bf6737768bc5c6474bc5b551
[3] Cf. para. 42, 43 letter i) and j) of ESMA Guidelines on ETFs and other UCITS issues (ESMA/2014/937).

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

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

ii. If your answer to question i. is no, what alternative methodology or thresholds could be considered to ensure that only systemically important non-financial counterparties are captured by higher requirements under EMIR?

(b) Please explain your views on any elements of EMIR that you believe have created unintended consequences for non-financial counterparties? How could these be addressed?

(c) Has EMIR impacted the use of, or access to, OTC derivatives by non- financial firms? Please provide evidence or specific examples of observed changes.

Question 1.3: CCP Colleges

Article 85(1)(c) states that: “ The Commission shall….assess, in the light of experience, the functioning of the supervisory framework for CCPs, including the effectiveness of supervisory colleges, the respective voting modalities laid down in Article 19(3), and the role of ESMA, in particular during the authorisation process for CCPs.”

In order for a CCP established in the Union to provide clearing services, it must obtain authorisation under Article 14 of EMIR. EMIR introduced a college system for the granting of such authorisation, which has, to date, been used for the process of authorisation of sixteen CCPs. The College comprises members from relevant competent authorities, relevant members of the European System of Central Banks and ESMA.

(a) What are your views on the functioning of supervisory colleges for CCPs?

(b) What issues have you identified with respect to the college system during the authorisation process for EU CCPs, if any? How could these be addressed?

We have no comments.

Question 1.4: Procyclicality

Article 85(1)(d) states that: “ The Commission shall….assess, in cooperation with ESMA and ESRB, the efficiency of margining requirements to limit procyclicality and the need to define additional intervention capacity in this area.”

CCPs authorised in the Union must take into account potential procyclical effects when calculating their margin requirements. The specific factors that must be considered to avoid disruptive movements in margin calculations are provided for under Article 41 EMIR and Article 28 of Commission Delegated Regulation (EU) No 153/2013.
(a) i. Are the requirements under Article 41 EMIR and Article 28 Regulation (EU) No 153/2013 adequate to limit procyclical effects on CCPs' financial resources?

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

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

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

We have no comments.

Question 1.5: CCP Margins and Collateral

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

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

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

From a buy-side industry perspective, CCPs have generally developed robust, effective collateral and margin frameworks which try to find the right balance between the CCP's risk obligations and the investment fund management companies' wishes to be able to post a broad range of eligible assets as collateral to the central counterparties.

However, due to regulatory barriers created by ESMA, UCITS' main access to liquidity for the purpose of collateralising derivative transactions, especially for VM, is currently inhibited due to the ESMA Guidelines on ETFs and other UCITS issues[4] (please see our detailed answer to question (b) ii). In this context, we would like to point out that the EU Commission has created an unequal treatment of market participants regarding the clearing obligations as pension funds have been granted a temporary exemption from the clearing obligations under EMIR due to their perceived access of liquidity. This exemption has only recently been confirmed and extended by the Commission[5].

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

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

[4] Cf. para. 42, 43 letter i) and j) of ESMA Guidelines on ETFs and other UCITS issues (ESMA/2014/937).
[5] http://europa.eu/rapid/press-release_IP-15-3643_en.htm?locale=en.

Please see our detailed answer to question (b) ii. CCPs accept a broad range of eligible collateral. The eligible collateral should be as broad as possible and similar for centrally and non-centrally cleared derivative transactions. The eligible collateral should consist of high-quality, liquid assets which can be posted at a central bank. Furthermore, eligible collateral should be subject to conservative credit, market and liquidity risk parameters. Such parameters could include enhanced collateral haircuts and concentration limits on acceptable collateral to assets that bear a high degree of positive correlation to the exposures they collateralise (for example certain equities collateral pledged as initial margin for equity derivatives clearing).

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

Many CCPs accept only cash as variation margin contribution. We consider this crucial because since the end of 2012 UCITS do not have sufficient access to liquidity any more. ESMA has closed repos as one of UCITS' main source for liquidity. The consultation by the ESAs on the draft regulatory Technical Standards on risk-mitigation techniques for OTC derivative contracts not cleared by CCP[6] will intensify this problem. Furthermore, the German Treasury[7] supports the aim to verify at the EU level whether UCITS should be allowed to use the cash obtained by repo transactions for the collateralization of cleared/uncleared derivative transactions.

