SVERIGES RIKSBANK
SE-103 37 Stockholm
(Brunkebergstorg 11)

Tel +46 8 787 00 00
Fax +46 8 21 05 31
registratorn@riksbank.se
www.riksbank.se

DNR 2015-00550-AFS

ESTABLISHED 1668

Public Consultation on Regulation (EU) 648/2012 on OTC-derivatives, central counterparties and trade repositories

Sveriges Riksbank welcomes the public consultation on Regulation (EU) 648/2012 on OTC-derivatives, central counterparties and trade repositories (EMIR) and the opportunity to comment on the consultation document. An important milestone in implementing the G20 commitment in the EU was reached with EMIR. The Riksbank's experience, not least from participation in CCP colleges, shows that there are issues that need to be addressed within the context of EMIR and its technical standards.
However, international standard setting groups as FSB, BCBS, CPMI and IOSCO are undertaking significant work on international standardisation to foster international convergence. Therefore, all adjustments to EMIR should bear in mind the ongoing international work. It is therefore of utmost importance that the EMIR review is carried out while ensuring a consistent framework internationally and avoiding inconsistencies in a globally active market that could trigger competitive distortions and level playing field issues.

Question 1.1: CCP Liquidity
At present, EMIR refers to central bank facilities primarily in relation to deposits of cash and settlement. It remains for each central bank to determine itself which facilities it wishes to offer to CCPs in accordance with its mandate. In Sveriges Riksbank's view the current legal framework is sufficient to ensure appropriate CCP access to central bank facilities while at the same time respecting the principle of central bank independence established in Article 130 of the Treaty on the Functioning of the European Union (TFEU). Consequently, Sveriges Riksbank sees no compelling reasons to introduce any new measures in EMIR regarding CCPs access to central bank facilities, including any provisions that an authorisation granted in accordance with Article 8 of Directive 2013/36 should be a prerequisite for CCPs' access to such facilities.

- Any measures introduced regarding central bank facilities must contain consistency with Article 130 TFEU and thus adhere to the principle of central bank independence when they perform their statutory tasks. This principle implies that central banks have an inalienable right to provide access to central bank facilities, including access to central bank credit, at their own discretion, as recognised by Article 85 of EMIR. Central banks must also be free to decide whether or not to provide CCPs with access to central bank facilities, and to define the eligibility conditions these CCPs would have to meet in order to benefit from such facilities, in accordance with their mandates and in pursuance of their statutory tasks.

  Without prejudice to the above mentioned legal aspect of central bank independence, the introduction of requirements in EMIR that would give CCPs an automatic right to central bank liquidity would create moral hazard on an extraordinary scale, rather than more robust liquidity risk management of CCPs authorised in the EU. If such an automatic right would be introduced, then central banks would also need to be given some authority over CCPs, i.e. supervisory or regulatory powers to a certain extent.
  In addition, measures regarding CCP access to central bank facilities would also have to take into account that central banks need to control the financial risk for themselves and ultimately for their stakeholders and their currency.

  Sveriges Riksbank agrees that the EU CCP liquidity risk management can be enhanced. Instead of granting CCPs access to central bank facilities, national competent authorities should continue to examine and, where appropriate, seek improvements with respect to CCPs liquidity risk management. It should be noted that such work is already ongoing regarding stress testing (in the context of relevant CPMI-IOSCO work) and recovery and resolution (in the context of relevant EU legislation, CPMI-IOSCO and FSB work).

  Article 85 of EMIR states that the input delivered by the ESCB to the Commission should take into account any result of ongoing work between central banks at Union and international level. Since the entry into force of the Regulation, no guidance has been issued at Union or international level on the possible requirements for CCP access to central bank facilities. To the contrary, it is acknowledged that 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.

Question 1.3: CCP Colleges

a.) Functioning of supervisory colleges

As a member of several colleges, Sveriges Riksbank's experience is that they work well in general and that the participating authorities exhibit a cooperative spirit. For participating authorities the colleges are important to gain insight into the operations of CCPs that provide services in their Member States and thus are of importance for financial stability in the relevant Member State. Colleges also provide relevant authorities with an opportunity to provide input to the supervisory process.

However, the involvement and engagement of national authorities differ, as some of them are more focused and dedicated to the work carried out in the colleges than

others. Not all authorities wish to participate, some of them having very limited resources to do so. The mandatory participation in colleges according to Article 18 of EMIR might thus merit a review.

Another important issue is the level playing field. CCPs are companies that support financial stability but they are also subject to competition. It is therefore imperative that all of them have to live up to the same requirements also in practice. The supervisory colleges in general and ESMA in particular, have an important role and task in ensuring that CCPs are treated in a consistent manner.

b.) Issues identified during the authorisation process

Sveriges Riksbank would first like to acknowledge that cooperation in the colleges has in general been good also when it comes to the authorisation process and that the competent authorities have had an enormous task to perform. The colleges have not been operational for so long and although they mostly work well and smoothly, it is important that they also work in a consistent manner, so that issues dealt with in different colleges are treated consistently throughout all colleges. The Riksbank's experience shows that this has not always been the case. We believe ESMA has an important role here to foster supervisory convergence and consistent supervisory practices as well as ensuring uniform procedures.

One particular issue that has arisen during the authorisation process is the level of details in the application which differed between CCPs. According to Article 19.1 second subparagraph EMIR, the college has to reach a joint opinion on the basis of the risk assessment report prepared by the competent authority of the CCP. If the application is not sufficiently detailed, then the subsequent report cannot be so either. This complicates both the college's possibility to make consistent assessments and the possibility for the college members to fulfill their tasks according to EMIR.

