FIA EUROPE

EXECUTIVE SUMMARY

The following table sets out a summary of FIA Europe members' proposals for the European Commission to consider in the context of its review of the European Market Infrastructure Regulation ("EMIR").

CCP access to central bank liquidity facilities
Minor changes to EMIR are required to further facilitate access. RTS 153/2013 should be amended such that: - cash deposits held with a central bank in a currency other than that central bank's currency should count as part of the CCP's liquid resources; - the 95% reinvestment rule should apply across *all* cash held by a CCP and not on a per currency, per account, basis; and - the typographical errors in Article 45(2) thereof are remedied. We encourage the European Commission to carry out a cost/benefit analysis to determine whether a 95% threshold for reinvestment of overnight cash deposits is truly appropriate for all EU CCPs. We also encourage European central banks at all times (not just in stressed markets) to facilitate the acceptance from CCPs of cash deposits in all major currencies and to offer CCPs access to central bank liquidity facilities. The terms and availability of such facilities should be transparent. CCPs should not be required to be authorised as credit institutions in order to gain access to central bank facilities. We address various questions raised to FIA Europe by National Competent Authorities as to whether granting CCPs access to central bank liquidity facilities is desirable from a policy perspective.
Non-Financial Firms
Article 10 should be amended so as to require the calculation of the clearing threshold to be on an appropriate measure of exposure (net of collateral), to exclude intragroup transactions and only to include transactions entered into by a group company established in the EU or entered into by a non-EU group company with FCs or NFCs. Firms should be able to rely on the hedging exemption, even where some of the trades could be interpreted as not being a hedge, as long as there is a reasonable commercial basis to conclude that such trades where intended to be part of the counterparty's hedging strategy. FIA Europe members support the proposed changes to the definition of "OTC derivative" in Article 2(7) of EMIR, which are proposed to be effected by the Securities Financing Transaction Regulation. EMIR should be amended to clarify that third country AIFs are equivalent to non-financial counterparties and that EMIR does not apply to EU/non-EU central, regional, local and municipal government bodies, nor to EU/non-EU central banks and treaty organisations.
CCP colleges
FIA Europe members recommend that greater clarity be provided as regards the circumstances that require the Article 17 process to be followed when *extending* a CCP's authorisation, together with further transparency as to what significant changes should trigger a requirement to obtain an extension to such authorisation. Members would like to see ESMA's website updated regularly with timetables of authorisations, advising of an effective date in advance of an application being deemed complete and/or anticipated date of authorisation. It would assist with firms' implementation of EMIR if a grace period could be provided for upon the authorisation of a CCP, to give firms time to implement the EMIR requirements with respect to such CCP. Further, each future RTS relating to the clearing obligation should anticipate the possibility that further firms will become category 1 counterparties as a result of one or more new CCPs being authorised or recognised during the period prior to the date on which the RTS come into force.

The Article 49(1) validation process on significant changes to risk models should be streamlined.

CCPs should fully disclose their models to clearing members and the details of the scope/objective of any review of such models should be clearly identified.

Procyclicality

In providing only 3 prospective alternative means to limit margin procyclicality for a variety of contract types, Art 28 of RTS 153/2013 does not take into account the myriad of account asset class nuances that, for instance, offer a means that sensibly limits margin procyclicality for seasonal energy contracts.

CCP margins and collateral

FIA Europe's affiliate, FIA Global, is planning to set out specific recommendations on margin later this year. We will ensure that such recommendations are shared with the European Commission. CCPs should be allowed to hold securities directly through non-EU settlement systems. CCPs should adopt the CPMI-IOSCO PFMI qualitative and quantitative disclosure frameworks.

Scope

The treatment of branches of EU / non-EU entities should be clarified in the level 1 text and such changes should be subject to further consultation. Further clarity should be provided as to whom specific provisions apply.

Clearing obligation

Indirect clearing: It must remain *voluntary* for clearing members to offer indirect clearing services.

It must be expressly stated in an operative provision of EMIR that the obligation in RTS 149/2013 for the clearing member to pay all monies due to the indirect client following the default of the client mandatorily override any conflicting national Member State insolvency or property laws. Where the clearing member and/or client are located in a third country with conflicting insolvency or property laws, such provision should be disapplied - in such circumstances, the clearing member should be deemed compliant with EMIR if it returns the proceeds of liquidation to the bankruptcy trustee of the insolvent client for the account of its clients in accordance with the applicable insolvency law and the client should provide additional disclosure to ensure that indirect clients are properly informed of risks relating to conflicting insolvency or property laws.

The post-default porting provisions of EMIR relating to indirect clearing should be removed, to align with MiFIR. FIA Europe members are supportive of, and were directly involved in preparing, ISDA's response to this review with respect to CCP account types in the context of indirect clearing.

The leverage ratio in the Capital Requirements Regulation must be amended to recognise the exposure-reducing effect of segregated margin.

Frontloading: The frontloading obligation should be removed for future asset classes and products.

Compression: Trades resulting from compression exercises should not be required to be mandatorily cleared.

Suspension/termination of the clearing obligation: As recommended by both ESMA and the ESRB, regulators should have the power to suspend or terminate the clearing obligation for any OTC derivative. The consequences of any such suspension should be clearly set out in EMIR.

Trade reporting

FIA Europe members propose:

- the complete removal of exchange trade derivatives from the EMIR reporting obligation. Should the European Commission be unwilling to adopt such a change, FIA Europe members seek a move to single-sided (end of day) *position* reporting with respect to *exchange traded* derivatives;
- with respect to *OTC* derivatives, a move to *single-sided* transaction reporting; and
- that intragroup transactions be exempted from the EMIR reporting obligation, on the grounds that they are not systemically important.

By way of further proposals, the European Commission should consider removing NFC- from the reporting obligation; collateral and valuations should be reported by the more sophisticated counterparty; the reconciliation of outstanding unmatched historic trades should still be completed; the requirement to backload the reporting of OTC derivative transactions should be removed; differences in the specific labels for and parameters of reporting fields should be harmonised internationally; and, for exchange traded derivatives, the trading venue should be required to publicly specify the UPI applicable to each of its products.
Risk mitigation techniques and exchange of collateral
FIA Europe members support and endorse ISDA's response in these two areas.
Cross-border activity in the OTC derivatives markets
Where conflicts of insolvency and/or property law arise, non-EU clearing members should not be required to comply with the provisions of Art 39 of EMIR relating to ISAs and OSAs nor with Article 48. Art 13 and 25 equivalence assessments should be completed for all major jurisdictions before the clearing obligation goes live for Category 1 entities. The equivalence processes themselves should be clarified and be more transparent. FIA Europe members encourage the European Commission to consider amending Art 25 of EMIR so as to separate (i) the issues of the recognition of non-EU CCPs as the basis for allowing counterparties to satisfy their EMIR clearing obligations from (ii) the question of whether the non-EU CCP should be treated as a QCCP for the purposes of CRR.
Transparency
National Competent Authorities and third country regulators should have real time access to TR data.
Requirements for CCPs
FIA Europe's affiliate, FIA Global, is proposing to set out specific recommendations on margin later this year. We will ensure that such recommendations are shared with the European Commission. We will also continue to develop member views, as appropriate, relating to CCP governance and transparency; CCP recovery and resolution; margining by CCPs; CCP "skin in the game"; allocation of non-default losses; and replenishment of the CCP default fund. EMIR does not sufficiently address the amount of skin in the game required for each product that it clears; allocation of non-default losses; and various aspects relating to the replenishment of the CCP default fund. As noted above, there are various conflicts between EMIR and national Member State insolvency and property laws that impact segregation and portability. Clients should be required to confirm their choice of segregation models within a specified timeframe. We suggest 90 calendar days. In the event that no such confirmation is received within such timeframe, clients should be deemed to have opted for the existing account structure through which their trades are cleared. The individuals comprising a CCP's risk committee should be appropriate for the role of the committee. Clearing members should have greater input into CCP governance decisions, such as a level of a CCP's risk assumption and the clearing of complex products (e.g. swaptions). CCPs should adopt consistent rulebook structures that articulate key concepts with greater clarity.
Requirements for Trade Repositories
FIA Europe members note that inter-TR matching rates for exchange traded derivatives are below 1%.
Additional Stakeholder Feedback
FIA Europe members note that ESMA have introduced two new categories of cleared instruments on its website register of CCPs, namely "derivatives that are not financial instruments" and "assets that are not financial instruments". A number of queries arise as a result of these new categories.

FIA EUROPE

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?

Yes.

By way of summary of the changes that FIA Europe members propose to EMIR to facilitate such access:

- Article 33(1)(a) of Regulatory Technical Standards (RTS) 153/2013 should be amended, so that deposits in currencies other than the applicable central bank's currency of issue count as part of the CCP's liquid resources;

- An exception for relatively small amounts of currency, linked to the commercial viability of reverse repo programmes, should be introduced or Article 45(2) of RTS 153/2013 should be amended to clarify that the 95% reinvestment rule applies across *all* cash held by a CCP and not on a per currency per account basis.

- The typographical error in the closing words of Article 45(2) of RTS 153/2013 should be amended, so as to read "the requirement under Article ***43***, except the requirement at paragraph 1(c) of ***Annex II***."

As a policy matter, FIA Europe members consider that, in both emergency scenarios and as part of their business-as-usual processes, CCPs should be:

- able to put cash on deposit with central banks (to satisfy as at least *part* of their liquidity risk controls requirements pursuant to Article 44 of EMIR); and

- offered access to central bank liquidity facilities.

CCPs should not be required to be credit institutions in order to have access to such deposit or liquidity facilities.

In accordance with the recommendations set out in the Winters report[1] that was published by the Bank of England ("*On balance, there would seem to be significant merit in being clear about the availability and terms of central bank liquidity insurance*"), the terms of such facilities should be transparent and known by market participants and CCPs alike[2].

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[1] http://www.bankofengland.co.uk/publications/Documents/news/2012/cr2winters.pdf: see paragraphs 168-173, the text of which is reproduced below in response to this question 1.1, in the section addressing the management of moral hazard risks posed by central bank liquidity facilities.

[2] Per the Winters report: "*The central bank can avoid the signaling effect of activating a facility by having liquidity insurance*

It should not be *mandatory* for CCPs to establish deposit accounts with central banks nor for them to have established access to central bank liquidity facilities, but the option should not be precluded.

Being pragmatic, FIA Europe members note that the CPMI-IOSCO Principles for Financial Market Infrastructure (PFMIs) leave it to the discretion of the relevant central bank whether or not to offer central bank liquidity facilities, and the terms on which such facilities are offered[3]. So, whilst our members are strongly of the view that there is a need for CCPs to have more access to central bank deposit accounts and liquidity facilities, they acknowledge that it may be more appropriate for further consensus to be sought on this issue via CPMI-IOSCO, rather than seeking amendments to EMIR per se that have the specific intent of facilitating further access by CCPs to such facilities.

However, we note that Article 33(1)(a) RTS 153/2013 only allows "cash deposited at a central bank of issue" to count as liquidity resources - this suggests that e.g. deposits of euro with the Bank of England would not count as liquidity resources. FIA Europe members do not consider that outcome to be consistent with the policy intent. Accordingly, they consider that EMIR should be amended so as to enable cash held with a central bank in a currency other than the currencies issued by that central bank to fall outside the 95% reinvestment requirement.

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

95% reinvestment rule – CCPs accessing the commercial repo markets vs central bank liquidity

Analysis

Article 47 (Investment Policy) of EMIR, as supplemented by Article 45(2) of RTS 153/2013 (Highly secured arrangements maintaining cash), requires that not less than 95% of all cash balances maintained overnight other than with a central bank shall be deposited through arrangements that ensure the collateralisation of the cash with highly liquid financial instruments meeting the EMIR requirements.

In practice, this means that CCPs that cannot deposit their cash at a central bank have to reverse repo out almost all the cash that they would otherwise hold overnight. Article 44 accordingly imposes a stringent obligation on European CCPs to have access to deep and liquid commercial repo markets.

This requirement introduces a material degree of circularity in respect of the CCP's credit and liquidity risk exposures - over the course of any given trading day, banks (through their OTC clearing or exchange traded derivatives desks) provide collateral to the CCP in order to protect the CCP against the default of such bank, only for the CCP to hand back such collateral to another part of that bank (the repo desk):

- The liquidity of a CCP originates from its clearing members: each day, clearing members provide collateral in cash and non-cash form to the CCP, to protect the CCP against the default of such clearing members.
- The settlement agents used by the CCP to settle payments (of margin and otherwise) are often the same financial institutions as the clearing members: if that clearing member defaults, for example by reason of its insolvency, such clearing member will also cause significant liquidity issues for the CCP (because one of its settlement agents will also be in default), if they are less able to transfer assets between them and their clearing members.

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facilities permanently available and setting out ex-ante the terms under which the central bank would expect to lend. And greater knowledge of the terms of central bank liquidity insurance allows banks to factor this into their planning, and take out what they see as an appropriate level of self-insurance, consistent with having the central bank insurance available to help manage the very extreme 'tail' risks that might arise."

[3] Cf. Footnote to paragraph 3.7.14 thereof

- The largest players in the commercial repo markets are typically the larger clearing members of such CCP. Accordingly, if a clearing member defaults, it is also likely to result in a default under one or more repo facilities established with that CCP pursuant to Article 44 of EMIR.

Repos have a much higher default risk than exposures to central banks. As noted in a BIS report[41] published shortly after the 2008 crisis: "*Whereas fails to deliver Treasuries had averaged around USD90 billion per week during the two years preceding the crisis, they rose to above USD1 trillion [per* week*] during the Bear Sterns episode and then soared to record higher of almost* *USD2.7 trillion* *[per* week*] following the Lehman default. The extraordinarily low GC repo rates during this period exacerbated the problem by reducing the cost of failing. Normally, the failing party would borrow the necessary security through a reverse repo to avoid failing. But when repo rates are close to zero, the interest rate earned overnight is below the cost to borrow the required securities, there is no incentive to avoid failing (Fleming and Garbade (2005)). As settlement fails increased, investors who had previously lent out their Treasuries pulled back from repo markets, as the low GC rates available were not enough to compensate for the risk that the securities might not come back. These dynamics have been recognised by the Treasury Market Practices Group, a body of market participants convened by the Federal Reserve Bank of New York*".

Whilst the situation in European repo markets on that occasion was not the same as the US repo markets, the occurrence of the above events in the European repo markets in a future stressed scenario cannot be precluded.

Article 45(2) of RTS 153/2013 effectively forces CCPs to be exposed to the credit and liquidity issues highlighted in the above referenced article. This is not a desirable regulatory outcome: the key objective *must* be to ensure that the assets of the CCP are exposed to as little credit and liquidity risk as possible, given their heightened importance in the global financial system following the 2009 G20 Commitments.

It has been questioned whether the repo markets have sufficiently deep liquidity to meet the increasing demands of CCPs pursuant to EMIR. The above article highlights how quickly such liquidity can dry up. In June 2015, the Financial Times reported that the Chief Risk Officer of LCH.Clearnet (the world's largest interbank swaps clearer) has expressed concern that LCH.Clearnet may soon reach a threshold where it would have to stop accepting new trades for clearing, as it would become untenable for the CCP to invest through the repo markets on a daily basis the approximately USD150 billion of client funds that it holds. The extent to which there will be sufficient liquidity in the repo markets with respect to certain non-G7 currencies to enable CCPs to meet their EMIR reinvestment obligations is also uncertain.

The increasing demand for repo services by CCPs, combined with the increase in regulatory capital costs for those banks who provide such repo services, can reasonably be anticipated to increase costs for *all* users of commercial repo services:

- one can envisage that, in time, Article 45(2) of RTS 153/2013 may have unintended knock-on consequences for other (non-CCP) users of the commercial repo markets: as CCPs' demand for access to commercial repo markets continues ever upward, there is a risk that the availability of repo facilities for non-CCP users of European markets decreases; and

- the absolute availability of repo facilities may also decrease in coming years: the ability of banks to provide commercial repo facilities (to CCPs and non-CCPs alike) is also increasingly constrained, by reason of the introduction of further constraints on banks' balance sheets under Capital Requirements Directive IV ("CRDIV") with respect to their commercial repo businesses.

Finally, Article 45(2) of RTS 153/2013 has proven impractical to comply with for CCPs in respect of accounts

[4] http://www.bis.org/publ/qtrpdf/r_qt0812e.pdf

whose investment is segregated, where relatively small amounts of particular currencies are collected. It is not commercially possible to engage in reverse repo transactions (investing cash for non-cash) in the financial markets for small amounts of currency. The response of some CCPs has been to cease allowing cash margin to be provided for particular accounts. This has reduced clearing member choice as to collateral and eliminates the possibility of margin calls on public holidays in the country of the currency being called. In practice, this requirement has reduced demand for usage of European currencies by US clearing members and their customers.

Proposals

FIA Europe's members recommend that the European Commission (the "Commission") carry out further cost/benefit analysis on the "95%" reinvestment figure, to determine whether a threshold of 95% is truly appropriate for all European Union CCPs; whether the threshold should be lowered from 95%; and whether it should be lowered even further for at least some, smaller, CCPs. FIA Europe members acknowledge that by reducing the amount of cash that has to be reinvested in repo markets, the CCP will be holding on to more of such cash overnight in its own commercial bank accounts, which would increase:

- its exposure to its banking services providers; and
- the amount of its unsecured exposure (because, unlike the repo facility, the deposit account would result in an unsecured exposure of the CCP to the deposit-taking bank).

Further, to the extent that there is insufficient liquidity in the commercial repo markets to enable a CCP to meet its EMIR obligations and to prudently manage its credit and liquidity risks, FIA Europe members consider that central banks should fill that gap, subject to appropriate arrangements and safeguards being in place. Accordingly, FIA Europe members encourage central banks:

(i) to permit CCPs to put cash on deposit with them; and/or

(ii) subject to this being consistent with the liquidity provisions made available to other credit institutions (acceptable collateral being lodged, etc.), to offer CCPs access to their liquidity facilities ***in stressed market scenarios***; and

(iii) subject to this being consistent with the liquidity provisions made available to other credit institutions (acceptable collateral being lodged, etc.), to offer CCPs access to their liquidity facilities ***in business-as-usual scenarios***.