We elaborate in detail:

- **Regulatory basis**

As set out in Article 51 para. 2 of Directive 2009/65/EC, Member States may authorize UCITS to employ techniques and instruments related to transferable securities and money market instruments under the conditions and within the limits which they lay down in the fund rules provided that such techniques and instruments are used for the purpose of efficient portfolio management. It has been further clarified in the aforementioned provision, that under no circumstances those operations shall cause the UCITS to diverge from its investment objectives as given in the UCITS' fund rules or prospectus.

Para 42 of the ESMA Guidelines on ETFs and other UCITS issues requires that all assets received by UCITS in the context of efficient portfolio management techniques should be treated as collateral (even when they are not) and shall comply with the restrictions on collateral as set out in para 43. Para 43 subparagraph (j) substantiates the purposes for which cash collateral received by UCITS is allowed to be used. This list allows not for making cash collateral contributions to derivative transaction counterparties. Germany implemented the ESMA Guidelines in 2013 (cf. Article 1 of the German Derivatives Regulation dated July 16, 2013 – "DerivateV"; BGBl. I, S. 2463), dated February 18, 2013.

On March 24, 2015 ESMA published Questions and Answers to ESMAs Guidelines on ETFs and other UCITS issues (ESMA/2014/295). Against the background that the purchase price received under a repurchase agreement is deemed to be "cash collateral" by para 42 of the Guidelines, ESMA responds to the question whether such "*cash collateral*" received by UCITS in the context of efficient portfolio management techniques can be used by UCITS "*for clearing obligations under EMIR*". The conclusion

[6] http://www.eba.europa.eu/documents/10180/1106136/JC-CP-2015-002+JC+CP+on+Risk+Management+Techniques+for+OTC+derivatives+.pdf

[7] http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Internationales_Finanzmarkt/Finanzmarktpolitik/Finanzmarktregulierung/2015-08-07-finanzmarktregulierung-bericht.pdf?__blob=publicationFile&v=2

by ESMA was that cash collateral received by UCITS can only be placed or invested in the assets listed in para 43 (j) of the ESMA Guidelines.

Due to the legal prohibition created by ESMA, highly regulated investment funds (UCITS/AIFs) face significant problems to create additional liquidity:

- **CCP clearing obligation (Article 4 para 1 EMIR)**

– UCITS/AIF management companies are required to provide variation margin as cash collateral contribution to the CCPs. There is currently not even one CCP accepting a non-cash variation margin worldwide.

– The split of OTC derivatives into cleared and uncleared OTC derivatives leads to the fact that cleared OTC derivatives form a position to be collateralized, thus reducing netting effects between cleared and uncleared OTC derivatives.

- **Mandatory collateralization of uncleared OTC derivatives (Article 11 para 3 EMIR)**

– If a counterparty does not accept non-cash collateral belonging to a UCITS/AIF, collateralization must take place in cash.

– According to the ESA draft regulatory Technical Standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP, Article 1 VM generally requires counterparties to receive non-cash variation margin within one business day. Article 1 VM only allows longer settlement periods (up to three business days) where the “delay” leads to an increased initial margin. Most UCITS/AIFs will not reach the threshold triggering the requirement for initial margins (cf. Article 6 and 7 GEN of the aforementioned Consultation Paper JC/CP/2015/002)).

  - Article 1 para 5 VM of the aforementioned consultation paper clarifies that *“[…] where no initial margin is required, because of the potential exceptions of Section 1, Chapter 1 of this Regulation, the collection shall not exceed one business day.*” It will be impossible to transfer non-cash variation margin within one business day. UCITS/AIFs are likely to be obliged to provide the variation margin for uncleared OTC derivatives in cash (at least prior a potential partial replacement of cash variation margin initially posted by non-cash variation margin).

– The obligation laid down in Article 2 para 5 HC of the ESAs draft regulatory Technical Standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP requires market participants to calculate haircuts at least every three months and whenever the volatility of market prices changes materially. This could have the effect that counterparties of UCITS/AIFs will not accept extensive lists of eligible non-cash collateral anymore. Therefore, UCITS/AIFs could be required to collateralize with cash.