EMIR has very strict timeframes for the college to reach a joint opinion, thus creating a challenge for college members. Clear rules on the content, the format and the level of details of the risk assessment report would enhance the process to make an own assessment and reach a joint opinion. Should the risk assessment report not fulfill the requirements, a way out should be offered to college members, e.g. to make it possible for them to refrain from voting. If no joint opinion is reached because college members refrain from voting, the competent authority should be required to produce a new and more granular report, instead of the college having to deny authorisation. On the basis of gathered experience at Sveriges Riksbank, we propose the Commission to review the authorisation process in order to make it both clearer and smoother.

EMIR has a clear timing aspect for the authorisation process, which has its pros and cons. A rule should be introduced, making it possible for competent authorities to unravel its assessment according to Article 17.3 EMIR (that an application is complete). This might be the case when new information is provided which reveals that the competent authority has misjudged the completeness of the application.

Questions 1.4 Procyclicality and 1.5: CCP Margins and Collateral

Given the international policy work that has been initiated in several areas relevant for CCP risk management (including, inter alia, CPMI-IOSCO work on assessing stress testing practices and margin requirements across CCPs) , Sveriges Riksbank is of the firm opinion that the EMIR review is carried out while ensuring a consistent framework internationally and avoiding inconsistencies in a globally active market that could trigger competitive distortions and level playing field issues.

Definitions and Scope

The definition in Article 1.5(b) EMIR of public sector entities is very unclear. Most public sector entities are neither owned nor have explicit guarantees from central governments. The definition itself as well as its purpose must be clarified.

Sveriges Riksbank would suggest a minor change to the definition of CCPs in Article 2.1 EMIR. *Contracts* should be replaced by financial instruments to better reflect the scope of EMIR, since all CCPs and not just those clearing derivatives are encompassed by the Regulation.

Non-financial counterparties in Article 1(9) EMIR are defined as undertakings established in the Union other than the entities referred to in points (1) and (8). The Commission has provided a clarification in its frequently asked questions, stating that the term undertaking, in line with decisions from the Court of Justice in the context of competition law, would refer to activities instead of entities. The term undertaking would thus include entities, regardless of their legal status, performing economic activities in the market. This means, individuals carrying out an economic activity are also considered to be undertakings and hence subject to EMIR even though they do not impact on systemic risk. Since the Regulation might prove very burdensome for smaller non-financials, the definition should be reviewed and due consideration should be given as to which non-financials to encompass. Not all of them should by default be subject to EMIR.

Clearing Obligations

Sveriges Riksbank is a strong advocate of mandatory clearing of OTC-derivatives that fulfil the conditions for the clearing obligation. Mandatory clearing is an important contributing factor to reducing systemic risk. However, mandatory use of central counterparties for contracts which do not fulfil the criteria for mandatory clearing can unintendedly lead to CCPs' exposures to potentially illiquid contracts /or significant changes in margin requirements, possibly with pro-cyclical implications. It is imperative that the clearing obligation is terminated for contracts that no longer fulfil the conditions for that.

Today, EMIR does not contain rules for the termination of mandatory clearing. From a financial stability point of view, such a requirement is also important. Sveriges Riksbank proposes the introduction of a rule stipulating the conditions under which the clearing obligation can be terminated.

- In addition to that, ESMA should also be tasked to regularly review the appropriateness of the identified classes of OTC-derivatives that are subject to the clearing obligation.

Requirements for CCPs

As Sveriges Riksbank stated in its answers to questions 1.4 and 1.5, the Commission should await the outcome of the current international policy work before proposing any significant changes to title IV of EMIR. However, there are some provisions which can be addressed during the review process.

According to Article 21.1 and 2 EMIR, the competent authority shall review the arrangements, strategies, processes and mechanisms implemented by CCPs to comply with EMIR and evaluate the risks to which CCPs are, or might be, exposed. The review and evaluation shall cover all the requirements on CCPs laid down in EMIR. In our view, it is imperative that reviews and evaluations are done in a consistent manner throughout the EU. Against this background, a minimum set of rules specifying the format and content as well as the level of details to be included in the review and evaluation, is required. This could be achieved by ESMA issuing guidelines as laid down in Article 16 Regulation 1095/2010 (ESMA-Regulation).

According to Article 1.4 (a) EMIR, national debt offices are exempted from EMIR. However, national debt offices that wish to clear transactions centrally, do become participants of CCPs. National law and statutes may not allow them to contribute to the default fund of a CCP. However, title IV of EMIR does not enable CCPs to make an exemption for national debt offices or other exempted entities contribution to the default fund. A practical consequence of the exemption in Article 1.4 EMIR should be that the exempted entities are also exempted from other requirements of EMIR, such as contributions to default funds of CCPs in which they might wish to participate.

The default fund is one of the CCPs lines of defence, thus being an important component of its risk management and the default waterfall. Today, there are no rules specifying the time period to replenish the default fund of a CCP should it be exhausted. In order to enhance transparency, the resilience of CCPs and create predictability for clearing members, Sveriges Riksbank suggests that clear rules for a the time period permitted for replenishing the default fund should be considered in the review of EMIR.

As a member of each supervisory college, ESMA is an integral part of the authorisation process of each CCP. ESMA however has no voting rights. Consequently, it seems inadequate to require a validation from ESMA when a CCP is adopting significant changes to its models and parameters according to Article 49.1 EMIR. In line with its role and task to build consistent supervisory practice, ESMA should be *consulted* on all validation matters. Also the concept of what constitutes a significant change must be clarified, as there seems to be a great dissension in the colleges about that.