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 repsonses 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.

More information:

- on this consultation
- on the protection of personal data regime for this consultation

1. Information about you

*Are you replying as:

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

*Name of your organisation:

The Global FX Division (GFXD) of the Global Financial Markets Association (GFMA)

Contact email address:

The information you provide here is for administrative purposes only and will not be published

fwillis@gfma.org

*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:

898223513605-51

*Type of organisation:

- ○ Academic institution
- ○ Company, SME, micro-enterprise, sole trader
- ○ Consultancy, law firm
- ○ Consumer organisation
- ◉ Industry association
- ○ Media
- ○ Non-governmental organisation
- ○ Think tank
- ○ Trade union
- ○ Other

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

United Kingdom

*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)
- [x] Trade Association
- [ ] Non-Financial / Corporate enterprise
- [ ] Governmental Organisation / Regulator
- [ ] Law firm / Consultancy
- [ ] Other
- [ ] Not applicable

Important notice on the publication of responses

*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

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?

> The Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA) supports the submission made by the International Swaps and Derivatives Association, Inc (ISDA).

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

Question 1.2: Non-Financial Firms

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

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

(a) 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?

> The GFXD supports the submission made by ISDA.

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?

(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?

The GFXD supports the submission made by ISDA.

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?

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The GFXD supports the submission made by ISDA.
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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?

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The GFXD supports the submission made by ISDA.
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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?

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The GFXD supports the submission made by ISDA.
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If your answer is no, for what reasons? How could they be improved?

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

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The GFXD supports the submission made by ISDA.
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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?

The Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA) welcomes the opportunity to comment on behalf of its members on the European Commission's Public Consultation on Regulation (EU) No 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories, issued on 22 May 2015.

The GFXD was formed in cooperation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Its members comprise 24 global Foreign Exchange (FX) market participants1, collectively representing more than 90% of the FX inter-dealer market2. Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.
We support the submission made by ISDA but wish to raise, for FX, the ongoing concern regarding the scope of FX products covered under EMIR, specifically the delineation of FX spot and FX forwards.
The definitions of FX OTC derivatives under EMIR Article 2 (5) are taken from those defined under Annex C4 of Directive 2004/39/EC (MiFID). Jurisdictional interpretation of FX spot and FX forwards has led to inconsistencies in the application of EMIR, first raised to the EC by ESMA in a letter dated 14 February 2014 (http://www.esma.europa.eu/system/files/2014-184_letter_to_commissioner_barnier_-_classification_of_financal_instruments.pdf), and in replies dated 26 February 2014 (http://www.esma.europa.eu/content/EC-response-classification-financial-instruments) and 23 July 2014 (http://www.esma.europa.eu/content/EC-letter-ESMA-classification-financial-instruments), the EC concluded with the view that no modifications could be made at that time due to the 'sunset clause' of MiFID I Article 4(2).
1 Bank of America Merrill Lynch, Bank of New York Mellon, Bank of Tokyo Mitsubishi UFJ, Barclays, BNP Paribas, Citigroup, Credit Agricole, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Lloyds, Mizuho Bank, Morgan Stanley, Nomura, Royal Bank of Canada, Royal Bank of Scotland, Société Générale, Standard Chartered Bank, State Street, UBS, Wells Fargo and Westpac
2 According to Euromoney League Tables

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

The GFXD supports the view that an FX spot contract is, and should be defined as, an agreement to exchange two currencies within the customary timeline of the relevant spot market, in general: (i) within two valid banking days for the currencies involved, and without regard to the underlying purpose for the contract or whether payment netting has been applied by the transacting parties as part of the settlement arrangements for such contracts; or (ii) beyond such two days if for the purpose of facilitating the purchase or sale of a security denominated in a foreign currency (FX Security Conversions) for settlement within the settlement cycle for the security; and such contract should not be considered a MiFID financial instrument.

As included in our letter to ESMA and the EC on 25 March 2014 (http://www.gfma.org/correspondence/item.aspx?id=585) FX Security Conversions typically settle at the same time as the foreign security, normally under T+7 business days. We note that there are market initiatives underway to shorten the main security settlement cycles to T+2 or T+3 days. However, in the secondary markets where physical securities are actually held, especially in Emerging Markets, the settlement cycle can be longer, for instance up to 30 days, and is typically agreed at execution. This longer settlement period allows for the physical delivery of the traded security.