- **Liquidity sources**

After Germany implemented the ESMA Guidelines, UCITS can only obtain liquidity now by

a) Short term credits up to 10% of the UCITS' net asset value (cf. Article 83 para. 2 of Directive 2009/65/EC);

b) Sale of assets

Unlike other financial counterparties which are subject to EMIR, UCITS/AIFs are not allowed to use cash collateral received from one party to make a cash collateral contribution to another party.

Neither Directive 2007/16/EC nor Directive 2009/65/EC or Directive 2011/61/EU include a prohibition for UCITS/AIFs to post the purchase price obtained under a repurchase agreement as cash collateral to a counterparty.

We propose to modify Article 51 para 2 of Directive 2009/65/EC, adding the following new sub-paragraph after sub-paragraph 2:

"Member States shall authorize UCITS to employ techniques and instruments relating to transferable securities and money market instruments used for the purpose of procuring the liquidity required for making cash collateral contributions with respect to derivatives."

or swiftly delete para 42 in the ESMAs Guidelines on ETFs and other UCITS issues.

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.
i. Are there any provisions or definitions contained within Article 1 and 2 of EMIR that have created unintended consequences in terms of the scope of contracts or entities that are covered by the requirements?
ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Article 2 para 5 of EMIR defines the derivative asset classes based on MiFID Annex I chapter C No. 4-10. It is currently not defined yet, at which stage a FX-Forward should be treated as a derivative, hence it is not possible to fulfil the reporting requirements for the asset class with legal certainty. Therefore, we encourage the EU Commission to clarify if a FX-Forward is a derivative or not.

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) i. With respect to access to clearing for counterparties that intend to clear directly or indirectly as clients; are there any unforeseen difficulties that have arisen with respect to establishing client clearing relationships in accordance with EMIR?

Yes. Please see our detailed answer to question 1.5 (b) ii.

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

We see the following problems:

- **Difference of offering/regulatory barriers**

A CCP may accept a wide range of collateral. However, the relevant clearing member may not automatically accept the same range of collateral. Furthermore, UCITS are not able to use the purchase price received under repurchase agreements for making cash collateral contributions (please see our response to question 1.5 (b) ii. for further details).

- **Difference in CCPs clearing frameworks**

The CCP clearing frameworks are very different. In the context of the authorization process of a CCP, it is not transparent to market participants whether the relevant clearing framework is in compliance with the laws and obligations applicable to those financial counterparties (UCITS/AIFs) that have to comply with the clearing obligation under EMIR. Furthermore, it is not transparent to market participants, whether clients of a clearing member face default risk under the different segregation models offered by such CCPs and clearing members.

The EMIR regulation makes it necessary for a financial counterparty (UCITS/AIFs) that intends to clear OTC derivatives via a particular CCP to undertake its own individual risk assessment of such a CCP. Such assessment is not only time consuming and cost intensive but also leads to legal risk when market participants come to different results.

We encourage the EU Commission to take into consideration that before a clearing obligation for a class of OTC derivatives is approved, ESMA risk assessment is made available to the market participants.

- **Alignment of EMIR with other regulations**

We observe that a number of clearing members have withdrawn from the OTC clearing market. This limits end users' (e.g. UCITS/AIFs) choice of clearing brokers and hinders buy-side clients in their CCP onboarding process. Clearing members have to follow a tight regulatory framework (e.g. CRR/G-SIB regulation) which restricts their ability to provide client clearing services. We encourage the EU Commission to better coordinate the regulatory framework and the interactions of all regulatory measures before new legal obligations are introduced, thereby fostering the aim of the Capital Market Union.

- **ESMA should have the possibility to terminate or suspend swiftly the clearing obligation**

We are concerned that ESMA does not have the ability to terminate or suspend as a matter of urgency e.g. within a few days the clearing obligation in respect of a specific class or contracts within a class. We think it is of utmost importance that ESMA has the tools to disapply the clearing obligation in the event that (i) a CCP notifies ESMA that the liquidity of a class (or contracts within a class) as defined under Article 7 para 2 of Commission Delegated Regulation (EU) No 149/2013 has deteriorated to an extent that it may become difficult for the CCP to risk manage such derivative class and/or (ii) the liquidity of the class or contracts within a class becomes materially less than that what ESMA originally determined to make the relevant class subject to mandatory clearing.