If a central bank is not willing to countenance the offering of *liquidity facilities* to CCPs, FIA Europe members strongly encourage such central bank to nonetheless offer the CCP *deposit account* facilities, to mitigate the credit and liquidity issues referred to above.

Both the European Central Bank ("ECB") and the Bank of England *already* provide CCPs with access to central bank liquidity facilities, albeit those facilities are currently intended more for emergency purposes, rather than as part of the business-as-usual operation of the CCP. Some central banks require the CCP to be authorised as a credit institution in order to gain access, others do not.

Central banks' operational systems should be upgraded as necessary to support the provision of central bank deposit accounts and central bank liquidity facilities.

The case for central banks to permit CCPs to hold cash on deposit with them

Analysis: RTS 153/2013, Article 45(1) already envisages that CCPs may put cash on deposit with central banks.

Article 33(1)(a) of RTS 153/2013 also envisages that CCPs can include cash deposited at a central bank of issue as part of its liquid resources for the purposes of Article 44 EMIR.

CCPs operating in UK markets, whether authorised or recognised under EMIR, are eligible to apply for access to Bank of England reserves accounts (deposit accounts).[5]

Enabling CCPs to put cash on deposit with central banks (as at least *part* of their liquidity risk controls pursuant to Article 44 EMIR):

- enables CCPs to better manage their credit risk and liquidity risk exposures to commercial counterparties (many of whom are also their clearing members), addressing the circularity of credit and liquidity risk referred to above and thereby increasing the stability of the wider financial system for the benefit of all; and

- mitigates the risk of CCPs overly-dominating European commercial repo markets, thereby reducing (because of a reduction in demand in the commercial repo market from CCPs) some of the potential upward cost pressures on the provision of repo services to non-CCP users of the repo market.

Central banks should be strongly encouraged to provide such banking facilities to CCPs, to the extent that they do not already do so, at least in their currency of issue. Article 33(1)(a) of RTS 153/2013 should be amended to allow cash deposited with a central bank *other than the central bank of issue* to also count as part of the CCP's liquidity resources.

Given the amounts involved and the systemic importance of GBP and EUR to the European Union, one solution to the cross-currency issues that would be faced by CCPs holding cash deposits with central banks denominated in foreign currencies would be for central banks in the European Union to have inter-linking arrangements with other central banks (as highlighted in the recent press release accompanying the termination of legal proceedings between the Bank of England and the ECB, such that CCPs are offered equivalent facilities with respect to both GBP and EUR).

All major European CCPs clear contracts denominated in non-EU currencies, most significantly in US dollars. For example, CCPs may have obligations to make payment of USD-denominated variation margin to its members with respect to contracts cleared on such CCP, *before* it has received any cash back from its repo counterparties to whom it paid such USD the previous night (under the 95% reinvestment rule to which we refer above). This currency-driven timezone issue gives rise to liquidity demands that must be managed smoothly by the CCP. CCPs typically settle variation margin and final settlement amounts in the contractual currency and may offer tens of different currency accounts for such purposes. Even greater difficulties are created for Yen-denominated derivatives, due to the commonality of opening hours of banks in the Far East and Europe.

In the case of USD, it would significantly aid CCP's ability to manage such liquidity risk if they could deposit at least *some* of their USD cash deposits with a European central bank overnight – but this may require central banks in the European Union to have inter-linking arrangements with the US central bank.

<u>The case for permitting CCPs to have access to central bank liquidity facilities in stressed market scenarios</u>

Since November 2014, CCPs operating in UK markets, whether authorised or recognised under EMIR, have been eligible to apply to the Bank of England for access to its Sterling Monetary Framework and its Discount Window Facility[6]. In its June 2015 report, the Bank of England notes that "*Given their systemic importance to*

[5] Page 5, Bank of England publication "Sterling Monetary Framework Annual Report 2014-15", published June 2015.

[6] Page 5, Bank of England publication "Sterling Monetary Framework Annual Report 2014-15", published June 2015.

the UK economy, the provision of liquidity insurance through the Sterling Monetary Framework will assist these firms to manage their liquidity in times of market-wide or firm-specific liquidity stress."

The above arguments for permitting CCPs to put cash on deposit with central banks (i.e. to reduce the burdens that CCPs impose on the commercial repo markets and the knock-on consequences thereof, and to enable CCPs to mitigate their credit risk to commercial repo counterparties) are equally applicable to access to central bank liquidity facilities in stressed market scenarios.

In addition, access to central bank liquidity facilities would enable a CCP to continue to operate in the event that the liquidity of the commercial repo market dries up in a stressed scenario of the nature that occurred in 2008.

The case for permitting CCPs to have access to central bank liquidity facilities in business-as-usual scenarios

The above arguments for permitting CCPs to put cash on deposit with central banks are equally applicable to access to central bank liquidity facilities in business-as-usual scenarios.

Whilst noting that certain central banks are not in favour of being required, mandatorily, to provide CCPs with access to central bank deposit accounts or liquidity facilities, our members consider it critical for central banks to inject liquidity into markets and to mitigate credit and liquidity exposures to commercial counterparties, where that is needed pursuant to a regulatory system that has been specifically designed to promote the financial stability of the system as a whole through the use of CCPs. Such an approach should readily align with the broader financial stability and systemic integrity objectives of central banks.

Finally, an exception for relatively small amounts of currency, linked to the commercial viability of reverse repo programmes, should be introduced or clarification should be provided that the 95% rule applies across *all* cash held by a CCP and not on a per currency per account basis. If the later approach is to be taken, RTS 153/2013, Article 45(2) should be amended to read:

"2. Where cash is maintained overnight in accordance with paragraph 1 then not less than [95]% of such cash, calculated over an average period of one calendar month ***and measured on a cumulative basis across all accounts and currencies***, shall be deposited through arrangements that ensure the collateralization of the cash with highly liquid financial instruments meeting the requirements under ***Article 43***, except the requirement at paragraph 1(c) of ***Annex II***[7]".

Note that the above drafting proposal would require further drafting changes in the event that FIA Europe members' proposals with respect to question 1.1 of this Consultation regarding the deposit by CCPs of cash at central banks are adopted.

Inconsistent approaches as to whether CCPs must be credit institutions in order to access central bank liquidity facilities

Analysis

There are differing approaches across Europe as to whether CCPs must be mandatorily authorised as credit institutions in order to gain access to central bank liquidity facilities.

We are aware that in some EU jurisdictions[8], CCPs are required (pursuant to the national member state legislation applicable in that country) to be authorised as credit institutions. In France, not all banking rules

[7] There is an error in the closing words of Article 45(2) which should read "the requirements under Article **43**, except the requirement at paragraph 1(c) of **Annex II**.

[8] E.g. France and Germany

apply to French CCPs. In Germany, CCPs are required to be authorised as credit institutions, as their regulators feel that EMIR does not go far enough on its own – by way of illustration of the additional powers granted under the German Banking Act that do not exist in EMIR, German regulators have the power under that Act to fire the CCP's board members in the event of significant failures.

If access to central bank liquidity in some, but not other, member states is only to be permitted to those CCPs that are authorised credit institutions, there is a risk of a competitive imbalance from member state to member state – those with access to central bank liquidity may be perceived as more attractive than those without such access.

We note that the CPMI-IOSCO Principles for Financial Market Infrastructure (PFMIs) promote this imbalance, by virtue of the footnote to paragraph 3.7.14 thereof*: "The use of central bank services or credit is subject to the relevant legal framework and the policies and discretion of the relevant central bank.*"

Proposals

Given that the PFMIs leave it to the discretion of the relevant central bank whether or not to offer central bank liquidity facilities, and the terms on which such facilities are offered, it is unrealistic to expect EMIR to be amended so as to ensure that the same approach regarding the need to be authorised as a credit institution is adopted across all EU member states.

FIA Europe members are nonetheless of the view that all European CCPs should have the possibility of accessing central bank liquidity facilities, *without the need to be authorised as a credit institution*, subject to appropriate safeguards – over time[9], such safeguards could include that such CCPs are subject to an appropriate regime for recovery and resolution of the CCP and that such facilities are appropriately collateralised.

Lack of transparency of central bank liquidity frameworks

Analysis

Whilst the European Central Bank and the Bank of England each provide CCPs with access to their liquidity frameworks, it is unclear to market participants precisely what types of facilities are open to CCPs; whether such facilities are only available in stressed scenarios or at all times; which CCPs have availed themselves of such facilities; and the principle terms of the various facilities.

This runs contrary to the findings of the Winters report (published by the Bank of England) relating to central bank liquidity facilities provided to banks, in which it stated: "***On balance, there would seem to be significant merit in being clear about the availability and terms of central bank liquidity insurance, and the Bank [of England] has moved a long way in this direction."***

Proposals

In agreement with the recommendations from the Winters report, FIA Europe members encourage more transparency by CCPs that have an access arrangement in place for such facilities to clarify precisely what types of liquidity facilities are available to such CCPs; from which central bank(s); at what times; and the principal terms of such facilities.

Without such information, clearing members and the buy-side are not able to complete a full risk assessment of such CCP. Even firms that are members of the CCP's Risk Committee (and whom therefore have most

[9] Noting that there is currently no harmonised EU CCP recovery and resolution regime and it may be several years before one is in place.

access amongst the CCP's members to risk-specific information) are typically unable to share these details with their commercial or risk colleagues due to contractual confidentiality provisions.

To this end, we recommend the inclusion of a new provision in EMIR that requires CCPs to disclose publicly on their website the central bank liquidity facilities to which they have access, the times at which such access is permitted and the principal terms governing such facilities.[10]

Conflicting recovery and resolution laws applicable to CCPs that are credit institutions

Analysis

Those CCPs that are authorised as credit institutions are subject to the Bank Recovery and Resolution Directive ("BRRD") provisions and will in future also be subject to EU legislation relating to the recovery and resolution of European CCPs. Accordingly, one has to consider which regime would apply where a CCP is also an authorised credit institution?

Whilst this is not an EMIR point per se (as the need for a CCP to be authorised as a credit institution is a matter of national Member State law, not EMIR), it is relevant for the purposes of the question asked above (i.e. whether CCPs *should* be required to be credit institutions in order to gain access to central bank liquidity).

Proposals

FIA Europe's members are aware that the BRRD is merely a toolbox of recovery and resolution tools and that only certain tools thereunder are available to CCPs. When publishing its proposals on CCP recovery and resolution later this year, we encourage the Commission to clearly identify the extent to which CCPs may, if at all, also be subject to the BRRD and how any conflicts between the two pieces of legislation should be addressed. Some national regimes, e.g. the UK's Banking Act, already apply to CCPs but with various differences from the applicable regime for banks.

Addressing some of the queries raised by National Competent Authorities ("NCAs")

The following concerns (in **bold**) have been raised to us by some NCAs with whom we have discussed this Review, with respect to the provision of deposit accounts and central bank liquidity facilities:

(i) Granting CCPs access to central bank deposit account and liquidity facilities risks interference with central monetary policy

It has been suggested to FIA Europe that one reason to deny CCPs access to central bank deposit account services is so as to ensure that cash is not sucked out of the financial system as a result of being held on deposit at a central bank overnight.

We note that a number of CCPs already have access to central bank deposit account services, so we assume that such central banks have got comfortable with this issue.

Whilst that may be an effect of granting CCPs access to central bank deposit account services, FIA Europe members do not consider that to be a reasonable justification for generically denying access requests to central bank deposit account services: the financial stability benefits of ensuring that CCPs have access to cash

[10] We acknowledge that the Bank of England's current practice (for banks) is not to disclose which facilities have been made available to which banks and, to the extent that banks make use of such facilities and the Bank of England provides any disclosure at all, it does so on a time-delayed basis.

deposits when they need them, and of reducing CCPs' credit exposures to commercial repo counterparties and settlement banks (many of whom are their largest clearing members), outweigh the economic impact of withdrawing such deposited cash from the financial markets. Financial stability of EU CCPs should be paramount.

Further, under the current CRD IV regime, the capital constraints imposed on banks repo businesses (through the leverage ratio) may themselves restrict CCPs' access to repo markets, therefore necessitating an alternative.

It has also been suggested to FIA Europe that by providing CCPs with access to central bank deposit account facilities and central bank liquidity facilities, such central bank's money supply calculations could be skewed. That would only be true if the central bank in question failed to adjust its money supply policy to reflect the facilities provided to CCPs. The answer is therefore for the central bank to adjust its calculations. CCPs should not be denied access to central bank liquidity simply because the central bank would have to update its money supply policy as a result of providing such access – that need for adjustment is driven by *any* change to the availability and cost of money and credit from central banks.

(ii) The US does not provide central bank access to its CCPs

It is noted that the US Federal Reserve has been clear that it is not willing to provide central bank liquidity to US CCPs.

However, as observed by one of the NCAs to whom we spoke with respect to this review, the CPSS-IOSCO Principles for Financial Market Infrastructures (PFMIs) specifically envisage CCP access to central bank liquidity[11].

"Principal 7 – Liquidity Risk

Central bank services

3.7.14. If an FMI has access to central bank accounts, payment services, securities services, or collateral management services, it should use these services, where practical, to enhance its management of liquidity risk. Cash balances at the central bank of issue, for example, offer the highest liquidity (see Principle 9 on money settlements)."

Footnote to 3.7.14: "The use of central bank services or credit is subject to the relevant legal framework and the policies and discretion of the relevant central bank."

Given that the benefits of providing such services are widely recognised through the PFMIs, FIA Europe members consider that central banks should consider providing these services as a matter of course in the interests of minimising/reducing liquidity risk (provided such liquidity provision is secured by suitable collateral).

The US handles this by allowing the Federal Reserve to lend to commercial banks, who themselves lend to CCPs. This model increases exposures of central banks to the commercial banking sector and is not necessarily a desirable approach from a concentration risk perspective if funds are on-lent to CCPs.

(iii) Granting CCPs access to central bank liquidity facilities could give rise to moral hazard

It is acknowledged that access to central bank liquidity facilities can give rise to moral hazard. However, central

[11] http://www.bis.org/cpmi/publ/d101a.pdf

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banks are extremely alive to this risk, have researched it extensively and developed effective means to mitigate such risks in the context of banks that have been granted access to such facilities[12]. The arguments below regarding how to mitigate moral hazard risks with respect to bank access to central bank liquidity facilities would apply equally to CCPs having such access.

In its review of the Bank of England's framework for providing liquidity to the banking system, the above-referenced Winters Report discussed this issue and set out the ways in which it proposed the Bank of England improve its management of moral hazard risks going forward. If moral hazard risks can be managed for banks to the satisfaction of central banks, there is no reason why they could not be equally well managed for CCPs.

Indeed, the Winters report set out an excellent summary of the issues and the reasons why clear, upfront, transparent terms for central bank liquidity facilities are an optimal regulatory outcome:

"168. Central banks face a choice in how predictable their provision of liquidity assistance will be in times of stress. At times, as was the case in the Bank's pre-2006 model, they have chosen to retain almost complete discretion over the circumstances in which they will provide liquidity assistance, and on what terms. The use of such constructive ambiguity in central bank support has traditionally been thought of as a way to mitigate against moral hazard; unpredictability in a central bank's liquidity insurance provision means that banks cannot have confidence in an escape route being forthcoming when they might require it, which should incentivise them to take steps to manage their own risk prudently.

169. There are, however, well-known drawbacks to such an approach, some recognised as early as the criticism of the Bank by Bagehot in his pioneering work on lender of last resort: First, the act of finally stepping in to provide liquidity support sends a signal that the central bank has now concluded that there is a fairly extreme problem and that they need to take action to solve it. In some cases, the trigger for such action will be obvious, and so the central bank's decision is unlikely to come as a surprise. But absent a clear external driver, activation of a liquidity facility is likely to cause participants to question what the central bank knows that they do not, which may in itself increase tension in markets, potentially with a destabilising influence. An example of this was the leaked announcement of emergency liquidity assistance to Northern Rock, which was seen to spark the retail deposit run on the bank.

170. Furthermore, ambiguity around access to central bank liquidity support reduces banks' ability to factor such support into their liquidity management, and so is likely to lead to them self-insuring against liquidity risk to a larger degree. If a trade-off exists between a bank reducing this liquidity risk and extending credit provision, this self-insurance may lead to a sub-optimal level of credit provision by the banking system.

171. The central bank can avoid the signaling effect of activating a facility by having liquidity insurance facilities permanently available and setting out ex-ante the terms under which the central bank would expect to lend. And greater knowledge of the terms of central bank liquidity insurance allows banks to factor this into their planning, and take out what they see as an appropriate level of self-insurance, consistent with having the central bank insurance available to help manage the very extreme 'tail' risks that might arise.

172. That is not to say that there are no issues that arise from setting out the terms of liquidity insurance in

[12] C.f. the Winters report: *"Providing liquidity on generous terms may solve an immediate liquidity problem for a bank or the banking system as a whole. But if the terms are too generous, or if their availability is too certain, it could reduce banks' incentives to prudently manage their credit provision and liquidity in future as they might perceive they can rely on central bank intervention at times of moderate stress. Central banks need to be conscious of this potential for 'moral hazard' to arise as a result of their actions when setting the terms of their operations."*

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advance. Permanent facilities with pre-defined penal backstop pricing can become stigmatised if they are not used for a period of time. Even if a facility has been used in the past, it does not mean it will be used again when market prices go through the backstop. For example, European banks used central bank dollar-swap facilities in 2008/9 but were reluctant to use those facilities at the same price in 2010/11, even though market pricing was higher than the facility price. This may argue for keeping a level of constructive ambiguity in some operations by publicising the general terms of the facility but only activating it when necessary, and only then announcing the specific terms, such as pricing and maturity. But, as noted above, given the risks around activating new facilities in times of stress, such an approach is perhaps best suited to situations where facility activation can be seen to be driven by a clear external market-wide shock.