The FX market is global in nature. An artificial cap limiting such trades to a defined business day time-period in Europe alone (e.g. T+5, which we understand the EC may be considering) will lead to situations where market participants are subject to conflicting regulatory obligations for cross-border trades. As a result, participants may restrict FX Security Conversions to T+2 FX spot transactions, even when the securities settlement takes longer, thus exposing the participants to unnecessary FX risk.

Applying derivatives regulation to this type of incidental transaction will not provide any meaningful protection to participants (in the form of disclosures) or meaningful information to the regulatory authorities (in the form of regulatory reporting). Inconsistent treatment of these transactions globally should be avoided to ensure that the lack of an exclusion for FX Security Conversions from derivatives regulation in some jurisdictions (e.g. Europe) doesn’t create unnecessary disincentives from transacting in securities in those jurisdictions by raising their transactional costs relative to other jurisdictions which have excluded them (e.g. in the US and Canada).

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?

The GFXD supports the submission made by ISDA.

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?

The GFXD supports the submission made by ISDA but wish to raise the following additional points for FX.

We acknowledge the benefits that central counterparty clearing can bring to the OTC derivatives markets, for example in terms of operational efficiencies and counterparty credit risk reduction. However, the GFXD believes that the EU should not implement a mandatory clearing obligation for physically settling FX forwards, swaps or options, or for non-deliverable forwards (FX NDFs), at this time. In particular, the GFXD would like to raise the following key issues:

i. Global consistency is critical. Mandatory clearing of these products has not been implemented in the US at this time. Furthermore the US Department of Treasury (DoT) in 2012 exempted FX swaps and FX forwards from mandatory clearing (http://www.treasury.gov/press-center/press-releases/Pages/tg1773.aspx).

ii. There still exist significant issues with ensuring the systemically sound clearing and settlement of physically settled FX products including FX options. We note the recent announcement from CLS and LCH regarding their partnership to deliver settlement for cleared FX options; however we emphasise that any such solution will take time to fully test and safely implement.

iii. Voluntary clearing of FX NDFs is still in its infancy at this time. Processes around client clearing models and default management (as two examples) have yet to mature.

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

The physically settled FX market presents different challenges from more traditionally centrally-cleared products, specifically the need to

ensure the physical delivery of the full notional amount of the trade in the right currency and at the right time.
The 2012 CPSS and IOSCO principles for financial market infrastructures include several key principles to be considered when seeking to apply clearing to the OTC FX market, notably, no. 7 (liquidity risk), no. 8 (settlement finality), and no. 12 (exchange-of-value settlement systems). These principles would require physically settled OTC FX products to be cleared only by CCPs that can:

- guarantee of full and timely settlement; and
- ensure the guarantee addresses extreme but plausible market conditions through stress testing, including default scenarios.

To date, even for the deliverable OTC FX options market, which is much smaller than the deliverable OTC FX forwards and swaps market, no model put forward by a CCP &/or market participants has showed an ability to implement safe and sound measures and ensure the market, with the CCPs, can manage the associated liquidity and credit risks. Central banks will be unlikely to embrace mandatory clearing for the deliverable FX market unless it can be done without causing more harm than good to sovereign currencies and existing settlement processes.
To size the currency requirements facing a CCP when clearing physically-settled FX trades, the GFXD produced the results of research (http://gfma.org/Initiatives/Foreign-Exchange-%28FX%29/FX-Options-Clearing/) into the size of the deliverable OTC FX options market. The study estimated the same-day liquidity risk from a failure of 2 clearing firms (the largest, combined settlement obligation in each currency on any given settlement date) to be the equivalent of $161 bn/day, across 17 currencies.
Sizing the problem in this way informs potential solutions, but also how interested stakeholders approach finding a solution. The same-day liquidity risk is in addition to the replacement cost risk and market risk which a CCP must manage. Whether, and when, a credible, robust and safe solution for clearing this physically-settled FX product will be implemented remains unknown.
The FX forwards and swaps market is c. 55% of the global FX market, thus it could be that the same-day liquidity risk will far exceed that described above for physically settled FX options (c. 6% of the global FX market - http://www.bis.org/publ/rpfx13fx.pdf).
We also note the aforementioned DoT mandatory clearing exemption of FX swaps and forwards. Given the reduced counterparty credit risk profile of the FX swaps and forwards market, the challenges of implementing central clearing within this market significantly outweighed the marginal benefits that it would provide. Regulating deliverable FX swaps and forwards would require insertion of a CCP into an already well-functioning and highly interconnected settlement process, which could result in unnecessary operational and settlement challenges. The DoT outlined 3 main reasons:
A. FX swaps and forwards involve fixed terms and the physical exchange of currencies. Market participants know the full extent of their own payment obligations to the other party throughout the life of the contract.