Therefore, we recommend amending EMIR in order to include a mechanism enabling the short-notice suspension or termination of the clearing obligation in times of emergency.

(b) i. Are there any other significant ongoing impediments or unintended consequences with respect to preparing to meet clearing obligations generally in accordance with Article 4 of EMIR?

Yes.

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

Please see our comments to question 2.2 (a) ii.

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.

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

Yes.

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

We have the following comments:

- **Dual-sided versus single-sided reporting**

We strongly encourage the EU Commission to abolish the current dual-sided reporting regime. The reporting entities (e.g. UCITS/AIF management companies acting on behalf of regulated investment funds (UCITS/AIFs)) generally have problems to match trade details with the counterparties. Currently, the reporting entities send their reports to the trade repositories. It is quite unclear, whether the reports of one reporting entity are in fact matched with the reports of the other counterparty. Furthermore, investment fund management companies experienced that the sell-side is often failing to provide the UTI in time with respect to the reporting obligation on T+1. The management companies principally use interim UTIs in order to be able to adhere to the reporting obligation on T+1. As soon as the management companies obtain the final UTI by the sell-side, they will report the final UTI to the trade repository (TR). However, the transmission of an interim UTI increases the reporting volume for the TRs, thereby deteriorating the matching rates of the paired trades and the aggregation of the data for systemic purpose.

Therefore, we strongly urge the EU Commission to introduce a single-sided derivative reporting similar to the US reporting obligations. A single-sided reporting, preferably by the sell-side, will ease the reporting obligation both for all market participants and for the regulators when analyzing the data.

- **Global concept for UTI/UPI**

We strongly support the work started by IOSCO to establish a global UTI concept with the participation of the financial industry. The creation of a global UTI solution could be based on the governance structure concept of the LEI initiated as a public-private partnership under the auspices of the FSB. It is of utmost importance that a global UTI is developed as a public good with no intellectual property rights attached to a specific party. The reporting financial counterparties should be able to obtain the UTI license free and free of charge. The same concept should be applied for the UPI.

Furthermore, a UTI solution could be developed on the basis of a predetermined automatic algorithm for the reporting counterparties to a contract in order to avoid the generation of different UTIs by the reporting entities using different concepts/methodologies. Unspecified definition of standards to create the UTI/UPI leads to a large number of mismatches.

In this context, we would like to point out that the reporting entities (e.g. UCITS/AIF management companies) should be able to further use an interim UTI for a reporting of the OTC derivate contract to a TR. At the end of October 2015, TRs will only allow the reporting of a final UTI. UCITS/AIF management companies experienced that the sell-side is not able to provide the UTI for a trade in time with respect to the reporting obligation on T+1. Therefore, the investment management companies should have the possibility to use an interim UTI in order to be able to adhere to the reporting obligation on T+1.

- **Consistent definition of data fields and usage of globally accepted data standards**

The EMIR reporting implementation has clearly demonstrated a lack of data consistency. Therefore, all required data fields need to be specified in as much detail as technically possible, preferably on the basis of ISO templates as interpreted by the Securities Market Practice Group (SMPG). This will reduce divergent interpretation of the reportable items. Based on the technical specifications made by the trade repositories and the IT service providers the UCITS/AIF management companies are only able to implement the reporting obligations.

Furthermore, a consistent EU supervision should be supported by the development of harmonised data standards, formats and contents under the auspices of the ESAs. The threatening jumble of different data standards, formats and contents presents a huge burden for the industry in both operational and financial terms and impedes efficient supervision concerning in particular macroeconomic risks.

Therefore, we encourage the EU Commission to work together with ESMA to ensure that the EMIR reporting fields are as specific as technically possible based on globally accepted data standards, preferably on the basis of ISO templates. Related to the introduction of new data field requirements, ESMA should establish a standardised reporting implementation timeline for all reporting entities, e.g. only applicable once year similar to the harmonised SWIFT release.