173. ***On balance, there would seem to be significant merit in being clear about the availability and terms of central bank liquidity insurance, and the Bank has moved a long way in this direction.****"*

FIA Europe members are conscious that other (non-CCP) institutions that have access to central bank liquidity facilities are given that benefit because they are subject to strict banking, capital and prudential requirements. For example, the Bank of England now makes such facilities available to certain investment firms. When the clearing mandate was coming into effect in the US, CCPs were not subject to equivalent requirements – many felt that if they had been, it would have alleviated the moral hazard risk. However, with CCP Recovery and Resolution now taking a central policy role in the management of CCP risks, FIA Europe members believe these similarly strict requirements now sufficiently mitigate some of the moral hazard concerns that had previously been considered as part of this debate and, as such, the question as to whether CCPs have access to central bank liquidity facilities should be considered in the current (and near future) regulatory environment, rather than based on an older, less regulated environment for CCPs that existed in a third country jurisdiction a few years ago.

(iv) Granting CCPs access to central bank liquidity facilities could reduce the incentives of market participants to carry out due diligence on how the CCPs manage their risks

FIA Europe members disagree with this assertion, for the same reasons cited above. As noted in paragraph 170 of the above-referenced Winters report:

"Ambiguity around access to central bank liquidity support reduces banks' ability to factor such support into their liquidity management, and so is likely to lead to them self-insuring against liquidity risk to a larger degree. If a trade-off exists between a bank reducing this liquidity risk and extending credit provision, this self-insurance may lead to a sub-optimal level of credit provision by the banking system."

(v) Market participants could be inclined to take bigger positions against the CCP if they know the central bank will bail out the CCP

FIA Europe members are not suggesting that central banks be required to "bail out" CCPs. Rather, they merely suggest that the provision of liquidity by central banks should not be precluded as an option, in stressed market conditions nor business-as-usual conditions.

As noted by the New York Fed in its report "Central Bank Tools and Liquidity Shortages"[13]:

"…expectations of generalized liquidity provision by the central bank in systemic crises may lead institutions to neglect building up buffers for such events. In this way, the inherent financial fragility that potentially contributes towards making systemic crises more likely may be partly attributable to complacencies in risk management associated with anticipation of central bank intervention. ***This does not, however, constitute grounds for the central bank to refrain from providing support in a systemic crisis nor for their provision to***

[13] http://www.newyorkfed.org/research/conference/2009/cblt/CB_Tools_and_Liquidity_Shortages.pdf

*be on highly punitive terms. Insofar as such crises are associated with complacency in risk management, mistaken assumptions about asset price trajectories that only become evident ex-post, skewed compensation arrangements, limited liability and overall financial conditions that encourage risk-taking, **the burden of their prevention falls more naturally on the appropriate management of macroeconomic policies and regulatory structures than the specifics of the framework for emergency liquidity provision**."*

(vi) There may be a risk that the ECB will require the CCP to be located within the Eurozone in order for it to gain access to the ECB's central bank liquidity facilities

On 4 March 2015, in a case brought by the UK government against the ECB, the General Court of the EU annulled the Eurosystem Oversight Policy Framework published by the ECB insofar as it set a requirement for CCPs involved in the clearing of securities to be located within the Eurozone. On 29 March 2015, the ECB and the Bank of England announced measures to enhance financial stability in relation to centrally cleared markets in the EU, in addition to which the UK government agreed to cease all legal actions covering two further cases outstanding at the General Court of the EU on the issue of the ECB's location policy and the ECB seemingly agreed not to pursue an appeal of the case it had lost.

Accordingly, we consider the risk of the ECB successfully imposing such a requirement to be low, as it would likely result in further litigation.

In any event, the arguments of regulators discussed in (iii), (iv) and (v) above are not relevant to the issue of whether CCPs should have access to central bank deposit account services.

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[14]. 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?**

No, there remain some areas of uncertainty that continue to result in implementation issues for firms.

[14] EMIR Articles 2(9) (Definition), 3 (Intragroup transactions), 4 (Clearing obligation), 9 (Reporting obligation), 10 (Non-financial counterparties) and 11 (Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP) and RTS149/2013 Article 10 (Criteria for establishing which OTC derivative contracts are objectively reducing risks), 11 (Clearing thresholds) and Chapter VIII (Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP)

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?

The Clearing threshold calculation

Analysis

The main objections to the current approach are as follows:

- The calculation is based on simple notional rather than a measure of exposure;

- The calculation includes intra-group trades:

  - by their nature, these trades do not create risk to the financial system at large; and

  - this leads to triple-counting, thus overstating the notional being measured against the clearing threshold.

- The clearing threshold calculation captures non-financial counterparties (“NFCs”) that are not systemically important in the EU. In the event that the total gross notional of in-scope derivatives exceeds the thresholds established pursuant to Article 10(4) of EMIR, *all* companies within the group are deemed to be NFCs that meet the conditions referred to in Article 10(1)(b) of EMIR (“NFC+”).

- In particular, a group may include EU subsidiaries that have entered into only a limited number of OTC derivative transactions or non-EU subsidiaries that have entered into only a limited number of OTC derivative transactions with EU counterparties. Thus, the failure of those entities is likely to present very little risk to the EU financial system. However, Article 10 EMIR requires the group to calculate its compliance with the clearing threshold under EU rules by reference to all the derivative contracts of all its non-financial entities worldwide. This presents significant challenges for corporates, in particular those whose parent is headquartered outside the EU (because the definition of "group" is not limited to groups headed by a parent undertaking established in the EU), and incentivises third country entities to avoid dealing with EU counterparties.

Proposals

FIA Europe’s members recommend that the Commission considers an approach similar to that used for the Major Swap Participant (MSP) calculation utilised by the US Commodity Futures Trading Commission (as well as the identical calculation used by the US Securities and Exchange Commission for the Major Security Based Swap Participant test). These MSP calculations exclude intra-group trades and take into account collateralization and other factors to determine whether a non-financial counterparty is systemically important and thus would be subject to the US clearing requirement. Being based on a market participant’s actual exposure (both current and potential future exposure), this approach has the benefit of actively measuring the risk an entity proposes to the larger financial system and thus furthers the Commission’s goal of utilizing clearing to mitigate systemic risk.

In addition, for non-US entities, the MSP calculations focus on transactions with US persons not the entirety of the entity's exposures.

Therefore, we propose that Article 10 of EMIR be amended to require the calculation of the clearing threshold to be based on an appropriate measure of exposure (net of collateral), to exclude intragroup transactions and only to include transactions entered into by a group company established in the EU or entered into by a non-EU group company with financial counterparties or non-financial counterparties (i.e. counterparties established in the EU). Third country entities should only be required to aggregate transactions entered into with counterparties established in the EU (when determining whether they would be a non-financial counterparty over the clearing threshold if they were established in the EU).

Portfolio hedging

Analysis

Many NFCs, including corporate groups, continental commodity trading firms and insurance companies, often focus all their trading activity across the group into a single booking entity. This booking entity aggregates all positions into a single portfolio and then trades that portfolio with counterparties outside the group (i.e. with "external" counterparties).

Once the portfolio is aggregated in that single entity, firms cannot split out what represents hedging and what represents speculation, without a major restructuring of entities, systems and procedures. Counterintuitively, the costs of such a restructure may exceed the costs associated with treating the whole portfolio of the group as being speculative.

EMIR level 1 and 2 is clear that anticipatory and portfolio hedging are acceptable.

However, ESMA's answer to Q&A Question OTC 10(c)(3), in particular, is causing the above implementation challenges for firms, because the effect of this Q&A answer is that if a single speculative trade is included within the group's portfolio, it is not possible to rely on the hedging exemption – firms may therefore have little choice but to report *all* trades as speculative (notwithstanding that the vast majority may in fact be hedging transactions).

Why does this matter?

- it gives an inaccurate impression of the market: significantly more trades are reported as being speculative than is actually the case.

- hitherto, these issues would only have caused challenges under EMIR. However, now that Markets in Financial Instruments Directive II (MiFID II) is seeking to use the EMIR hedging definition for the purposes of the ancillary activities test, several firms who mostly engage in hedging will not be able to rely on the "ancillary activities" exemption under MiFID II because of the way they are required to report the extent of their speculative trading under EMIR - this not only brings such firms within scope for MiFID II/R and requires them to seek authorisation as an investment firm, but will also in time bring

them into scope for the regulatory capital regime under CRDIV.

The current ESMA guidance is accordingly no longer fit for purpose for EMIR nor MiFID II/Markets in Financial Instruments Regulation (MiFIR).

Proposals

In other jurisdictions, such as Canada, the regulators have clarified that "*there will be situations where an end-user may qualify for the [hedging] exemption even where some of the trades could be interpreted as not being a hedge, as long as there is a reasonable commercial basis to conclude that such trades were intended to be part of the end-user's hedging strategy*". Accordingly, firms have been advised by external counsel in Canada that the relevant hedging exemption *would* be available, even if some part of a portfolio represented speculative derivatives transactions.

It would be extremely beneficial if ESMA's answer to Q&A OTC10(c)(3) or the hedging provisions of EMIR itself could be clarified in a similar manner.

(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?**

Art 19(6) MiFID I, and its impact under Articles 2(7) and 10 of EMIR

Analysis

The lack of equivalence assessments under Article 19(6) of MiFID I means that, under the current definition of "OTC derivative" in Article 2(7) of EMIR, each time a NFC that does *not* meet the conditions referred to in Article 10(1)(b) of EMIR (an "NFC-") enters into an exchange traded derivative on a third country market, it is treated as an OTC derivative under Article 2(7) of EMIR.

This has an unintended consequence for the purposes of Article 10(1)(b) and 10(3) of EMIR, such that those third country exchange traded derivatives trades are treated as bilateral trades (notwithstanding that they are, in practice, cleared on third country CCPs) and therefore count towards the clearing thresholds applicable to NFCs under Article 10(1)(b). As a result, market participants are disincentivised from engaging in the trading of the very derivative products that EMIR seeks to encourage.

As the Commission is aware, this issue is exacerbated by the fact that Article 19(6) of MiFID I only envisages equivalence determinations with respect to trading venues that trade securities. It does not cover trading venues that facilitate the execution of derivatives transactions.

FIA Europe members are aware that the Commission proposes to address this issue by amending the definition of "OTC derivative" in EMIR via the impending Securities Financing Transaction Regulation (SFTR). We understand that such changes are proposed to be implemented via SFTR as that is the quickest way to legally amend this provision in EMIR, given the current legislative timetable of the Commission.

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Proposals

FIA Europe members are supportive of the changes proposed via SFTR to the definition of "OTC derivative" in Article 2(7) of EMIR.

FIA Europe members encourage the Commission to move quickly to recognise the principal non-EU exchanges as equivalent for this purpose. In particular, it will be important for the Commission to take early action to recognise those non-EU exchanges whose CCPs are recognised under Article 25 of EMIR to avoid any concerns that their exchange-traded derivatives might be regarded as OTC derivatives subject to the clearing mandate (and thus the EMIR rules on indirect clearing) if those derivatives happen to have some of the characteristics specified in the clearing mandate. The question of indirect clearing of non-EU exchange traded derivatives should be addressed under MiFIR.

Treatment of Non-EU NFC-

Analysis

FIA Europe members consider that it is incongruous for the EU to apply its margin rules extraterritorially to entities that do not fall under equivalent margin rules in their home jurisdiction.

Such a requirement is not aligned with global recommendations from Basel / IOSCO and therefore diverges from the approach taken in other jurisdictions. This has a significant impact on European firms' Asian operations, as a result of them needing to repaper all their client relationships.

Proposals

FIA Europe notes that the above concerns are proposed to be addressed in the latest proposed RTS from the European Supervisory Authorities (ESAs), such that non-EU NFC- should be excluded from the risk mitigation technique requirements of Article 11. FIA Europe members are supportive of this approach.

(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.**

Classification of non-EU counterparties

Analysis

Firms are finding it challenging to categorise non-EU counterparties, in particular.

A well-known difficulty relates to the classification of non-EU funds. Under the Alternative Investment Fund Managers Directive ("AIFMD"), non-EU Alternative Investment Fund Managers ("AIFMs") cannot become authorised in the EU until the Commission adopts a delegated act making the passport for the management and/or marketing of Alterative Investment Funds ("AIFs") in the EU available to non-EU AIFMs, which may not be until October 2015 and possibly only for certain third countries.

There are some clarifications as to the status of funds in ESMA Q&As, but this is incomplete with respect to third country entities.

Generally, funds will be treated as financial counterparties (“FCs”) where there is a registered or authorised AIF or AIFM in Europe, including for third country funds and third country managers. However, the situation is less clear for third country funds with non-EU registered managers. ESMA states in the Q&As that they are “third country entities”, but this does not explain whether they are to be treated as equivalent to a FC or NFC for the purposes of the clearing obligation and risk management techniques.

The reporting and risk mitigation requirements do not apply directly to third country entities, so this is not such a problem at present (beyond the need for such entities to sign up to the relevant ISDA Protocol to ensure compliance by their EU counterparty with EMIR risk mitigation requirements). However, when the clearing obligation applies, uncertainties in this area will become acute. Under Article 4 of EMIR, trades between an EU bank and a non-EU entity may be caught if the non-EU entity would be subject to the clearing obligation if it were established in the EU. It is unclear whether a foreign fund would be (i) equivalent to an FC and so subject to the clearing obligation or (ii) similar to an NFC and therefore exempt.

A similar situation arises for European institutions that deal with non-EU public sector bodies. Many public sector bodies established in the EU would not be subject to the clearing obligation by virtue of Articles 1(4) and (5) of EMIR or because they are not "undertakings" within the scope of the definition of a non-financial counterparty. However, although the Commission has given some guidance in its Frequently Asked Questions (“FAQ”) on the question of the meaning of the term "undertaking" this is very difficult to apply in many cases. In addition, it is unclear how the provisions of Article 11 and the RTS under that Article apply where an EU financial counterparty transacts with an entity that is not an "undertaking" (even when that entity is in the EU).

These issues are even more acute in relation to non-EU public sector bodies as many of the provisions of Article 1(4) or (5) are not applicable to non-EU entities, particularly as the Commission has expressly extended the definition in Article 1(4) only to the US and Japanese governmental entities. Similar issues arise in relation to many treaty organizations that are not multilateral development banks referred to in Article 1(5).

These ambiguities over public bodies’ categorisation creates risks, uncertainties and problems for dealers and have given rise to market practices which may not be intended. EU financial institutions need to categorise their clients as FCs or NFC+/- for operational purposes. However, clients cannot give clear representations on a question of law (whether they are equivalent to an FC or NFC+/-) when the law is unclear. Some clients are prepared to represent only that "if I were an NFC, which is a matter of legal uncertainty on which I cannot give a representation, then I would be an NFC+/NFC-", etc. This creates difficulties for:

- EU financial counterparties, who may be forced to classify their clients as FC by default and force trades into clearing (or to apply the full risk mitigation obligations of Article 11, including margin) when this is not warranted or on an earlier timetable than is necessary; and

- the would-be NFCs themselves, who face costs and timing issues (especially as we move towards the go-live date for mandatory clearing and margin obligations), an inability to sign up to the ISDA NFC

Protocol without incurring legal risks and the costs of time-consuming discussions with banks about contractual representations as to their status.

Proposals

FIA Europe members propose that it be clarified that third country AIFs are equivalent to NFCs, even if such AIFs are marketed in the EU pursuant to Article 42 of AIFMD. We understand this to be in line with ESMA's position. This is a significant interpretation of EMIR and it is important that a permanent record of this interpretation is maintained to ensure consistent application by NCAs and market participants across the EU.

FIA Europe members also propose that it be made clear that EMIR does not apply to either EU and non-EU central, regional and local and municipal government bodies. It should also be clarified that EMIR does not apply to any EU or non-EU central banks and treaty organizations. Consequently, the clearing and risk mitigation obligations should not apply to EU entities transacting with those bodies.

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?**

Transparency

Analysis

Transparency on the ongoing assessment of CCP's compliance with EMIR and the methodology / metrics used by NCAs to validate compliance is essential.

Proposals

FIA Europe members recommend greater focus on the extension to a CCP's authorisation, together with further transparency as to what significant changes should trigger a requirement to obtain an extension to such authorisation – e.g. new products, system changes, operational changes, margin methodology, for example, and the publication of the details of the extension application at the time of the application, together with the methodology / metrics being used by the College / NCAs to assess the application.

Some redaction for commercial purposes should be permitted, but this should be strictly limited in order to ensure information published remains relevant and informative.

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(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?**

Transparency

Analysis

There is no transparency as to when a CCP's application is deemed complete, nor when it is anticipated that a CCP will become authorised: during the process of EU CCPs applying for their EMIR authorisation, NCAs told clearing members to ask the CCPs for details of the timelines but, when asked, the CCPs said they were not able to disclose such information for confidentiality reasons (linked to the authorisation process). This made strict compliance with EMIR Article 39, on the day that the CCP became authorised, very challenging for clearing members and buy-side firms, whom were unable to effectively prioritise and allocate resources to an unknown timeline and compliance date because of such lack of transparency.

Similar issues may arise in the future if an additional CCP is authorised (or recognised) in the period leading up to the date on which a new clearing mandate comes into force, if members of that CCP (that were not already clearing members of other CCPs) might become "Category 1" counterparties under the clearing mandate.

Proposals

FIA Europe members would like to see ESMA's website updated regularly with timetables of authorisations, advising of an effective date in advance of an application being deemed completed and/or anticipated date of authorisation, so that industry has a chance to prepare and act proactively, rather than just being informed that an authorisation has been deemed complete and having to act reactively.

Additionally, EMIR should be amended to allow a grace period after a CCP is authorised giving clearing members time to implement the requirements of EMIR with respect to that CCP.

Regulatory technical standards ("RTSs") on the clearing mandate should take into account the possibility of new CCPs being authorised (or recognised) during the period prior to the date on which the standards come into force if this would affect the scope of Category 1.