B. The FX market already has a well-functioning settlement process. The main risk in FX transactions is settlement risk – largely eliminated by the creation of CLS Bank. CCPs, however, are designed to mitigate 'mark-to-market' risk, which counterparties to FX trades manage through Credit Support Annexes.
C. FX swaps and forwards are largely short-term transactions. c. 70% of the market for FX swaps and c. 40% of the market for FX forwards matured in 1 week or less, and c. 96% of the market for FX swaps and c. 95% of the market for FX forwards matured in 1 year or less (http://www.bis.org/publ/rpfx13fx.pdf.) – a significant reduction in duration of counterparty credit risk as compared to other classes of derivatives with more long-dated tenors.
The DoT also noted:
• Complexities around introducing CCP clearing into the FX market, specifically the large currency and capital needs that would arise if CCPs were responsible for guaranteeing settlement, given the size and volume of trades in the FX swaps and forwards market; and
• Operational challenges and potentially disruptive effects that arise from introducing a layer of clearing between trade execution and settlement.
On clearing of FX NDFs, GFXD supports the 2014 ESMA determination that the FX NDF market is not yet ready to support a mandatory clearing obligation (http://www.esma.europa.eu/system/files/2015-esma-234_-_feedback_statement_on_the_clearing_obligation_of_non_deliverable_forward.pdf). GFXD comment on ESMA's FX NDF Clearing CP: http://www.gfma.org/correspondence/item.aspx?id=631.

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?

The GFXD supports the submission made by ISDA but wishes to raise the following additional points for FX.
The global FX market presents some unique challenges for trade reporting when compared with other asset classes. FX forms the basis of the global payments system and as such both the number of market participants and the volume of transactions are high. This presents many practical challenges in ensuring that those that are required to

report actually can do so. As the FX market is global in nature, the reporting of a transaction will often be required to multiple jurisdictions, and any variation in the trade reporting requirements will be required to be adopted by either one, or both, parties to the transaction usually resulting in increased costs and increased operational risks.

For example, if we consider a transaction executed between US and a European counterparties, the following transparency and reporting obligations are among those applicable to the transaction:

1. US part 43: (real-time) public dissemination
2. US part 45: (post trade) swap data reporting
3. US part 23: business conduct obligations
4. MiFIR Article 8/18: pre-trade transparency
5. MiFIR Article 10/21: post trade transparency
6. EMIR Article 9: post trade reporting
7. MiFIR Article 15: business conduct transparency
8. MiFIR Article 26: transaction reporting

Each of these obligations will essentially be providing regulators with similar/the same data, for similar/the same reasons. This situation is further compounded if reporting is required to a third jurisdiction and considerably complicated if differing formats are required for similar attributes, such as the unique trade ID.

We note the Financial Stability Board's (FSBs) Consultation Paper on data aggregation, promoting the desire and requirement to standardise the reporting of swaps data, identifying the 4 key challenges facing the market today:

- Inconsistencies in trade identifier construct and other key reporting fields
- Inconsistencies as to when reporting is required to be submitted to the trade repository (trade date v trade date plus)
- Inconsistency in who is required to report, including dual v single sided requirements
- Inconsistency in the global treatment of participant confidentiality

These challenges are already directly affecting the industry in a number of ways. The low pairing and matching rates result in additional manual processes to remedy the inconsistencies, which are costly for both market participants, especially end users, and trade repositories.