- **Reporting for Exchange Traded Derivatives (ETDs)**

Regarding the reporting for exchange traded derivatives (ETDs) our members have problems to receive the complete set of data from the sell-side, as a position UTI as well as a transaction UTI is requested for the trade reporting. In many cases our members do not receive partial executions from the sell-side. We are not able to book the trades in the way they need to be booked to fulfil the reporting obligation. Therefore, we suggest excluding non-clearing members from the reporting obligation for cleared derivative transactions. Clearing members and the CCPs should take over the reporting obligation to a trade repository.

- **Reporting for FX-derivatives**

EMIR defines the derivative asset classes based on MiFID Annex I chapter C No. 4-10. As it is not defined at which stage a FX-Forward should be treated as a derivative, it is not possible to fulfil the reporting requirements for the asset class with legal certainty.

- **Amendments of ESMA to extent the reporting obligation**

ESMA required changes in the data sets after the reporting entities had started the implementation (e.g. collateral valuation, market value for each derivative position, new validation rules for selected data fields). This causes additional costs to market participants, as every amendment needs to be implemented on the technical platform and be tested before the starting date. A consistent implementation timeline process for derivative reporting is necessary.

Furthermore, we encourage the EU Commission to ensure that all further EMIR reporting requirements are accompanied by practical implementation deadlines which allow all market participants (UCITS/AIF management companies) to implement new regulatory obligations on time. Lessons should be clearly learned from the practical experience with the introduction of the EMIR reporting obligations on 14 February 2014 where the lack of sufficient implementation time combined with legal and operational uncertainty due to undefined ESMA standards have significantly hampered the ability of the market to timely implement the relevant technical specifications.

- **Backloading requirement**:

According to Article 9 para (1) of EMIR, the reporting obligation extends to all trades that were both outstanding on or entered into after August 16, 2012. This means all trades that were outstanding, but that had expired before the reporting start date (RSD) of February 12, 2014, will have to be reported to a trade repository. According to implementing regulation EU 1247/2012, those derivative contracts which were entered into on or after 16 August 2012, that are not outstanding on or after the reporting start date shall be reported to a trade repository within 3 years of the RSD for a particular derivative class.

We think that such an obligation requires significant effort for the investment fund management companies to retrieve and source such data. The value of such trade data will be of little use as many trades will be unmatched and reported without UTIs, which were not used at the time of execution. Many reports will be single-sided, as the counterparty to the trade may no longer exist (for example a fund that has closed down). Therefore, we recommend removing the above mentioned obligation for old trades.

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.

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i. Are there any significant ongoing impediments or unintended consequences with respect to meeting risk mitigation obligations in accordance with Articles 11(1) and (2) of EMIR?

Yes.

ii. If your answer to (i) 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 ESAs are now in the process of finalising these draft Regulatory Technical Standards. It is therefore recognised that the final requirements are not fully certain at this stage. The Commission services are not seeking comment on the content on the proposed rules published by the ESAs. Nonetheless the Commission services welcome any views from stakeholders on implementation issues experienced to date.

i. Are there any significant ongoing impediments or unintended consequences anticipated with respect to meeting obligations to exchange collateral in accordance with Article 11(3) under EMIR?

Yes.

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

Please see our detailed comments to question 1.5 (a) ii. We would like to point out that we already comply with the obligation to exchange collateral in accordance with Article 11 para 3 of EMIR. Banks and clearing members who are counterparties to OTC derivatives with UCITS/AIFs accept only a limited range of non-cash collateral.

The ESMA's Guidelines on ETFs and other UCITS issues (cf. para 42 in combination with para 43 j) of ESMA/2014/937, respectively former ESMA/2012/832), have imposed a prohibition to use liquidity obtained via repurchase agreements as collateral.

As short term credits are only allowed up to an amount of 10% of the NAV and those credits are usually used for handling fund redemptions, we expect liquidity problems for UCITS and in some Member States also for UCITS-like AIFs.

Therefore, we strongly urge the EU Commission to work together with ESMA towards modifying the above mentioned provisions in the ESMA Guidelines on ETFs and other UCITS and to allow UCITS to reuse cash obtained from repo transactions for providing collateral to OTC derivative trades.

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) i. With respect to activities involving counterparties established in third country jurisdictions; are there any provisions or definitions within EMIR that pose challenges for EU entities when transacting on a cross-border basis?