Process for extending EMIR authorisation for new products

Analysis

The authorisation process relating to the extension of an existing CCP's authorisation is too opaque and is not conducted in a sufficiently timely manner, despite the requirements being laid out in Articles 17-19 of EMIR.

As a result, CCPs are missing opportunities to bring competitive offerings to the market.

EMIR Article 15 is clear that the applicable timelines for extension of authorisation requests are the same as

those set out in Article 17 of EMIR, but these timelines have been ignored in practice.

The phrase "Additional services and activities" is not defined further under EMIR, which leaves it to NCAs to decide which activities/products should follow Article 17 procedures. It is not always clear to CCPs precisely when they are required to follow the Article 17 procedures – this is a particular issue for new product approvals.

Proposals

The College should adhere to the timings set out in EMIR. Meetings should be held promptly and all agenda items discussed.

FIA Europe members encourage the Commission to provide greater clarity as to the precise circumstances that require the Article 17 procedure to be followed. In addition, ESMA should seek to provide a standardised list of information required for the College process, depending upon whether the process falls under Articles 15, 17 or 49 of EMIR, respectively.

Uniform application and consistent approach to authorisation across the European Union

Proposals: ESMA should ensure consistency of standards across the NCAs and colleges by providing guidelines and standards to those NCAs and colleges, whilst allowing NCAs to remain responsible for review, technical validation and presentation of specific matters to colleges.

Processes regarding review of models, stress testing and backtesting under Article 49 of EMIR

Analysis

EMIR Article 49(1) requires CCPs to obtain independent validations, to inform its NCA and ESMA of the test results and to obtain their prior approval before adopting any significant change to the models and parameters.

EMIR Article 49(1) also requires that the process be subject to the College process and that an opinion be obtained in accordance with Article 19 of EMIR.

Unlike with Article 17, where the NCA has the right to grant or refuse authorisation, ESMA has validation rights under Article 49. The process poses a significant burden on EU CCPs, specifically with respect to obtaining regulatory approvals in a timely manner.

It is also not clear how "any significant change" is interpreted pursuant to these Articles. Current practice by NCAs indicates that their interpretation is that *any* change concerning the CCP models, stress testing and backtesting, represents a "significant change" for this purpose. This approach is unduly onerous.

A considerable complexity is also involved in the validation decisions.

Proposals

Proposals from CCPs

Innovation in relation to new risk management approaches should still be possible.

FIA Europe members recommend streamlining the EMIR Article 49(1) validation process on significant changes to the risk models of CCP, as the current approval steps are too cumbersome to implement.

In applying the Article 49 process and Article 15, the focus should be limited to the elements that are new to the service, not a full review of all documentation and models that have already been approved as part of the initial Article 17 process.

FIA Europe members recommend that ESMA and the NCAs focus the process on changes that are *significant*, and not apply the process to any immaterial change a CCPs proposes to make to its risk models with regards to any elements that are novel. NCAs already have the appropriate regulatory tools for CCPs to approve less significant changes in their day-to-day application of relevant national rules (and EMIR) and risk committee review/*ex post facto* intervention powers should be enough for other changes.

Other proposals from Clearing Members

When CCP models are disclosed to clearing members, the full model should be disclosed and details of the scope/objective of any review of the model should be clearly identified. In this respect, we understand that CPMI-IOSCO are currently working on international disclosure requirements. FIA Europe members consider this to be an effective way of pursuing this policy objective, both at an international and European level.

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?**

Lack of international use of anti-procyclicality buffer: No jurisdiction other than Europe appears to consider procyclicality as explicitly as EMIR, which often leads to differences in margining for equivalent contracts in different jurisdictions.

Reg 153/2013: Article 28 of Reg 153/2013 does not necessarily achieve all the aims of EMIR Article 85(1)(d).

In providing only three prospective alternative means to limit margin procyclicality for a variety of contract types, it does not take into consideration the myriad of account asset class nuances that, for instance, offer a means that sensibly limits margin procyclicality for seasonal energy contracts. Further interpretation differences in applying these three alternatives (e.g. applying a 25% add on without necessarily providing for the ability to deplete this) further impacts the ability of these tools to limit procyclicality.

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

FIA Europe's affiliate, FIA Global, is planning to set out specific recommendations on CCP margin later this year for submission to CPMI-IOSCO in the context of their ongoing work around CCP margin, which will also cover procyclicality. We would be pleased to discuss the detail of those recommendations with the Commission upon finalisation (which finalisation will occur the closing date of this consultation).

Lack of international use of anti-procyclicality buffer: We ask the Commission to provide more clarity on how it has addressed and proposes to address the lack of procyclicality in third country legislation in the context of equivalence assessments pursuant to Article 25 of EMIR.

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

Whilst FIA Europe members would expect an ongoing review by the NCA, this is something that should be addressed during the EMIR CCP authorisation process.

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

Not applicable.

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?**

There have been numerous changes to the margin policies and models as a result of EMIR requirements. The transparency provided by CCPs to affected participants varies, with differing implementation styles. CCPs should be required to harmonise their transparency requirements and changes in line with the CPMI-IOSCO PFMIs qualitative and quantitative disclosure frameworks.

CCPs are systemic risk managers responsible for ensuring the overall safety and soundness of their markets. Given the potential for systemic risk to be more concentrated, CCPs' risk management frameworks have become more important than ever. CCPs must structure the default waterfall and design their margin policies

in such a way as to ensure they can adequately manage exposures to their clearing members. As CCPs are commercial entities that operate in a competitive environment, there is a balance to be struck between the commercial aspect of running a CCP and maintaining a prudent, sustainable environment to allow market continuity during a time of stress – it is important for CCPs, their members and their regulators to ensure that the right balance is achieved between these competing objectives, above all ensuring that exposures are appropriately risk managed to a high and prudent standards. Key tools in managing these risks include ensuring that CCPs have the ability to attract and maintain a diverse set of clearing members to reduce concentration risk.

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

FIA Global is planning to set out specific recommendations on CCP margin this year. We will ensure that such recommendations are shared with the Commission and would be pleased to discuss the details of those recommendations upon finalisation.

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

FIA Global is planning to set out specific recommendations on CCP margin and eligible collateral later this year. We will ensure that such recommendations are shared with the Commission and would be pleased to discuss the details of that recommendations upon finalisation.

FIA Europe members note the following areas in which EMIR could be improved:

Drafting errors

RTS 153/2013 contains clear typographical errors. Article 45(2) (Highly secured arrangements maintaining cash) states "Where cash is maintained overnight in accordance with paragraph 1 then not less than 95 % of such cash, calculated over an average period of one calendar month, shall be deposited through arrangements that ensure the collateralisation of the cash with highly liquid financial instruments meeting the requirements under **Article 45**, except the requirement at **paragraph 1(c) of that Article**."

The references to Article 45 and to paragraph 1(c) should be to **Article 43** and to **Annex II, paragraph 1(c)**.

Third country settlement systems

Another issue making it difficult for EU CCPs to hold US dollar margin assets is that ESMA's Q&A indicate that DTCC (in its capacity as a settlement system) is not regarded as a securities settlement system under EU law (for the purposes of Article 47(3) EMIR) but US laws effectively require assets to be held through DTCC. This could be solved by allowing CCPs to hold securities through non-EU settlement systems. EMIR currently effectively mandates usage of third country custodians in respect of instruments or currencies that are held in non-EU settlement systems (because, unlike non-EU settlement systems, non-EU custodians are permitted under Article 44 of RTS 153/2013). The exclusion of third country settlement systems and mandate towards third country custodians is contrary to the policy goal underlying EMIR of moving CCPs to maintain accounts directly at settlement systems rather than via custody accounts.

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

FIA Global is planning to set out specific recommendations on CCP margin and eligible collateral later this year. We will ensure that such recommendations are shared with the Commission and would be pleased to discuss the details of those recommendations upon finalisation.

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?

Yes

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

Art 19(6) MiFID I, and its impact under Articles 2(7) and 10 of EMIR

Please see our response to Question 1.2(b) above for FIA Europe members' views on the definition of "OTC derivative" in Article 2(7) of EMIR.

Treatment of branches

Analysis

There has been significant uncertainty as to the territorial application of EMIR in relation to undertakings incorporated in the EU and operating through branches outside the EU and in relation to undertakings incorporated outside the EU and operating through branches in the EU. In particular:

- Some of the EU legislation referred to in the definition of "financial counterparty" contemplates that non-EU entities may establish branches in the EU and be authorised under that legislation (e.g. MiFID II) but the RTS with respect to transactions between third country entities assume that they will not be financial counterparties;
- EMIR does not contain a definition of "established" in relation to the definition of non-financial counterparty in Article 2(9), the references to third country entities in Articles 3, 4 and 11 or the provisions of Article 25;
- Article 9 EMIR applies to "counterparties", which is not a defined term;
- Some of the RTS pursuant to Article 11(1) EMIR only address the case where financial counterparties and/or non-financial counterparties enter into derivative contracts with each other but appear to be intended to apply to transactions with third country entities as well;
- It is not clear how Article 13 applies where an EU entity enters into a derivative contract through a non-

EU branch and that branch is located in a jurisdiction with equivalent rules (and is subject to those rules) but the counterparty is located in a third jurisdiction (and similar issues apply in relation to non-EU entities that are entering into transactions with an EU counterparty where the non-EU entity is acting through a branch in an equivalent jurisdiction and is subject to the rules in that jurisdiction).

While there has been some limited clarification of these issues by ESMA, it is unsatisfactory that these important issues are not explicitly resolved by the Level 1 text.

Proposals

FIA Europe members recommend that the treatment of branches of EU/non-EU entities be clarified in the level 1 text. This should be the subject of a specific consultation to ensure that the proposed changes are appropriate. In particular, the changes should specifically address how the provisions of Article 13 apply in relation to entities acting through branches to ensure appropriate relief from duplicative and conflicting rules.

Inconsistency with other directives / regulations:

Analysis

There is a need for consistency between CRDIV, Capital Requirements Regulation (CRR), MiFID II etc. and EMIR. For example, CRR makes available certain preferential regulatory capital treatments for cleared trades, if European segregation models are used, but the relevant provisions do not contemplate third country CCPs whose segregation requirements have been subject to positive equivalence assessments.

Proposals

There is a need to ensure that definitions that are dependent upon determinations to be made in other legislation, e.g. equivalence, are clearly identified, tracked and assessed to minimise the impact of inconsistent application upon those subject to the legislation. Not only should defined terms in EMIR be aligned with terms used in other related legislation, but they would also ideally be aligned with the terms used by BIS and CPMI-IOSCO.

Scope of specific provisions

Analysis

The application of certain sections of EMIR to particular counterparties (CCPs, clearing members, direct clients, indirect clients) and certain derivatives types is unclear. The indirect clearing provisions are one illustration of such areas of uncertainty.

Proposals

EMIR should further clarify to whom specific provisions apply, as regards EU / Non-EU CCPs, clearing members, direct clients, indirect clients etc., so as to avoid inconsistency of application and to ensure clear exemptions/default approaches where conflicts of law arise with third country legislation or non-relevance to the implementation of EU policy.

EMIR should also clarify whether specific provisions apply to uncleared OTC derivatives and/or voluntarily cleared OTC derivatives and/or mandatorily cleared OTC derivatives and/or exchange traded derivatives.

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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[15]. ESMA has proposed a first set of mandatory clearing obligations for interest rate swaps which are yet to come into force[16].

Counterparties are therefore in the process of preparing to meet the clearing obligation, to the extent that their OTC derivatives contracts are in scope[17] of the requirements.

(a) **With respect to access to clearing for counterparties that intend to clear directly or indirectly[18] as clients; are there any unforeseen difficulties that have arisen with respect to establishing client clearing relationships in accordance with EMIR?**

Yes. In summary, the challenges arise by virtue of:

- Lack of clarity of the jurisdictional scope of the indirect clearing provisions, which leads to uncertainty on the insolvency and property law analysis of the leapfrog payment from clearing member straight to the indirect client, upon the default of the direct client; and

- The detrimental effect of the regulatory capital and leverage ratio requirements imposed on clearing members pursuant to the CRR. ***The key issue here is that the leverage ratio does not currently recognise the exposure-reducing effect of segregated margin: as a result, clearing members have much less balance sheet capacity to clear derivatives for their clients, which is actively hampering the successful implementation by the industry of the EMIR clearing obligation.***

The answer to increasing access to clearing does not lie in *mandating* the offering of indirect clearing by clearing members, but rather by resolving the ambiguity in the insolvency law/property law conflicts between EMIR and national Member State insolvency/property law legislation and, in addition, clearly addressing the rights of indirect clients in the event that the direct client is located in a non-EU jurisdiction with incompatible insolvency laws.

FIA Europe members would anticipate an increase in their offering of indirect clearing services in the event that the Commission amended EMIR (in the main body thereof – not just the recitals, as the recitals are not legally binding) so as to put the insolvency/property law issues (set out in further detail below) beyond doubt, by stating that:

- the requirements of Article 4(5) of Commission Delegated Regulation (EU) No 149/2013 shall prevail over any conflicting laws, regulations or administrative provisions of any Member State that prevent the parties from fulfilling them, including insolvency laws or property laws; and

[15] EMIR Article 4(3)
[16] 2014/ESMA/799 Consultation Paper, Clearing Obligation under EMIR no.1 published on 11 July 2014
2014/ESMA/1184 Final Report, Clearing Obligation under EMIR no. 1 published on 1 October 2014
2015/ESMA/807 Consultation Paper, Clearing Obligation under EMIR no. 4 published on 11 May 2015
[17] EMIR Articles 4 (clearing obligation) and 5(4)(Clearing obligation procedure), RTS 149/2013 Chapter IV (Article 7 – Criteria to be assessed by ESMA) and RTS 285/2014 on direct, substantial and foreseeable effect"
[18]RTS 149, Chapter 2 (Articles 2 to 5)

- with respect to indirect clearing services provided via a direct client that is located in a third country that is subject to insolvency or property laws that are incompatible with the requirements of Article 4(5) of Commission Delegated Regulation (EU) No 149/2013[19], clearing members are under no obligation to pay all monies due to the indirect clients following the default of the client, notwithstanding Article 4(5).

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

Indirect clearing MUST remain *voluntary* to offer

Analysis

It is critical that clearing members retain the discretion of whether or not to offer indirect clearing. It is incorrect to believe that making such offer mandatory will result in greater access to central clearing – on the contrary, it is highly likely to result in a large number of clearing brokers withdrawing their clearing services as a direct consequence of the lack of economic sustainability associated with the mandatory offering of indirect clearing (due to the impact of the leverage ratio, *inter alia*) and unmanageable legal risks. Indeed, some firms have already exited certain clearing businesses because of the broader capital concerns. Given the limited number of clearing brokers currently offering access to central clearing of OTC derivatives, it is essential that legislators avoid the unintended consequence of accelerating further contraction in the range of service providers.

Clearing members are willing to offer clearing services to significant clients, for which there is a strategic incentive to the clearing member to consider direct clearing within the broader client relationship. ESMA appears concerned with respect to smaller clients, who would not fall within this category. The current experience of clearing members is that large and small clients (both direct and indirect) *are* able to find a suitable clearing broker through which they can access a CCP in order to meet their clearing obligations under EMIR.

Proposals

- EMIR should remain unchanged on this aspect – Article 4 of RTS 149/2013 should continue to refer to "Clearing members that offer to facilitate indirect clearing" rather than make the facilitating of indirect clearing arrangements a mandatory requirement for all clearing members.

- Each clearing member should remain free to offer its clearing services to clients on the basis of its own, internal, business and counterparty credit risk assessment of each client. Imposing mandatory indirect clearing would create systemic risk by requiring clearing members, in some instances, to cut across risk management standards in order to facilitate such indirect clearing.

[19] *"5. The clearing member shall also ensure that its procedures allow for the prompt liquidation of the assets and positions of indirect clients and the clearing member to pay all monies due to the indirect clients following the default of the client."*

Indirect clearing – challenges relating to jurisdictional scope

Analysis

The jurisdictional scope of indirect clearing is unclear: do the CCP, clearing member, direct client and indirect client all have to be located in the EU? We note that ESMA Q&A CCP Question 8(j) indicates that EU clearing members are not required to comply with Article 39 when clearing on non-EU CCPs.

Per the table below, a distinction needs to be made between when the clearing obligation is deemed to be met in a given jurisdictional scenario versus when the leapfrog payment has to be made by the clearing member straight to the indirect client upon the default of the direct client.

Proposals

We welcome the clarity that the ESMA Q&A provides, but recommend that the operative provisions of EMIR be amended to make clear (i) when the clearing obligation is deemed to have been complied with[20] and (ii) the jurisdictional circumstances in which the leapfrog payment has to be made by the clearing member straight to the indirect client upon the default of the direct client.

Indirect clearing by indirect clients through Non-EU CCPs that have been recognised under Article 25 of EMIR

With respect to OTC derivatives cleared:

- by EU or non-EU indirect clients;
- via EU or non-EU clients; and
- via EU or non-EU clearing members; and
- on a non-EU CCP *that has been recognised under Article 25 of EMIR*,

our members' understanding is that:

- the non-EU CCP is only required to comply with its *national* clearing regime – it is automatically deemed to be compliant with the requirements of EMIR;
- the clearing member will need to comply with its EMIR obligations with respect to the position and assets that it clears on behalf of the client, to the extent permitted by the laws to which it is subject[21];
- the *client* will need to disclose to the EU / non-EU indirect client that such indirect client may *not* benefit from the account segregation requirements and other protections contained in Article 39 of EMIR;
- such EU / non-EU indirect client shall be deemed to have met its mandatory clearing obligation, [22] by clearing such OTC derivative on such non-EU CCP; and

[20] Noting that non-EU counterparties can be subject to the EMIR clearing obligation in certain circumstances

[21] E.g. US FCMs will not be able to comply with the leapfrog provisions contained in RTS 149/2013 as such provisions conflict with the US Bankruptcy Code

[22] Non-EU counterparties will only be subject to the EMIR clearing obligation if, *inter alia*, EMIR Article 4(1)(a)(iv) applies to them or EMIR Article 4(1)(a)(v) applies to the OTC derivative transaction to which they are a party

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- the requirements of Chapter II *(Indirect Clearing Arrangements)* of RTS 149/2013 shall automatically be deemed to have been satisfied by both the clearing member and the client.