From a regulatory perspective, the above inconsistencies mean that the data collected through trade reporting cannot currently be used to create an accurate picture of the market. For example, Charts 1 & 2 of the MiFID Addendum consultation paper issued by ESMA in February 2015 used trade reporting data to create an overview of the FX market. When compared with the BIS triennial survey data (http://www.bis.org/publ/rpfx13fx.pdf) there were considerable differences, the net impact being that liquidity and transparency would have misrepresented the actual market. For a more detailed breakdown of

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our concerns in relation to the MiFID addendum paper please see the GFXD
response, available at
http://www.gfma.org/correspondence/item.aspx?id=677.
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If your answer is yes, please provide evidence or specific examples. How could these be addressed?

As part of the cross-trade association working group to develop a single-sided reporting hierarchy, the GFXD supports the submission made by ISDA regarding single-sided reporting but wish to raise the following additional points for FX.
The GFXD has consistently promoted and supported efforts to align global trade reporting standards as we believe that consistent trade reporting requirements offer regulators the best opportunity to oversee trading practices and systemic risk. The GFXD would like to bring to the EC’s attention a joint associations letter sent on 11 June 2015 to a number of regulators, including ESMA, calling for greater harmonisation of trade reporting, and the ISDA principles for data reporting, which the GFXD fully supports. Both are available at http://www2.isda.org/functional-areas/technology-infrastructure/data-and-reporting/reporting/.

The GFXD requests that the EC takes this opportunity to explicitly define trade reporting requirements in Europe and promote the use of a global common data set as referenced in our response to ESMA in February 2015 (http://www.gfma.org/correspondence/item.aspx?id=662). The derivatives industry has consistently sought more clarity from ESMA and the NCA community on how EMIR Tables 1 and 2 should be explicitly populated, how the unique trade identifier (UTI) and unique product identifier (UPI) should be constructed, and that the inconsistencies in how individual trade repositories require their data to be submitted should be addressed.

Outside of Europe, we have requested a similar approach, as evidenced in our response to the CFTC consultation on swap data reporting and record keeping requirements (http://gfma.org/correspondence/item.aspx?id=598). We have made similar requests to other regulators, including ASIC, MAS and HKMA. We would like to encourage ESMA to partner with the CFTC and other regulators to create this common data set, which should form the basis of future reporting enhancements. We suggest that any implementation timelines are sufficient to allow for market participants to build, test and implement changes, without increasing the already unmanageable number of trade reporting inconsistencies at the trade repositories.

The GFXD is aware of a number of initiatives underway globally to progress the harmonisation of trade reporting data. Notably, we understand that IOSCO has commenced a project to look at standardising the most important common fields, beyond the work it has already begun on the UTI and UPI. We look forward to engaging with that work where possible. The GFXD has conducted analysis with DTCC to address some of the most common European FX reporting problems, including the lack of consistency in the reporting of FX swaps (whether the swap, as supported by the GFXD, is reported as two legs with separate trade IDs or as one leg). We are in the process of providing feedback to both the cross-trade repository and cross-industry association forums.

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?

The GFXD supports the submission made by ISDA.

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

Question 2.5: Exhange 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?

The GFXD supports the submission made by ISDA.

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?

The GFXD supports the submission made by ISDA.

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

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

The GFXD supports the submission made by ISDA.