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

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

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

A harmonization of EMIR and the Dodd-Frank Act is necessary in the medium to long term view. The difference between EMIR and the Dodd-Frank Act led to the consequence that business between European and US entities basically stopped. The lack of convergence between the main derivative rules of different jurisdictions (e.g. Europe and US) and the absence of equivalent determinations works as an incentive for market participants to focus their trading activity in their respective local markets. This will further increase market fragmentation and enhances the trading costs as a result of liquidity fragmentation and loss of market efficiencies, thereby damaging the real economy. We fear that this is outcome is not in the best interests of Europe’s end-investors (e.g. UCITS/AIFs).

Therefore, we think that EU counterparties trading with non-EU counterparties established in, or subject to the rules of, an Article 13 para 2 EMIR equivalent jurisdiction should be able to elect which set of equivalent rules should apply to a particular trade. This flexible, pragmatic approach could allow for situations where EU firms entered into transactions with counterparties that are obliged to comply with another ruleset – for example, where an EU counterparty trades with an US person.

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.

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

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

We have no comments.

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) i. Are there any significant ongoing impediments or unintended consequences with respect to CCPs' ability to meet requirements in accordance with Titles IV and V of EMIR?

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

(b) i. Are the requirements of Titles IV and V sufficiently robust to ensure appropriate levels of risk management and client asset protection with respect to EU CCPs and their participants?

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

(c) i. Are there any requirements for CCPs which would benefit from further precision in order to achieve a more consistent application by authorities across the Union?

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

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.

i Are there any significant ongoing impediments or unintended consequences with respect to requirements for trade repositories that have arisen during implementation of Titles VI and VII of EMIR, including Annex II?

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

We have no comments.

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.

i. Are there any significant ongoing impediments or unintended consequences with respect to any requirements or provisions under EMIR and not referenced in the preceding questions that have arisen during implementation?

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

We encourage the EU Commission to take into consideration the following points:

- **CCP clearing obligation**

We appreciate the work done by ESMA to introduce a mandatory clearing obligation for IRS and CDSs. However, we fear that the introduction of a mandatory clearing obligation for a derivate class could restrict the end users' (UCITS/AIFs) choice to appoint a CCP. Therefore, we propose by mandating the clearing obligation to ensure that at least two CCPs should have client clearing offerings in place for new cleared derivative transactions. In this respect we fear that the EMIR clearing obligation could possibly favour the development of a monopolistic situation for central counterparties, clearing members and confirmation platforms as most of the envisaged mandatory clearing products (e.g. IRS, CDD) are only dominated by very few CCPs and platform vendors.

- **Increased costs for cleared/uncleared derivative transactions by the investment funds**

The implementation of EMIR increases the costs for cleared/uncleared derivative transactions by the investment funds. Further regulatory implementation obligations beyond EMIR (e.g. CRR/Basel III and G-SIB) change the infrastructure for the (OTC) derivative markets. More and more sell-side counterparties put pressure on buy-side counterparties to clear derivative transactions regardless of the required timelines of the regulatory Technical Standards (e.g. IRS).

- **CCP resilience, recovery and resolution**

Due to the introduction of a global mandatory clearing obligation, CCPs will play a key role in terms of systemic relevance, safety and reputation for all involved market participants, preferably the end users (UCITS/AIFs). The resource/resilience of a CCP should be further strengthened. CCPs should create a mandatory stress testing framework which is developed on a global basis. The information on the stress testing frameworks should be made available to the public, thereby reinforcing the end user (UCITS/AIFs) confidence. In the event of a CCP default, central counterparties should establish clear procedures to ensure a fast close out of positions in the failed CCP, thereby limiting end users' (UCITS/AIFs) losses. Furthermore, we recommend that Initial Margin should not be constrained with further hair cutting in order to provide additional protection against contagion to other counterparties.

- **CCPs/clearing members should have sufficient capacities for onboarding investment funds in time**

CCPs and clearing members should ensure to have sufficient capacities in place in order be able to onboard and to set up many (new) accounts of investment funds in time according to their segregation needs. CCPs and clearing members should have efficient and clear procedures/processes and IT infrastructures in place, thereby alleviating the onboarding process for UCITS/AIF management companies, especially in times when a new account with the CCP/clearing member needs to be set up very fast.