Indirect clearing by indirect clients on EU CCPs that have been authorised under Article 14 of EMIR

If an EU or non-EU indirect client subject to the clearing obligation clears an OTC derivative transaction (that is subject to a mandatory clearing obligation) through a CCP that has been authorised under Article 14 of EMIR, such indirect client shall be deemed to have met its mandatory clearing obligation [22] by clearing such OTC derivative transaction on such EU CCP.

For the reasons illustrated in the following tables, FIA Europe members consider that the “leapfrog” payment provisions set out in Article 4(5) of Commission Delegated Regulation (EU) No 149/2013 should only apply where the clearing member and the direct client are each located in the EU.

CCP jurisdiction	Clearing member jurisdiction	Client jurisdiction	Indirect client jurisdiction	Clearing Obligation met by indirect client?[23]	Leapfrog payment to indirect client possible?	Rationale for whether the payment of all margin by the clearing member straight to the indirect client upon the default of the direct client (the "leapfrog payment") is / is not possible pursuant to Article 4(5) of Commission Delegated Regulation (EU) No 149/2013[24]
EU	EU	EU	EU	Yes	Yes	EMIR overrides national Member State insolvency and property laws applicable to the clearing member and the client[24]
EU	Non-EU	EU	EU	Yes	No	Whilst EMIR overrides national Member State insolvency and property laws applicable to the EU client[24], EMIR cannot override any third country laws applicable to the clearing member. The clearing member may be prohibited by such third country laws[25] from making such leapfrog payment to the indirect client
EU	EU	Non-EU	EU	Yes	No	EMIR cannot override third country laws applicable to the client: the leapfrog payment is therefore susceptible to challenge by the client's insolvency official
EU	Non-EU	Non-EU	EU	Yes	No	EMIR cannot override non-EU laws applicable to the client or to the clearing member - the clearing member may not be permitted under such third country laws from making such leapfrog payment to the indirect client and the leapfrog payment is susceptible to challenge by the client's insolvency official
EU	EU	EU	Non-EU	Yes	Yes	EMIR overrides national Member State insolvency and property laws applicable to the clearing member and the client[24]
EU	Non-EU	EU	Non-EU	Yes	No	Whilst EMIR overrides national Member State insolvency and property laws applicable to the EU client[24], EMIR cannot override any third country laws applicable to the clearing member. The clearing member may be prohibited by such third country laws[25] from making such leapfrog payment to the indirect client
EU	EU	Non-EU	Non-EU	Yes	No	EMIR cannot override third country laws applicable to the client: the leapfrog payment is therefore susceptible to challenge by the client's insolvency official
EU	Non-EU	Non-EU	Non-EU	Yes	No	EMIR cannot override non-EU laws applicable to the client or to the clearing member - the clearing member may not be permitted under such third country laws from making such leapfrog payment to the indirect client and the leapfrog payment is susceptible to challenge by the client's insolvency official

[23] Where such indirect client is established outside of the EU, assuming the OTC derivative transaction between the client and indirect client is required to be mandatorily cleared under Article 4(1)(a)(iv) or (v) of EMIR

[24] **Assuming that our comments regarding the need to address conflicting national Member State insolvency / property laws are incorporated into an operative provision of EMIR**

[25] E.g. Under the US Bankruptcy Code, the clearing member is prohibited from making such leapfrog payment, even if the client is located outside of the US.

FIA EUROPE

Indirect clearing - conflict with EU member state and third country insolvency and property laws

Analysis

The vast majority of indirect clearing would take place on a cross-border basis. Any security interests created pursuant to an indirect clearing arrangement must be designed to be enforceable in all circumstances, across all applicable jurisdictions. It is this issue that proves such an implementation challenge from a legal perspective.

FIA Europe members disagree with the view of ESMA and the Commission that the primacy of EU law means, unequivocally, that EMIR's indirect clearing provisions (in particular the "leapfrog" provision in Article 4(5) of Commission Delegated Regulation (EU) No 149/2013, pursuant to which all monies due to the indirect client are required to be paid by the clearing member straight to the indirect client) are incapable of successful legal challenge by the insolvency official of the direct client. ***We therefore ask the Commission to put the issue beyond doubt by making the changes to EMIR specified under "Proposals" below.***

It is acknowledged by the Commission and ESMA that the primacy of EU law does not apply to *third country* jurisdictions: for example, if the direct client is located in the US, the primacy of EU law does not overrule the US bankruptcy code. EMIR accordingly requires amendment to address the situation where the insolvency laws applicable to the direct client are incompatible with the "leapfrog" payment envisaged by Article 4(5) of Commission Delegated Regulation (EU) No 149/2013.

There is no exemption in any country from the property law challenges. The bankruptcy trustee of MF Global US asserted that it owned property rights in proprietary account margin that had been transferred to various CCPs to cover proprietary account positions of its affiliated clearing member, MF Global UK and CCPs had acted contrary to its property law rights in applying the margin against proprietary account liabilities or porting. The possibility of such challenges being successful may mean that clearing members are unwilling to make leapfrog payments or offer other solutions for indirect clients and that some European CCPs are reluctant to engage in porting. Property laws, as well as insolvency laws, need to be overridden by EMIR.

To illustrate the problems of seeking to apply indirect clearing when clearing members or the direct client is located in a third country, we set out below the reasons why EMIR indirect clearing is incompatible with the US bankruptcy code and CFTC rules. MiFIR indirect clearing is equally incompatible with such code and rules for the same reasons and the wording below accordingly mirrors the response provided by our affiliate, FIA Inc., to ESMA's MiFID II consultation earlier this year.

Commission Delegated Regulation (EU) No 149/2013 implements EMIR Article 4(3) with respect to indirect clearing. The second paragraph of EMIR Article 4(3) provides that such arrangements are permitted "*provided that those arrangements do not increase counterparty risk and ensure that the assets and positions of the counterparty benefit from protection with equivalent effect to that referred to in Articles 39 and 48 of EMIR*."

We focus in this part of our response on the potential impact of Commission Delegated Regulation (EU) No 149/2013 on the ability of US futures commission merchants ("FCMs") to provide clearing services to their clients, direct and indirect, with respect to OTC derivatives cleared through an authorised central counterparty

("CCP") in the European Union. In this regard, we are concerned that Article 4(4) and 4(5) of Commission Delegated Regulation (EU) No 149/2013 may restrict the ability of US FCMs (whether acting as clearing member or direct client) to facilitate indirect clearing, as those articles appear to be incompatible with US insolvency law applicable to US FCMs. Specifically, when an FCM is a client of a clearing member, the clearing member may not, upon the default of the client, transfer indirect client funds directly to indirect clients, as required by Article 4(5).

US FCMs act as intermediaries with respect to OTC derivatives cleared through an EU CCP in several ways – an FCM may be:

- a direct clearing member of an EU CCP, which is the clearing organisation for regulated markets both within and outside of the EU. For example, an FCM may be a direct clearing member of ICE Clear Europe with respect to the clearing of OTC credit default swaps;

- a client of an FCM that is a direct clearing member of an EU CCP; or

- the client of an EU credit institution or investment firm that is a direct clearing member of an EU CCP.

In each case, an insolvent FCM will be liquidated in accordance with: (i) the provisions of the US Bankruptcy Code (11 USC §§ 101 *et seq.*)("Code") and, in particular, Subchapter IV of Chapter 7 of the Code governing the liquidation of FCMs and other entities that fall within the definition of a commodity broker (11 USC §§761 *et seq.*) and (ii) the rules of the Commodity Futures Trading Commission ("CFTC") with respect to the liquidation of an FCM (17 CFR Part 190).[26]

Under the Code, a clearing member of an EU CCP would be authorised to exercise its contractual rights to cause the liquidation, termination or acceleration of a commodity contract[27]. 11 USD §§ 362(b)(6), 556.

The proceeds of such liquidation must be returned ***to the trustee in bankruptcy*** for distribution to customers in accordance with the Code and CFTC Rules. This therefore precludes the FCM (whether acting as clearing member or direct client) from making payment to the indirect client. 11 USC § 766(h) of the Code provides that ***the trustee*** "shall distribute customer property ratably to customers on the basis and to the extent of such customers' allowed net equity claims, *and in priority to all other claims*," except the costs of administration.

Article 4(4) of Commission Delegated Regulation (EU) No 149/2013 imposes on clearing members the obligation to "*establish robust procedures to manage the default of a client that provides indirect clearing services*". Article 4(5) of Commission Delegated Regulation (EU) No 149/2013 states that the clearing member

[26] Many FCMs are also registered with the US Securities and Exchange Commission as broker-dealers ("BDs"). In this event, a dually-registered BD/FCM that is insolvent will likely be liquidated in accordance with the Securities Investor Protection Act ("SIPA"). A SIPA trustee is nonetheless required to act in accordance with Subchapter IV of Chapter 7 of the Code and the CFTC's Part 190 rules with respect to the liquidation of the insolvent entity's FCM business.

[27] A commodity contract is defined to include: (i) a futures contract traded on a US futures exchange; (ii) a futures contract traded on a non-US exchange; and (iii) a swap cleared through a CFTC-registered derivatives clearing organization. 11 USC § 761(4).

"*shall also ensure that its procedures allow for the prompt liquidation of the assets and positions of indirect clients and the clearing member to pay all monies due to the indirect clients following the default of the client*".

Article 5(3) of Commission Delegated Regulation (EU) No 149/2013 provides that the client "*shall provide the clearing member with sufficient information to identify, monitor and manage any risks arising from facilitating indirect clearing arrangements. In the event of a default of the client, all information held by the client in respect of its indirect clients shall be made immediately available to the clearing member*".

The US Bankruptcy Code would not prevent a clearing member from establishing "robust procedures" to allow for the prompt liquidation of the assets and positions of indirect clients following the default of an FCM client. However, to the extent that Article 4(5) of Commission Delegated Regulation (EU) No 149/2013 would require a clearing member to return liquidation proceeds directly to the indirect clients of the US FCM, the RTS would be incompatible with the provisions of the US Bankruptcy Code and the rules of the CFTC with respect to the liquidation of an FCM, as described above.

Similarly, contractual arrangements between an FCM client and its indirect clients to facilitate the return of liquidation proceeds directly to the indirect clients upon the default of the FCM would be incompatible with the US Bankruptcy Code and the CFTC's regulations.

Proposals

The answer to increasing access to clearing does not lie in *mandating* the offering of indirect clearing by clearing members, but rather by resolving the ambiguity in the insolvency law/property law conflicts between EMIR and national Member State insolvency/property rights legislation and clearly addressing the rights of indirect clients in the event that the direct client is located in a non-EU jurisdiction with incompatible insolvency or property laws.

EMIR (in an operative provision thereof – not just the recitals, as the recitals are not necessarily legally binding) must be amended so as to put the insolvency/property law issues beyond doubt, by stating that:

- the requirements of Article 4(5) of Commission Delegated Regulation (EU) No 149/2013 shall prevail over any conflicting laws, regulations or administrative provisions of any Member State that prevent the parties from fulfilling them, including insolvency laws or property laws;

- the indirect clearing provisions shall not apply with respect to OTC derivatives cleared on non-EU CCPs;

- a clearing member will be in compliance with Article 4(5) of Commission Delegated Regulation (EU) No 149/2013 if the clearing member's "robust procedures" provide that, upon the liquidation of the indirect client assets and positions, the clearing member will promptly return the proceeds of such liquidation to the bankruptcy trustee of the insolvent client for the account of its clients in accordance with applicable insolvency law and the client provides additional disclosure to ensure that indirect clients are properly informed of risks relating to conflicting insolvency laws; and

- a client will not be required to comply with the provisions of Article 4(5) of Commission Delegated

Regulation (EU) No 149/2013, if such contractual arrangements with its indirect clients would be incompatible with the applicable insolvency law. Instead, where contractual terms that facilitate such payment are contrary to or inconsistent with third country laws or regulations, the client should provide indirect clients with relevant risk disclosure.

Indirect clearing: post-default porting

Analysis

To the extent that multiple clients hold their positions in the same account and their clearing provider defaults, all such clients whose assets/positions are recorded in such account must choose to port their positions to the *same* back-up clearing provider.

MiFIR's version of indirect clearing (which applies to exchange traded derivatives) will not include any provisions to facilitate the post-default porting of the indirect clients' positions to a back-up direct client/clearing member upon the default of the direct client, because it was recognised by ESMA that such a porting was in all likelihood not achievable in practice, given that clients are unlikely to all agree on the same back up clearing provider.

Proposals

With respect to post-default porting, the indirect clearing provisions in EMIR should be aligned with MiFIR, so as to acknowledge that there is no likelihood of a clearing member post-default porting indirect clients to a back-up direct client, upon the default of the direct client.

Indirect clearing: CCP account types

FIA Europe members are supportive of ISDA's proposals regarding CCP account types for indirect clearing under EMIR.

The impact of CRR's Leverage Ratio on access to clearing

Analysis

This comment relates to the Capital Requirements Regulation rather than EMIR, but demonstrates how one EU regulation (CRR) can have a detrimental effect on the objectives of another EU regulations (EMIR).

Once MiFID II comes into force, we anticipate the access to *trading* increasingly being driven by access to *clearing*: in short, if you cannot clear, you cannot trade. It is therefore important that access to clearing be provided as widely as possible and not restricted as an unintended consequence of related legislation concerning, among other things, indirect clearing and regulatory capital rules. Our proposals below relating to indirect clearing set out our proposed solution.

The Leverage Ratio (particularly the PFE calculation under CEM in CRD IV in Europe and analogous legislation

globally) has created capacity constraints on clearing members' ability and willingness to facilitate access to clearing for new clients: existing direct clients are presenting challenges for their clearing brokers if their portfolio has a significantly negative effect on the clearing member's balance sheet by virtue of the leverage ratio. New direct clients are finding it increasingly hard to access clearing for the same reason.

The key issue here is that the leverage ratio does not currently recognise the exposure-reducing effect of segregated margin: as a result, clearing members have much less balance sheet capacity to clear derivatives for their clients, which is actively hampering the successful implementation by the industry of the EMIR clearing obligation.

As the leverage ratio results in clearing members having a finite capacity to provide clearing services to clients, it is natural that they prioritise the provision of those services to their direct clients (whom they can choose) over indirect clients (over whom they have less control); further the direct clients can themselves decide whether to make use of the balance sheet capacity they are using for their own or their clients (indirect clients) needs and thus may remove this argument.

Proposals

FIA Europe and its members are aware that the Commission has launched a separate review of the impact of CRR. It is worth nothing here, however, that ***CRR should be amended to recognise the exposure-reducing effect of segregated margin*** if the EMIR clearing obligation is to be successfully implemented***.***

FIA Europe members encourage the Commission to work closely with prudential regulators, and the Leverage Working Group of the Basel Committee, to highlight the detrimental impact that the leverage ratio as currently calculated is having on access to direct and indirect clearing, with the goal of amending the leverage ratio to recognise the exposure-reducing effect of segregated margin.

(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?**

Yes. In summary, these relate to the following areas:

- The **frontloading** obligation –frontloading should be removed for future asset classes and products;
- Post-trade **compression** services –if two or more trades (that are not subject to the mandatory clearing obligation) are compressed by a certified third party vendor and such process generates a clearable trade, such trade should be exempt from the clearing obligation;
- **Suspension/termination of the clearing obligation** – regulators should have the power to suspend or terminate the clearing obligation. The consequences of such suspension or termination must be clear for both existing and future cleared OTC derivatives.

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

Frontloading

Analysis

Market participants are unable to accurately price trades that will be cleared at a future date. This will likely lead to a divergence in pricing and overall market disruption. This will likely hamper market liquidity during phase-in periods and may even disincentivise some market participants from hedging.

Whilst the analysis below refers to US CCPs, the concerns are equally applicable for all jurisdictions in respect of which an Article 25 recognition decision has yet to be made with respect to the CCPs in the applicable third country.

Category 1 and 2 counterparties entering into relevant transactions after the relevant frontloading date and clearing those transactions on US CCPs will not know whether they have to close out those transactions if the relevant recognition decisions are not in place by the start of the relevant frontloading period. This may have a detrimental effect on the willingness of market participants to continue trading and clearing on those CCPs and gives EU authorised CCPs an unwarranted form of competitive advantage in the interim (i.e. the certainty that the transaction can continue to be cleared on the CCP).

Given the challenges to date in reaching an EU-US agreement, market participants may remain concerned that the recognition will not be given in time and therefore may be reluctant to trade for clearing on US CCPs after the relevant frontloading date because of concerns that these issues will not all be resolved by the start date of the clearing obligation (and those Category 2 counterparties will need to put in place alternative clearing arrangements prior to the start of the window).

If the RTS relating to the mandatory clearing of G4 Interest Rate Swaps is adopted before the Commission has made the equivalence determination with respect to the US, and it should then transpire that the Commission cannot make the equivalence determination on time, there is no way of stopping the clearing obligation taking effect other than by amending the RTS, which would require the submission of such revised RTS to the European Council and European Parliament for non-objection.

Proposals

FIA Europe members propose that the concept of frontloading be removed from EMIR for future asset classes and products.

It is crucial to ensure that, going forward, the clearing obligation only applies to OTC derivatives contracts where those contracts are suitable for clearing, and that the mandates be implemented so as to minimize market disruption, ensure the continuity of markets participants' hedging programmes and to foster an environment where derivatives users are encouraged to reduce bilateral risk.

It would be helpful if the Commission and ESMA targeted achieving full recognition of all relevant third country CCPs before the start of the Category 1 frontloading period or, at the very least, having the equivalence determination in place before that date.