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

There remain significant impediments to regulators using the data stored in the trade repositories in Europe.
In their February 2014 feasibility study on ‘Approaches to Aggregate OTC Derivatives Data’ (http://www.financialstabilityboard.org/2014/02/pr_140204/), the FSB noted that:
“Currently, multiple TRs operate, or are undergoing approval processes to do so, in a number of different jurisdictions. The requirements for trade reporting differ across jurisdictions. The result is that TR data are fragmented across many locations, stored in a variety of formats, and subject to many different rules for authorities’ access…”
The FSB conclusions are about trade reporting globally, but the problem is similarly acute on a European level. It can be broken down into two main elements:
1. The information that firms are required to report differs across jurisdictions. This is a particularly acute issue for the FX market, which is by nature global, with trades often executed (and therefore reportable) across geographical borders; and
2. With no exact specifications for each field, firms are reporting the information in differing formats. In the European dual-sided reporting system, this causes mismatches which have to be returned to the banks for manual amendment.
Faced with these two issues, the trade reporting data that has been gathered thus far has proved to be difficult for regulators to access and analyse. Given that trade reporting was intended to provide regulators with oversight of the market for purposes of risk mitigation, this is of significant concern.
For example, Charts 1 & 2 of the MiFID Addendum consultation paper issued by ESMA in February 2015 used trade reporting data to create an overview of the FX market. When compared with the BIS triennial survey data (http://www.bis.org/publ/rpfx13fx.pdf) there were considerable differences, the net impact being that liquidity and transparency assessments were a misrepresentation of the market. For a more detailed breakdown of our concerns in relation to the MiFID addendum paper please see the GFXD response, available at http://www.gfma.org/correspondence/item.aspx?id=677.

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

The GFXD has consistently promoted and supported efforts to align global trade reporting standards. We believe that consistent trade reporting requirements offer regulators the best opportunity to oversee trading practices and systemic risk. The GFXD would like to bring to the EC's attention a joint associations letter sent on 11 June 2015 to a number of regulators, including ESMA, calling for greater harmonisation of trade reporting, and the ISDA principles for data reporting, which the GFXD fully supports. Both are available at http://www2.isda.org/functional-areas/technology-infrastructure/data-and-reporting/reporting/.

The GFXD requests that the EC takes this opportunity to explicitly define trade reporting requirements in Europe and promote the use of a global common data set as referenced in our response to ESMA in February 2015 (http://www.gfma.org/correspondence/item.aspx?id=662). The derivatives industry has consistently sought more clarity from ESMA and the NCA community on how EMIR Tables 1 and 2 should be explicitly populated, how the unique trade identifier (UTI) and unique product identifier (UPI) should be constructed, and that the inconsistencies in how individual trade repositories require their data to be submitted should be addressed.

Outside of Europe, we have requested a similar approach, as evidenced in our response to the CFTC consultation on swap data reporting and record keeping requirements (http://gfma.org/correspondence/item.aspx?id=598). We have made similar requests to other regulators, including ASIC, MAS and HKMA. We would like to encourage ESMA to partner with the CFTC and other regulators to create this common data set, which should form the strategic basis of future reporting enhancements. We suggest that any implementation timelines are sufficient to allow for market participants to build, test and implement changes, without increasing the already unmanageable number of trade reporting mismatches at the trade repositories.

The GFXD is aware of a number of initiatives underway globally to progress the harmonisation of trade reporting data. Notably, we understand that IOSCO has commenced a project to look at standardising the most important common fields, beyond the work it has already begun on the UTI and UPI, and we look forward to engaging with that work where possible. The GFXD has conducted analysis with DTCC to address some of the most common European FX reporting problems, including the lack of consistency in the reporting of FX swaps (whether the swap is reported as two legs with separate trade IDs or one leg). We are in the process of providing feedback to both the cross-trade repository and cross-industry association forums.

As a final point, global consistency in trade reporting would be improved by global use of LEIs. The GFXD is strongly supportive of global implementation of LEIs, particularly in emerging markets. Because the FX market acts as the global payment system, the users of the FX market are vast in number, wide in their geographical location and transact across jurisdictional borders. Many participants are not subject to G20 law and therefore do not feel the need to apply for a LEI (or feel the need to permission a 3rd party to apply for a LEI on their behalf), especially if their local regulator does not require a LEI. The GFXD suggests that any processes implemented to help market participants obtain a LEI are performed at the global regulatory level, not just the G20 level. All markets, including ‘emerging markets’ should be considered in this process as we believe the requirement to obtain a LEI should be implemented equally across all jurisdictions. Such an approach would mitigate the scenario where one party to a trade is not regulatory obliged to obtain a LEI.

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?

The GFXD supports the submission made by ISDA.

(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?

The GFXD supports the submission made by ISDA.

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?

The GFXD supports the submission made by ISDA.

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

The GFXD supports the submission made by ISDA.

If your answer 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.

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?

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?

3. Additional information

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)

Consultation document (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)

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

Contact

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