Alternatively, the Commission could amend the RTS before it adopts them so as to further delay the start of the frontloading period for the first clearing for the G4 IRS.

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Post-trade risk reduction services (compression)

Analysis

EMIR currently requires new trades resulting from systemically risk-reducing processes such as multilateral portfolio compression cycles (which result from original trades that are not subject to the clearing obligation) to be cleared. In many cases, it is impossible simply to fully or partially terminate existing bilateral derivatives within such compression exercises (either because there are no suitable bilateral derivatives for termination or because there is no industry consensus on how to agree on pricing of existing bilateral derivatives or backload them into clearing). Submitting new or amended derivatives to the clearing obligation presents market participants with significant pricing risks and limits the effectiveness of compression exercises as participants' tolerances for bilateral risk are readily exceeded. In practice, this results in a significant disincentive for firms to maximize participation in both multilateral and bilateral compression exercises.

Instead, permitting firms to enter into new trades resulting from such compression exercises on an uncleared basis will reduce systemic risk by permitting the collective management of interconnectedness and counterparty credit risk. We consider such approach to be consistent with certain of the objectives of EMIR (particularly the reference in recital 17 of EMIR that in applying the clearing obligation, ESMA must pay due regard to counterparty credit risk).

Proposals

FIA Europe members propose that if a firm:

- compresses two or more trades (none of which were subject to the EMIR clearing obligation as at the trade date);
- via a certified portfolio compression service; and
- the output thereof is a new trade that *would* be subject to the EMIR mandatory clearing obligation,

then such new trade should be exempt from the mandatory clearing obligation.

Suspension/termination of the clearing obligation

Analysis

The European Securities and Markets Authority ("ESMA") recognised in its "Consultation Paper – Clearing Obligation No 1", published on 14 July 2014, that there were a number of issues in the Level 1 text with regard to the suspension or termination of the Clearing Obligation and itself recommended that the issues, as set out below in the extract from the Consultation Paper, should be addressed in the EMIR Review:

"58. …Indeed market participants consider that ESMA may need to remove or suspend the clearing obligation on specific classes for a number of reasons including:

- *when the composition of market participations dramatically shifts (e.g. fewer clearing members), thereby rapidly impacting the risk profile of the market;*
- *when there is only one CCP left to clear the contract;*
- *when liquidity dries on a contract e.g. during a financial crisis, because of the migration from rate indices such as LIBOR to potential alternatives, because of the introduction of a new and more*

attractive substitute to a certain contract;

- *when the quality of available market prices deteriorates;*
- *when the collateral accepted by the CCP is reduced.*

59. *Under such circumstances, it is generally agreed by market participants that ESMA would need to act as a matter of urgency (within a few days) to remove the clearing obligation from a specific Class+. The procedural delays resulting from the modification of an RTS would not be compatible with this objective.*

60. *This being said, stakeholders also point out that the removal of a class from the clearing obligation should only take place in limited and exceptional circumstances. It is therefore crucial to keep the process for removing a class as transparent as possible.*

63. *Taken all these considerations into account, ESMA has further analysed the practical aspects of the clearing obligation procedure and the interaction with the public register, and has concluded that there is little room for manoeuver in the Level 1 text to achieve the result of modifying the scope of the clearing obligation without going through the issuance of new or modified RTS.*

66. *…[I]t may be more problematic that, in case a clearing obligation needs to be removed or suspended because e.g. the level of liquidity on a specific set of contracts has dried out, ESMA does not have another possibility than going through the procedure of modification of the RTS, which is the same as the procedure of issuance of a new RTS. Indeed, EMIR foresees in Article 5(6) that a class ceases to be subject to the clearing obligation only if it no longer has a CCP to clear it, which may happen if all the CCPs, on their own initiative, stop clearing a specific class or if their competent authorities withdraw the authorisation to clear this class to all the CCPs clearing it.*

67. *Therefore, during the 2015 review of EMIR foreseen by Article 85(1), ESMA will flag that the clearing obligation process may need to be reviewed to take into account the fact that the classes that had been deemed subject to the clearing obligation in the past may no longer satisfy the necessary conditions in the future, and that the time of the procedure to amend the RTS is unsuited to the level of urgency that such a modification may require."*

We also note that the European Systemic Risk Board (ESRB) is supportive of the proposition that EMIR should include the possibility of, and the conditions to be fulfilled, for a swift removal or suspension of the clearing obligation for certain classes of OTC derivatives if the relevant market situation so requires.[28]

Whilst the issue of implementing an effective, timely and transparent process for suspending/terminating the clearing obligation is essential, it is also vitally important to clarify the consequences of such suspension/termination on those impacted contracts which are already being cleared and the ability for participants to continue to trade such contracts, notwithstanding the change to the clearing obligation.

At present, Article 5 of EMIR states that a contract shall cease to be subject to the clearing obligation where it "no longer has a CCP which is authorised or recognised to clear those contracts under this Regulation" but it is not particularly clear as to what happens to those contracts that had been cleared by the CCP, nor what needs to be done with respect to new trades. Article 5(6) of EMIR merely provides that "and paragraph 3 of this Article shall apply". If "this Article" is intended to refer to Article 5, then reverting to paragraph 3 will re-trigger the ESMA public assessment of whether the contracts should be subject to mandatory clearing and "shall publish a call for a development of proposals for the clearing of those classes of derivatives". The result is therefore rather circular and does not assist clearing members in determining what to do with outstanding positions/trades at the CCP nor what to do with respect to new trades.

[28] https://www.esrb.europa.eu/pub/pdf/other/150729_report_other_issues.en.pdf?d4d412dca869f6c678a4be5d7dc58984

Furthermore, following the implementation of the MiFID II/MiFIR draft RTS 26: "Draft regulatory technical standards on suspension and removal of financial instruments from trading", where a contract has been suspended or removed from trading, it needs to be make clear whether or not the clearing obligation for such a contract still applies and whether participants are able to continue to trade such contract bilaterally.

Proposals

To ensure that all OTC derivative contracts that are subject to the mandatory clearing obligation are, at all times, suitable for clearing, EMIR should be amended to empower regulators to suspend or terminate the clearing obligation for an OTC derivative contract or a class thereof in an efficient, timely and transparent manner.

FIA Europe members encourage the Commission to also address the following questions:

- if all authorised/recognised CCPs have their authorisation terminated/revoked/suspended: what are the processes and the timescales for such termination/revocation/suspension? What is the impact for contracts that are already being cleared by the CCP (both OTC derivative contracts and exchange traded derivatives)? What are the consequential impacts for those markets/exchanges that use the services of that CCP with respect to such derivatives?

- if the clearing obligation for a particular contract/asset class is suspended: who has the power/authority to suspend the clearing obligation? What is the impact for contracts that are already being cleared by the CCP (both OTC derivative contracts and exchange traded derivatives)? Do such OTC derivative contracts continue to be voluntarily cleared? What should counterparties do with respect to new OTC derivative contracts entered into by them - can they continue to be voluntarily cleared, even though the clearing obligation has been suspended?

In the event of revocation of any CCP's recognition or authorisation, FIA Europe members believe that clearing members should be able to continue to clear on such CCP in order to effectively manage and transition out of their exposure over a reasonable period of time, which the current EMIR Level 1 text would not allow for because clearing members cannot clear contracts subject to mandatory clearing onto a CCP that has lost its authorisation or recognition, nor in some cases continue to clear at all. An appropriate transition period is necessary to limit market disruption as well as to meet the longer term policy objective of maintaining trades at a CCP. This could be determined by ESMA at the time of the event, following input from clearing members and alternative CCPs and taking into account (i) the relative size and importance of the de-authorised CCP in the market and (ii) the availability of capacity at alternative CCPs and their current clearing members. This dynamic approach would allow ESMA to issue tailored guidance to facilitate a timeline for trades and exposure to be transferred to an approved CCP in an orderly manner, which is particularly important as ESMA has expressed doubt as to its ability to suspend a clearing obligation in a timely manner.

We note that this phase out approach is consistent with policy motivations in other areas of regulation that contemplate the revocation of a CCP's EMIR status. This is the case in Regulation 575/2013 Capital Requirements Regulation which provides for a period of time in which clearing members may continue to calculate their exposure with beneficial qualifying-CCP capital treatment even though the revocation of a CCP's status means that it becomes a non-qualifying-CCP. Absent a dynamic approach to a transition period in the context of clearing, it would be helpful to adopt specific transitional provisions that are aligned to CRR in this way.

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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[29] 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?

Yes.

FIA Europe members recommend:

- *with respect to exchange traded derivatives reporting*: the complete removal of *exchange traded derivatives* transactions from the EMIR reporting obligation. Should the Commission be unwilling to adopt such a change, FIA Europe members seek a move to single-sided (end-of-day) *position* reporting for *exchange traded derivatives* – this would significantly improve the data quality issues experienced to-date;

- *with respect to all other reportable derivatives transactions*: a move to single-sided transaction reporting; and

- that intra-group trades be exempted from the EMIR reporting obligation, on the grounds that they are not systemically important.

These proposals, when combined with changes to other reporting obligations under MiFIR, Market Abuse Regulation (MAR) and the regulation on wholesale energy market integrity and transparency (REMIT), would bring efficiencies and enhance data quality (see the section below on poor data quality), ensuring that regulators have all the information that they need to monitor for market abuse activity whilst also giving regulators access to the specific details of individual trades.

FIA Europe members consider that the significant system/development costs incurred so far in developing double-sided reporting should not be considered as a ground for declining to introduce single-sided reporting.

The reporting of trades executed on Multilateral Trading Facilities ("MTFs") or Organised Trading Facilities ("OTFs") should be made on the same basis as other exchange traded derivatives - like exchange traded derivatives, such trades are executed on the basis of standardised terms and on a transparent execution venue.

If single-sided reporting is adopted, reporting under REMIT will also need to be adjusted, so as to ensure that counterparties to a trade can continue to rely on the EMIR based exemption to REMIT reporting, even in circumstances where it is not the reporting counterparty under EMIR.

There are considerable difficulties with the overlaps or underlaps between EMIR and REMIT e.g. as to

[29] EMSA Consultation Paper "Review of the technical standards on reporting under Article 9 of EMIR", published 10 November 2014

executed trades which are then cleared (where the executed trade may not be reported under EMIR but is reportable under REMIT).

A fuller review of the European reporting regime is merited to ascertain of how it might be possible to streamline the reporting obligations under EMIR, MIFIR, REMIT and SFTR.

Each of these issues are discussed in more detail below.

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

Analysis

Regulatory goals regarding data collection: the primary purpose of EMIR reporting is to enable regulators to maintain systemic risk oversight of markets, in line with the original G20 principles. Today's EMIR requirement to report transaction data (as opposed to position data) for exchange traded derivatives does not enable regulators to perform this intended function, as exchange traded derivatives transactions are compressed and maintained at a position level and reporting of position data was not formally included in the requirements. Although the scope of EMIR reporting was the monitoring of systemic risk, it has become apparent that some regulators use this data for the purpose of detecting potential market abuse – in this respect, MiFIR will introduce enhanced reporting obligations that will provide the information that competent authorities will need to detect such possible market abuse.

Substantial intrinsic differences between OTC derivatives and *exchange traded derivatives*: Whilst it was originally envisaged that EMIR would cater solely for reporting of OTC derivatives as per the G20 principles, the obligation to report exchange traded derivatives contracts was included at a very late stage of the trilogue process.

In practice, this has led to the EMIR reporting regime being designed with OTC derivatives in mind. This has resulted in the inclusion of mandatory reporting fields that, whilst appropriate for OTC derivatives (such as "effective date"), are not a feature of exchange traded derivatives contracts.

Such fields are nonetheless mandatorily required to be completed for exchange traded derivatives contracts, which has led to a market practice of populating those reportable fields with "manufactured" values.

Inconsistency with third country regulation: The European Union is the only jurisdiction to include exchange traded derivatives within its reporting framework as a result of the 2009 Pittsburgh G20 Commitments.

The US regime has seen less challenges due to their single-sided reporting regime and, in part, due to its more limited scope.

Figures recently published by ESMA illustrate that, for the month of April 2015, exchange traded derivatives and listed derivatives traded off exchange accounted for around 69% of all reported trades – 69% of EMIR reports submitted to Trade Repositories that month were therefore not required to be reported under such G20 Commitments. Industry and regulator resources would be best focused on improving the quality of EMIR reporting of OTC derivatives, in line with the G20 mandate.

Poor data-quality: This is exacerbated by the two-sided reporting regime. The lack of consistency in what data is required to be provided for which field in which format is causing significant ongoing impediments. Member firms report that industry matching rates for the economics of the trade are at 90%+, *(e.g. confirmations and portfolio reconciliation),* but that the pairing rates for reporting once one includes the various non-economic fields required under EMIR dual-sided reporting falls to 56%. Failure to generate the UTI correctly and poor

LEI pairing is a significant reason for such low pairing rates. An example of poor data quality can be evidenced from the December 2014 MiFID II consultation paper. There were many issues with data extracted from the trade repositories that were used by the regulator to draw conclusions and make recommendations. This provides further evidence that the regulators are unable to rely on the existing data reported under the two-sided reporting regime.

Inter-TR matching rates for exchange traded derivatives: Inter-TR matching rates for exchange-traded derivatives are below 1%: over 1 billion exchange traded derivatives trades remain unreconciled between TRs. Issues with the Inter-TR reconciliation have exacerbated the concerns around transparency. Currently, the number of unmatched exchange traded derivatives transactions has reached the point where firms do not have the operational capacity to resolve them. Member firms believe the additional burden placed on the buy side is unnecessary given there are other reconciliation processes under EMIR. The effort deployed here could be better spent ensuring those other reconciliation processes are achieved.

UTIs: Currently there is no global standard for production of a Unique Trade Identifier. Interpretation of the rule results in differing transmission by counterparties which affects matching rates. The current lack of transparency from Trade Repositories regarding UTI matching and pairing rates also means that the specific scale of the problem surrounding UTI is opaque. From anecdotal evidence, however, we believe that it remains a significant problem (primarily with firms reporting UTIs that differ). This has led to a significant implementation challenge.

UPIs: At the point of trade, it is often unclear which Unique Product Identifier applies to the given traded product.

Data privacy: In some instances, the data privacy laws of third countries effectively make the reporting of trades under EMIR a criminal offence under their local legislation. This causes significant implementation challenges for firms, whereby they have an unenviable choice: either to fail to meet their EMIR obligations or to commit a criminal offence under such third country laws.

Delegated Reporting: Where there has been no delegation of reporting and each side reports transactions separately, FIA Europe members have found it extremely challenging to match transactions to the reports received from counterparties in order to match the UTI, especially in the case of exchange traded derivatives. For exchange traded derivatives, this is further exacerbated by the high volume of ETD contracts.

Given the limited criteria on which there is clear instruction available from ESMA and/or wide industry agreement, automatic matching processes are not feasible and result in an unacceptably large number of unsuccessful pairings of data.

The take up of delegated reporting by asset managers is mixed. An increasing number of them are now self-reporting due to the challenges of delegating to a number of dealers who offer differing services and results in inconsistent trade data in the trade repository, although some have now moved towards delegated reporting due to the increasing costs and challenges to self-report. A lack of third party vendor solutions following the February 2014 start date for reporting has limited the options available for delegated reporting.

Many asset managers have a complex bifurcated approach whereby they delegate for some products (primarily exchange traded derivatives and cleared OTC derivatives) and self-report for others, or for valuation and collateral where there has been a reluctance on the part of brokers to accept delegation.

The lack of a centralised method to collect and store client static data for delegated reporting has resulted in client data being sent to and maintained in multiple repositories.

There is a very significant tail of corporate end users that do not have the capacity to build out an EMIR reporting system to report low volumes of trades per year. Those corporates tend to delegate their reporting. The reporting of inter-affiliate trades is also an issue for corporates (e.g. those with a head office). The corporate's dealer will only report the trade between the dealer and that corporate. If there is a back to back intra-group trade between head office and an affiliate, the corporate and such affiliate will need their own reporting solution, therefore the delegated model is not a complete solution for these firms.

Some clients choose an executing broker based on whether or not the broker provides a delegated reporting service.

Even within a delegated reporting model, firms who delegate may still be required to source LEIs and open accounts at trade repositories (e.g. to set up the static data) in time to execute their trades – this can lead to a delay in executing transactions.

Proposals

FIA Europe members recommend:

- *with respect to exchange traded derivatives reporting*: the complete removal of exchange traded derivatives transactions from the EMIR reporting obligation, failing which a move to single-sided *position* reporting; and

- *with respect to all other reportable derivatives transactions*: a move to single-sided transaction reporting.

- that intra-group trades be exempted from the EMIR reporting obligation, on the grounds that they are not systemically important.

The implementation of a single sided reporting regime is anticipated to be less resource intensive for firms than is currently the case with respect to dual sided reporting. Accordingly, were EMIR to move to a single sided reporting regime, more resources may become available to those firms whom currently support dual sided reporting, which resources could be used by those firms to further improve the data quality of their single sided reports and to comply with other EMIR obligations that require matching (e.g. portfolio reconciliation, confirmations etc.).

Set out below are the details of the three options put forward by FIA Europe's members:

1. **Remove exchange traded derivatives from the reporting regime**: Unlike OTC derivative contracts, exchange traded derivatives contracts are, by their nature, standardised and matched "on exchange" prior to clearing. The commercial terms are therefore agreed immediately at the point of execution.

   Trade repositories are not needed for exchange traded derivatives: all the transaction and position data that regulators require for transaction, position and market abuse monitoring is already maintained by the exchanges and CCPs that facilitate the execution and clearing of such exchange traded derivatives contracts and/or will otherwise be available to regulators pursuant to MiFID I, MiFIR, MAR and REMIT (among other regulations that contain reporting obligations).

   Regulated Markets are already required under MiFID I to monitor the open interest in each of their contracts, so the implementation of the requirement on exchanges to provide to regulators the position data relating to each trading member should not be onerous nor difficult to implement – as regulated

markets already maintain such data, all that would be required would be for exchanges to send existing data to the appropriate regulators.

By removing 69% of trade reports (those relating to exchange traded derivatives and listed derivatives) from the EMIR reporting obligation, this would significantly free up firms' resources to meet its reporting obligations with respect to OTC derivatives – fixing the reporting of *OTC* derivatives should be seen as the key regulatory objective and priority, given that OTC derivatives are significantly less transparent and visible to regulators, as a result of being traded bilaterally rather than on a regulated trading venue.

One NCA has queried "*how will we know who the end user is if we exempt exchange traded derivatives from EMIR trade reporting?*"

Members note that the US faced this challenge under Dodd-Frank. Their solution was to adopt a large trade reporting regime, to sit alongside the single sided reporting regime under Dodd-Frank, so that they had visibility into the underlying omnibus accounts.

Members also note that end user data is held at the CCP - CCPs can, and do, request further end user data from those clearing brokers who have significant positions.

2. **Adopt Single Sided Position Reporting**: Should the Commission not agree that exchange traded derivatives should be removed from the EMIR reporting regime, then we recommend such exchange traded derivatives reporting regime be amended to become an *"end-of-day"* single sided position reporting regime. Under EMIR, firms are currently required to report exchange traded derivatives at a **transaction level**. However, exchange traded derivatives are managed and valued at a **position level**.

It should be noted that:

- many CCPs and large brokers run netting cycles at the end of each business day, but not intra-day;
- brokers execute a cross and "hold" the position intraday, before allocating the trade to the relevant end customer at a later point in time; and
- unlike trades executed via a Central Limit Order Book (CLOB) (which can be reported almost immediately), the speed with which it is possible to report block trades that are executed and become binding over a telephone is inherently slower.

For these reasons, to require positions to be reported intra-day would give a misleading impression of the open interest in such positions. Intra-day reporting would also result in gross positions being reported, to the extent that such positions are not netted until the end of such business day. We therefore consider it most appropriate to report the positions that exist at the end of each trading day, once all block trades are reported to the trading venue and all give-ups/take-ups are finalised.

Using transaction data to recreate position data outside of a trading system is extremely problematic and difficult to achieve - in any event, aggregation of transactions by regulators to recreate a position is unnecessary when position data is readily available from Regulated Markets, CCPs and Clearing Brokers.

FIA Europe members appreciate and support the fact that moving to position reporting will require a different set of reporting attributes.

Figures published by ESMA illustrate that since reporting went live on 12th February 2014, around 16 billion transactions have been reported to trade repositories.

A switch to single sided position reporting would not only give regulators the information required to fulfil their mandate, but would also reduce reporting levels by billions of line items a year, thereby significantly reducing costs and operational risk.

If the Commission do adopt this proposal in lieu of excluding exchange traded derivatives from all reporting obligations under EMIR, we recommend that (i) the CCP be the reporting party for trades between the CCP and the Clearing Broker, (ii) the clearing broker be the reporting party for trades between the clearing broker and its direct clients and (iii) for each back to back contract further down the contract chain that exists between the CCP and the ultimate end user, the party nearest to the CCP be the reporting entity, as set out in the following table.

Party 1	**Party 2**	**Reporting Party**
CCP	Clearing Member	CCP
Clearing Member	Direct Client	Clearing Member
Direct Client	Indirect Client	Direct Client
Indirect Client	Indirect Client's client	Indirect Client
Etc.		

Today's "delegated reporting" regime is, in effect, single sided reporting. FIA Europe's proposal effectively seeks to mandate delegated reporting for exchange traded derivatives at a position level. Those clearing member firms who already offer a delegated reporting service for their clients inform us that there are few material costs per se in moving to single sided position reporting. The main costs relate to (i) the decommissioning of their existing delegated reporting set up and (ii) creating the hierarchy of who has the reporting obligation under single sided reporting.

Like other reporting regimes, collateral and valuations should be reported by the more sophisticated party. The reconciliation of valuation data is dealt with elsewhere in EMIR (e.g. the EMIR portfolio reconciliation provisions);

FIA Europe and its members were represented on a cross-trade association working group to develop a single-sided reporting hierarchy blueprint for exchange traded and OTC derivatives – see ISDA's response. FIA Europe members are supportive of this proposal.

3. **Single Sided Transaction Reporting**: For all other derivatives, our members consider that single sided transaction reporting is more appropriate than dual sided reporting.

   Any dispute as to the accuracy of the trade report could be reconciled through dispute and reconciliation protocols under Article 11 of EMIR.

By way of further proposals relating to reporting under EMIR, FIA Europe members recommend that:

- given the significant build out costs for corporates to implement an EMIR reporting process, the general lack of systemic importance and the weak cost/benefit analysis for the same (given they may only enter into a couple of trades a year and are not systemically important users of derivatives), the Commission to consider removing NFC- from the EMIR reporting obligation;

- notwithstanding the move to single-sided reporting / the exemption of exchange traded derivatives reporting going forward, the reconciliation of outstanding historic unmatched trades should still be completed;

- the requirement to backload the reporting of OTC derivatives transactions should be dropped – there may not be LEIs for historic counterparties;

- differences in the specified labels for and parameters of reporting fields should be harmonised internationally: they currently create unnecessary confusion, leading to perceived errors, and operational costs; and

- for exchange traded derivatives, the trading venue should be required to publicly specify the UPI applicable to each of the products capable of execution on such venue or pursuant to the rules of such venue.

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?

Yes

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

FIA Europe supports and endorses the response of the International Swaps and Derivatives Association, Inc. ("ISDA") to this question.

Question 2.5: Exchange of Collateral

Article 11(3) of EMIR mandates the bilateral exchange of collateral for OTC derivative contracts that are not centrally cleared. Article 11(15) mandates the ESAs to further define this requirement, including the levels and type of collateral and segregation arrangements required. The ESAs consulted publically on their draft proposals in the summer of 2014.

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

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

Yes

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

FIA Europe supports and endorses the response of ISDA to this question.

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?**

Yes

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

This question 2.6 is framed by reference to "OTC derivatives markets" being global in nature, but it should be noted that the exchange traded and cleared OTC derivatives markets are just as global. The following recognition / equivalence assessments are therefore of critical importance:

Extra-territorial application of EMIR Article 39

Analysis

Non-EU clearing members are required by EMIR Article 39 to offer individually segregated accounts to their clients when providing clearing services with respect to EU CCPs of which such entities are a member. As identified by ESMA in its Q&As, this requirement is incompatible with the applicable rules of some of the jurisdictions in which non-EU clearing members are located (e.g.US bankruptcy code) with the result that such entities are unable to comply with this EMIR requirement.

The industry is currently relying on an ESMA Q&A to interpret how to achieve compliance with the Article 39(7) disclosure requirements, primarily through a mechanism that involves US clearing members offering individual segregation through a European clearing member (which may or may not be affiliated).

Proposals

Article 39 provisions relating to the Omnibus Segregated Account (OSA) and Individually Segregated Account (ISA) offering should be disapplied with respect to clearing members located in any third country where conflicts of laws arise. Non EU Clearing members can still comply with the disclosure requirements of Article 38 and Article 39(7) per the guidance in the ESMA Q&A 8i.

To avoid legal uncertainties in this area, FIA Europe members recommend that the ESMA Q&A answer addressing this issue be incorporated into the level 1 text (so as to make the position legally binding).

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EMIR Article 13 recognition

Analysis

Article 13 is most important with respect to intra-group transactions and the non-cleared margin rules.

Article 13 recognition remains outstanding for ALL third country jurisdictions: the extent to which an entity is deemed to meet its EMIR obligations by complying with similar third country regimes is accordingly still not addressed in the way envisioned by Article 13.

EMIR Article 13 equivalence assessments need to be forthcoming and be granted in a timely manner for the purposes of avoiding duplicative or conflicting requirements for clearing (EMIR Article 4), reporting (EMIR Article 9), the treatment of non-financial counterparties (NFCs) (EMIR Article 10), and risk mitigation techniques for non-cleared trades, including, in due course, margin requirements (EMIR Article 11).

Article 13 determinations are particular important for the purposes of the intragroup exemption from clearing. Market participants cannot rely on the intragroup exemption for transactions in mandatorily cleared products between an EU entity and its non-EU affiliate unless the non-EU affiliate is established in a jurisdiction for which an Article 13 equivalence determination is in place.

We understand that the Commission has devised a legal mechanism that will be included in the final RTS imposing the clearing obligation for the G4 IRS, delaying the need for these determinations for a period of three years (during which time, EU entities will be able to rely on the intragroup exemption if the other criteria are met).

However, it is striking that the ESA's recent second joint consultation on the draft RTS for the margining of uncleared OTC derivative transactions did not mention the corresponding issue that arises with respect to such margining.

An Article 13 determination potentially expands the range of clearing options for cross-border transactions. For example, we can consider a transaction in a product subject to both the EU and US clearing mandates between an EU and a US counterparty at a time when an Article 25 determination has been made and some US CCPs have applied for and obtained recognition under Article 25. At that point, the counterparties are only able to clear their transactions on CCPs that are authorised in the EU and registered as DCOs in the US, or on US or non-US CCPs that are registered as DCOs and are recognised in the EU.

Proposals

Given the number of inter-affiliate OTC derivatives transactions between EU and non-EU affiliates of the global investment banks, it is critical that the Article 13 recognition process be completed for all major jurisdictions before the clearing obligation goes live for Category 1 entities.

Confirmation from the Commission is required that when EU counterparties trade with counterparties established in, or subject to the rules of, an EMIR Article 13(2) equivalent jurisdiction, the parties are permitted to mutually agree which set of equivalent rules would apply to a particular trade between them, based on considerations such as the jurisdictional nexus of the trade and any other rulesets to which the counterparties are subject.

The process for granting equivalence under EMIR Art 13 is not entirely clear. FIA Europe members request that the Commission clarifies the practical application mechanics of, and requirements for, equivalence. We encourage the Commission to work closely with regulators in third countries, as it develops plans for equivalence decisions.

It appears that a Commission equivalence decision under EMIR Article 13 would effectively mean that counterparties entering into a transaction subject to EMIR will be deemed to have fulfilled the obligations contained in EMIR Articles 4, 9, 10 and 11 where at least one of the counterparties is established in that third country. However, it is not fully clear how this principle would apply in practice to trades with counterparties established in, or subject to the rules of, an equivalent jurisdiction.

Unlike with Article 25, where the equivalence process is triggered by the submission of an application by a CCP, EMIR Article 13 does not provide any guidance with regards to the process or timeline for the delivery of equivalence decisions. As a result, FIA Europe members believe that while the Commission should seek to engage with third country regulators, it should not be a requirement for third countries to apply for a Commission equivalence determination. Further guidance on the expected timeline for Commission equivalence, equivalence under EMIR Article 13 equivalence are of equal importance.

Any assessment of equivalence for the purpose of Article 13 should follow an outcomes-based approach.

As discussed above, the legislation should make clear how Article 13 operates where an EU counterparty enters into an OTC derivative transaction acting through a branch in a non-EU jurisdiction which has been determined to be equivalent under Article 13, if the counterparty is subject to the clearing, reporting or risk mitigation rules of that non-EU jurisdiction (even if the counterparty is located in a third jurisdiction which has not been determined to be equivalent). In these circumstances, the counterparty should be able to opt to comply with the relevant rules of the jurisdiction in which the branch is located. Otherwise, the counterparty risks being subject to duplicative and conflicting EU and local rules. Similarly, Article 13 should address the situation where a non-EU counterparty incorporated in one jurisdiction enters into a transaction with an EU counterparty where the non-EU counterparty is acting through a branch in a second non-EU jurisdiction (and is subject to the rules there).

EMIR Article 25 recognition of third country CCPs

Analysis

The application of Article 25 remains outstanding for a number of third country jurisdictions, including but not limited to the USA.

The Commission's current efforts regarding the equivalence assessment of the legal and supervisory framework of third-country CCPs, which is a prerequisite for recognition of such CCPs by ESMA, is of vital importance for market participants.

The combination of a lack of third-country CCP recognition and the expiry of the transitional provisions (on 15 December 2015) related to own funds requirements for exposures to CCPs in the Capital Requirements Regulation (CRR), could severely impact European firms (EU firms) acting on a cross-border basis from both a clearing and capital requirement perspective.

From a clearing perspective:

- OTC derivatives contracts subject to an EMIR clearing obligation: EU counterparties will be unable to clear these contracts through non-EU CCPs that have not been recognised under EMIR, even if clearing via a local clearing member, on the basis that an EMIR clearing mandate can be discharged only via an EU authorised CCP or a non-EU recognised CCP. This issue is exacerbated by the frontloading requirement to the extent that the clearing mandate starts phasing in prior to an official decision on the equivalence of the non EU jurisdiction, as continuing to clear on a CCP in a region without recognition may

result in greater market disruption for those cleared trades have to be liquidated at the end of the frontloading window.

- OTC derivatives contracts not subject to that EMIR clearing obligation, which are voluntarily cleared: EU clearing members could not be direct clearing members of non-EU CCPs which have not been recognised under EMIR (Article 25 EMIR) Consequently, any clearing through such non-EU CCP would only be possible (a) where the trades are not subject to an EMIR clearing mandate and (b) are cleared via a non-EU clearing member. For third country CCPs, there is a risk of open positions that have been voluntarily cleared on such third country CCP being "trapped" at that third country CCP with no possibility of closing them out: if such CCP has its application for EMIR recognition under Article 25 rejected, EMIR does not permit firms to enter into offsetting trades to close out the current portfolio. This results in the open positions being trapped at such third country CCP.

From a capital perspective: EU Banks and investment firms would not be able to continue to apply preferential capital treatment to CCPs not recognised by ESMA as these cannot be considered qualifying CCPs (QCCPs) under the CRR in the absence of a positive recognition decision. As a result, EU banks and investment firms will incur onerous and uneconomic capital requirements if they or their consolidated non-EU subsidiaries continue to access third-country CCPs that have not yet been recognised, or have simply failed to apply for recognition.

Such concerns are problematic not only for EU firms' continued access to third-country CCPs that have applied for recognition under EMIR, but also for EU firms' access to CCPs established in other third-country jurisdictions. Indeed, in addition to the jurisdictions where CCPs have applied for recognition, consideration should also be given when it comes to equivalence decisions for jurisdictions whose CCPs may not yet have applied for recognition but are adhering to the Committee on Payments and Market Infrastructures and International Organisation of Securities Commissions' (CPMI-IOSCO) Principles for Financial Market Infrastructures (PFMIs). CCPs from these jurisdictions would have a strong incentive to apply for recognition where equivalence decisions are already in effect. Such jurisdictions, including China, Mexico, Colombia, Russia and Turkey represent important emerging markets with significant derivatives markets, particular for products such as FX and commodities and their own existing CCP infrastructure and European financial firms should be given the opportunity to participate in such markets without experiencing burdensome capital requirements which could place severe limitations on the amount of business transacted by EU firms in these jurisdictions, and in the worst case could force some firms to pull out altogether.

The current process for recognition seems to be largely driven by a third country CCP making an application. We encourage the Commission to consider proactively engaging with CCPs in countries that have not made an application for recognition.

Proposal

We consider that it is important to separate:

- the issues of recognition of a non-EU CCP under Article 25 as the basis for allowing counterparties subject to EMIR to satisfy their clearing obligation under EMIR by clearing through the non-EU CCP and for allowing non-EU CCPs to clear transactions on EU trading venues; and

- the issues of whether there are prudential reasons to restrict an EU firm being a clearing member of the non-EU CCP or whether the non-EU CCP should be treated as a QCCP for the purposes of the Capital Requirements Regulation.

The existing process under Article 25 is appropriate in relation to the first group of issues. These relate to the ability of non-EU CCPs to perform systemically important functions within the EU that would otherwise be performed by EU CCPs e.g. clearing transactions between two EU counterparties or clearing transactions on

EU trading venues.

However, the second group of issues primarily affects the ability of EU firms to participate in non-EU markets (either directly or through non-EU subsidiaries). There should be a separate, simpler process addressing these issues which is much more closely based on reliance on the compliance of the CCP with international standards and without any requirement for reciprocal recognition arrangements for EU CCPs. In particular, there should be no need for the CCP to apply for recognition for these purposes or to comply with other conditions (such as the existence of co-operation agreements). However, CCPs that are recognised under Article 25 should not need separate recognition under this procedure.

If this approach were adopted, it is likely that many of the existing applicants for recognition under Article 25 would withdraw their applications, if they were recognised under the separate procedure, as they are not seeking to be able to clear OTC derivatives subject to the EU clearing mandate or to clear for EU trading venues.

Analysis of other Article 25 issues

For the sake of completeness, there are two other specific issues relating to EMIR Article 25:

(i) Where an Article 25 equivalence determination for a jurisdiction is made shortly before the relevant clearing obligation comes into effect (e.g. Q2 2016 for G4 currencies, based on current estimates) but the relevant CCP in that jurisdiction have not yet been granted recognition by that date

It is largely within the control of the Commission and ESMA to manage the timetable appropriately so that the equivalence determination is made in good time such that ESMA can complete the recognition process. However, this may not be straightforward in all cases because, even if an Article 25 equivalence determination is in place, ESMA cannot grant recognition unless:

- ESMA has established co-operation arrangements with the relevant third country regulator (which may take time and is not entirely in the control of the Commission and ESMA); and

- The CCP is established in a third country which is considered as meeting the Anti- Money Laundering and anti-terrorism financing standards referred to in Article 25(2)(d).

On this latter point, the Council has published a list of countries which are considered to meet this standard,[30] but there are CCPs that have applied for recognition and that are based in countries not on this list, e.g. Argentina, Israel, Malaysia, New Zealand and Taiwan. However, this seems unlikely to be an issue in relation to the first two groups of mandatorily clearable products (assuming the second class is index CDS).

(ii) Where an Article 25 equivalence determination for a jurisdiction is made before the relevant clearing obligation comes into effect, but the relevant CCPs in that jurisdiction has not applied for recognition (e.g. because it does not have any EU clearing members)

Notwithstanding such CCP may not have any EU clearing members, some EU participants may wish to be able to clear through a non-EU member of that CCP. In order to ensure that such CCP is treated as a QCCP under CRR, it would need to have received recognition under EMIR, so as to ensure that the regulatory capital costs applicable to the EU participant with respect to the clearing derivatives on such CCP do not render such clearing uneconomic. This again seems unlikely to be material in relation to the first two groups of mandatorily clearing products.

[30] http://ec.europa.eu/internal_market/company/docs/financial-crime/3rd-country-equivalence-list_en.pdf

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Proposals with respect to such other Article 25 issues

It is critical that the Article 25 recognition process be completed for all major jurisdictions and CCPs located in third countries ahead of the earliest date of the entry into effect of the frontloading obligation applicable to G-4 Rates derivatives or 15 December 2015 (the CRR deadline), to avoid a fragmentation of global markets.

Delegated Regulation (EU) No. 285/2014 regarding RTS on direct, substantial and foreseeable effect of contracts within the Union

Analysis

The RTS can be very difficult to interpret. In particular, the drafting seems to mix up the difference between:

(i) guaranteed payments (i.e. all payment flows due under OTC derivatives contracts);

(ii) notional amounts (the notional amount of OTC derivatives contracts by reference to which actual payments may be calculated); and

(iii) the current exposure under OTC derivatives contracts (the close out value).

Article 2 sets two tests based on the "the guarantee", both of which must be satisfied to cause the OTC derivatives contracts to have a direct, substantial and foreseeable effect within the EU.

Article 2.1 (a) requires that there is a guarantee in relation to OTC derivatives contracts with an aggregate notional amount of at least Euro 8 billion. This suggests that, so long as an entity manages its guaranteed OTC derivatives contracts so as to stay below the Euro 8 billion notional amount, it should avoid being drawn into EMIR simply due to the existence of the guarantee.

However, the subsequent wording in article 2 raises some questions as to whether the notional amount is the only relevant number. In article 2.1 (b), "it" is tested by reference to the current exposure on all derivatives of the guarantor. These current exposures are the mark to market values owed to the guarantor by out of the money counterparties that could be lost in a default of the counterparty. The test in (b) is therefore (somewhat illogically) comparing a measure of the guarantor's exposure on a particular guarantee to the aggregate amounts that the guarantor could lose if its out of the money counterparties default. It is not clear whether the "it" that must be at least equal to 5 per cent of current exposures is (i) the aggregate guaranteed payments under the swaps with a notional amount of at least 8 billion (ii) the notional amount of such swaps or (iii) the current exposure under those guaranteed swaps.

Proposals

FIA Europe members request that the intention of these provisions be clarified through amending the provisions in the RTS.

Transparency

More transparency is needed with respect to third country equivalence processes and the process itself must be completed in sufficient time to enable industry to rely on the level 1 equivalence processes in the way intended by legislators – this is not possible if material equivalence assessments remain outstanding at the point in time that material EMIR obligations go-live.

Deferral mechanisms

If implementation deadlines for the recognition of third countries legislation are not capable of being met in practice, our members consider that it would be useful for the Commission / ESMA to have additional flexibility to address how a delay in application of the relevant rule may be achieved, so as to enable industry to avail themselves of the intended level 1 mitigations relating to cross-border regulatory conflicts and equivalence.

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

Yes

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

FIA Europe's affiliate, FIA Global, is planning to set out specific recommendations on CCP margin later this year for submission to CPMI-IOSCO in the context of their ongoing work around CCP margin. We would be pleased to discuss the detail of those recommendations with the European Commission upon finalisation (which finalisation will occur the closing date of this consultation).

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[31], international regulators[32] and the public[33] have the envisaged access to data reported to trade repositories[34]?

Yes

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

Access by NCAs: For reasons that are not clear to us, the most recent data accessible to NCAs is often more than three months old. NCAs need more real time access to data if they are to achieve their market surveillance objectives. We believe that ESMA's latest project in this area will go some way to alleviating this issue.

Access by the third country regulators: Given the global nature of the derivatives market, it is essential that third-country regulators have access to TR data direct from the TRs themselves, without limitation. An obligation of such disclosure should be introduced into EMIR itself or relevant regulations under EMIR, in order for such disclosures then to be required by law throughout the union, and hence automatically permissible under the Data Protection Directive and national privacy laws.

[31] RTS 151/2013, Article 2(4) to 2(11) (Data access by relevant authorities)
[32] RTS 151/2013, Articles 2 (Data access by relevant authorities) and 3 (Third country authorities)
[33] RTS 151/2013, Article 1(2) (Publication of aggregate data)
[34] EMIR Article 9 (Reporting), RTS 148/2013 (Minimum details of the data to be reported to trade repositories) and RTS 151/2013 (Data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data)

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The principal obstacle is reciprocity. Currently, Article 76 allows third countries without a TR easy access to data in EU TRs. In contrast, third countries that have their own TR can only access EU data if there is a binding international treaty in place and subject to an equivalence determination (Article 75).

Question 2.8: Requirements for CCPs

Titles IV[35] and V[36] of EMIR set out detailed and uniform prudential and business conduct requirements for all CCPs operating in the Union. CCPs operating prior to EMIR's entry into force are required to obtain authorisation in accordance with the new requirements of EMIR, through the EU supervisory college process.

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

Yes.

Please note that FIA Europe members believe this question should also address *Clearing Members'* ability to meet the requirements under Articles 38 and 39 of EMIR.

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

Conflict with national member state insolvency laws: EMIR recital 64 provides that the requirements in EMIR on the segregation and portability of clients' positions and assets should prevail over any conflicting laws, regulations and administrative provisions of Member States that prevent the parties from fulfilling them.

However, it is unclear whether EMIR actually overrides national Member State insolvency laws. Some member states have implemented changes to insolvency laws to implement EMIR fully, notably the UK and Germany. Other countries have amended their legislation only to protect arrangements involving national CCPs (e.g. France and Italy) and others have done nothing, relying on interpretations of EMIR recitals but having conflicting national insolvency laws (e.g. Netherlands, Belgium, Luxembourg). Some of these member states are important venues for derivatives clearing, being the place of business for some CCPs and many clearing members and the location for the holding collateral through central securities depositories.

Some member states' regulators whose legislators have not addressed insolvency issues have raised enforcement and compliance issues with CCPs and their clearing members; this seems rather inequitable, given that these are matters for the legislature and regulators to resolve.

The UK has amended Part VII of its Companies Act to align UK insolvency laws with the intent of EMIR, but we note the limitations of this approach are that such amendment only operates to protect payments to a client where the parties in the chain are all located in England or Wales. Germany has made similar changes to its domestic legislation. In practice, most indirect clearing facilities will involve parties in different jurisdictions. More broadly, it remains subject to debate whether European Union legislation is capable, under the EU treaties, of overriding member state insolvency laws.

No over-ride to property laws: EMIR portability provisions should also mandatorily over-ride property laws. The bankruptcy trustee of MF Global US asserted that it owned property rights in proprietary account margin that had been transferred to various CCPs to cover proprietary account positions of its affiliated clearing member, MF Global UK and that CCPs had acted contrary to those rights in applying the margin against

[35] EMIR Articles 26 to 50 (Requirements for CCPs), as supplemented by RTS 152/2013 (Capital requirements for central counterparties) and RTS 153/2013 (Requirements for central counterparties)
[36] EMIR Articles 51 to 54 (Interoperability arrangements)

proprietary account liabilities or porting. The possibility of such challenges being successful and EMIR's acquiescence in their existence may mean that some European CCPs are reluctant to engage in porting.

Client elections of segregation models: FIA Europe members recommend that EMIR Article 39(5) be amended to specify a maximum time by which clients of clearing members must provide their choice of level of segregation in writing – whilst the views of our member differ as to the appropriate duration of such period, 90 calendar days would broadly be in line with members' views. If, despite the clearing member having used reasonable endeavours to obtain the same, no written response is provided by the client to the clearing member within that 90 calendar day period, they should be deemed to have opted for the existing account structure through which their trades are cleared at that time.

Proposals

FIA Europe members propose the following drafting amendments to EMIR to address the above issues with respect to insolvency and property laws:

EMIR Recital (64) should be amended as follows:

"EMIR Recital (64)*: Clients of clearing members that clear their OTC derivative contracts with CCPs should be granted a high level of protection. The actual level of protection depends on the level of segregation that those clients choose. Intermediaries should segregate their assets from those of their clients. For this reason, CCPs should keep updated and easily identifiable records, in order to facilitate the transfer of positions and assets of a defaulting clearing member's clients to a solvent clearing member or, as the case may be, the orderly liquidation of the clients' positions and the return of excess collateral to the clients. The requirements laid down in this Regulation on the segregation and portability of clients' positions and assets should therefore prevail over any conflicting laws, regulations and administrative provisions of the Member States that prevent the parties from fulfilling them****, including insolvency laws or property laws***."

A new paragraph 11 should be added to Article 39:

"***11. The requirements laid down in this Article shall prevail over any conflicting laws, regulations or administrative provisions of any Member State that prevent the parties from fulfilling them, including insolvency laws or property laws. No court of a Member State shall recognise a third country governmental or court order that is contrary to the requirements of this Article 39. Articles 39(5) and 39(6) shall not apply if either the clearing member or the client is not established in the Union and the relevant third country law does not permit the same level of segregation to be offered.***"

A new paragraph 8 should be added to Article 48:

"***8. The requirements laid down in this Article shall prevail over any conflicting laws, regulations or administrative provisions of any Member State that prevent the parties from fulfilling them, including insolvency laws or property laws. No court of a Member State shall recognise a third country governmental or court order that is contrary to the requirements of this Article 48. Articles 48(5), 48(6) and 48(7) shall not apply if either the clearing member or the client is not established in the Union and the relevant third country law does not permit the same level of segregation to be offered.***"

Commission Delegated Regulation (EU) No 149/2013 should be amended by the addition of the following new Article 2(3):

"**(3)** ***The requirements laid down in this Chapter II shall prevail over any conflicting laws, regulations or administrative provisions of any Member State that prevent the parties from fulfilling them, including insolvency laws or property laws. No court of a Member State shall recognise a third country governmental or court order that is contrary to the requirements of this Chapter II. Articles 3(1), 4(5), 4(5) and 5(2) shall***

not apply if either the clearing member or the client is not established in the Union and the relevant third country law does not permit the same level of segregation to be offered."

(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?**

No

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

FIA Europe will provide its detailed proposals later this year – a global approach is required

Whilst FIA Europe members consider that the following changes would enhance certainty around the operations of CCPs and the obligations of their clearing members, the Commission should seek to bring any changes into effect through the appropriate international forum, e.g. CPMI-IOSCO. The taking of any unilateral action to amend CCP risk management processes beyond international commitments could further exacerbate the lack of recognition of third country jurisdictions and CCPs for the purposes of equivalence assessments.

FIA Europe members have detailed views on the following topics, but the length and timing of this consultation has not provided sufficient time for those detailed proposals to be agreed across the membership.

- CCP governance and transparency;
- CCP recovery and resolution;
- Margining by CCPs (including stress-testing);
- CCP "skin-in-the-game";
- Allocation of non-default losses incurred by CCPs;
- Replenishment of the default fund and requirements for a minimum funded default fund; and
- Adequacy of financial resourses.

In particular, we note that EMIR does not sufficiently address:

- the amount of capital that a CCP is required to contribute to its default waterfall for each product that it clears: although EMIR Article 45, as supplemented by Article 35(2) of Commission Delegated Regulation (EU) No 153/2013, stipulates that a minimum of 25% of a CCP's regulatory capital must be dedicated to the default waterfall and Article 35(3) of Commission Delegated Regulation (EU) No 153/2013 requires allocation of its dedicated resources among the product segments that it clears, the prescribed size of CCP "skin-in-the-game" required by EMIR is not sufficient. As evidenced by various industry papers published on the subject[37], further thinking is required as to its appropriate sizing.
- the extent to, and circumstances in, which clearing members and/or end-users should bear non-default losses incurred by a CCP: FIA Global's CCP Risk Position Paper[38] commented that non-default losses should be absorbed by CCP capital and not passed on to members; and
- the rules relating to the replenishment of the CCP default fund require consistency in timing for replenishment of CCP resources and member contributions to the default fund, in both a default

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[37] **JPM**: http://www.jpmorganchase.com/corporate/About-JPMC/document/resolution-plan-ccps.pdf
Blackrock: http://www.blackrock.com/corporate/en-fr/literature/whitepaper/viewpoint-ccp-tbtf-april-2014.pdf
PIMCO: http://europe.pimco.com/EN/Insights/Pages/Setting-Global-Standards-for-Central-Clearinghouses-.aspx
Letter from Buy-side Firms: http://www.blackrock.com/corporate/en-us/literature/publication/buyside-ceo-letter-on-ccp-rr.pdf
Citi: http://www.risk.net/risk-magazine/feature/2419321/ccps-need-thicker-skins-citi-analysis?utm_medium=email&utm_term=&utm_con-tent=CCPs%20need%20thicker%20skins%20-%20Citi%20analysis&utm_campaign=RN.Risk_Management.Cat_TS.EU.A.U&utm_source=RN.DCM.Editors_Up-dates&im_mfcid=9520872
Letter from buy-side firms: http://www.blackrock.com/corporate.en-us-literature-publication.buyside-ceo-letter-on-ccp-rr.pdf
[38] https://fia.org/articles/fia-global-issues-recommendations-central-clearing-risks

scenario and a business as usual scenario. Additional guidance is required with respect to the requirement to have a minimum default fund funded at all times (EMIR Article 42(1)), as CCPs interpret this requirement differently, leading to a large member default fund liability. We encourage the Commission to consider the following: how often should the default fund be replenished? How quickly? By how much? How many times can replenishment be required over a given period of time? There are inconsistent answers in CCPs' rulebooks on these issues today.

FIA Europe proposes to discuss its detailed proposals with the Commission once they have been finalised later this year by its affiliate, FIA Global, and would be pleased to discuss the details of those proposals.

Governance: We note that the background of the individuals comprising each CCP's risk committee vary widely: sometimes they are risk officers, sometimes compliance officers or from other backgrounds. We encourage the Commission and NCAs to ensure that appropriate attendees comprise the CCP's risk committee. The role of the Risk Committee representative should be to provide independent opinion on risk management strategy and impact on market integrity. Confidentiality agreements to which Risk Committee members are subject should be adapted to allow them to seek expertise within their member firm (subject to such fellow employees within the member firm also being subject to corresponding confidentiality obligations).

The following responses represent the views of the clearing members of CCPs that are members of FIA Europe, as recently set out in FIA Global's CCP Risk Position Paper[39]:

Enhancing participants' ability to assess CCP risk through consistent and transparent CCP disclosures

Analysis

To assess CCP risk, clearing members and their clients require consistent and transparent information about CCP procedures, rules risk methodologies and investment policies. CCPs must provide transparency and certainty with respect to their assessment and management of risk both before and after a participant default.

Proposals

Our members that are clearing members recommend that CCPs adopt consistent rulebook structures that articulate key concepts with greater clarity.

Reducing conflicts of interest, aligning incentives and improving risk management through enhanced CCP governance

Analysis

Enhanced CCP governance will act to reduce conflicts of interest and better allow for risk assumption and management for both CCPs and participants. In the event of a capital loss, participants may have more at stake than the CCP themselves.

Proposals

With respect to non-default losses, there should be greater transparency around the first tranche of non-default loss-specific losses that the CCPs contribute.

Our members that are clearing members consider that they should have meaningful input into CCP governance decisions, such as a CCP's level of risk assumption and the clearing of complex products (e.g. swaptions). Moreover, there must be clear procedures and consequences for a CCP that does not accept such

[39] https://fia.org/articles/fia-global-issues-recommendations-central-clearing-risks

input. We encourage regulators to collaborate with CCPs and participants to determine appropriate sizing for a CCP's skin in the game so that it is aligned with participants' interests.

(c) **Are there any requirements for CCPs[40] which would benefit from further precision in order to achieve a more consistent application by authorities across the Union?**

Yes.

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

See the comments above in response to question 1.1, regarding access to central bank liquidity.

Question 2.9: Requirements for Trade Repositories

Titles VI[41] and VII[42] 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[43]. 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?

Yes

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

Inter-Trade Repositories matching rates for exchange traded derivatives: Inter-Trade Repositories matching rates for exchange-traded derivatives are below 1%: over 1 billion ETD trades remain unreconciled between TRs.

[40] Titles IV and V of EMIR, RTS 152/2013 (Capital requirements for CCPs), RTS 153/2013 (requirements for CCPs) and ITS 1249/2012 (Format of records to be maintained by central counterparties)
[41] EMIR Articles 55 to 77 (Registration and supervision of trade repositories), as supplemented by RTS 150/2013 (Details of the application for registration as a trade repository) and ITS 1248/2012 (Format of applications for registration of trade repositories)
[42] EMIR Articles 78 to 82 (Requirements for trade repositories), as supplemented by RTS 151/2013 (Data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data)
[43] RTS 150/2013 (Details of the application for registration as a trade repository)

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?

Yes

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

ESMA's public register of authorised CCPs

ESMA has introduced two new categories of cleared instruments on its website register of CCPs[44], namely "derivatives that are not financial instruments" and "assets that are not financial instruments". This has created confusion, because these categories are not available to CCPs at the point of EMIR authorisation and CCPs who clear similar products variously either have or do not have authorisation for these categories. A number of queries arise as a result, e.g., does any CCP that clears products traded in the final week prior to expiry need these? Do they only cover spots and if so, of what duration? What is the distinction between "assets" and "derivatives"? Which EMIR provisions affecting clearing members (e.g. segregation, disclosure requirements etc.) apply to these products? FIA Europe request that the answer to each of these queries be clarified.

[44] See http://www.esma.europa.eu/system/files/ccps_authorised_under_emir.pdf