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FRANCE

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ESMA Consultation Paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories

Dear Sir or Madam,

BVI¹ appreciates the opportunity to present its views on ESMA's draft Technical Standards concerning the regulation on OTC Derivatives, CCPs and Trade Repositories.

BVI supports the proposal of the EU-Commission to regulate the derivative market infrastructures (e.g. central counterparty (CCP) and trade repositories (TR).

Implementation of CCPs with the buy-side needs careful planning and should not to be rushed. All market participants need sufficient time to prepare. Our members need 6 to 12 months to set up policies and procedures for using a CCP following resolution of the major legal and operational issues.

¹ BVI Bundesverband Investment and Asset Management represents the interests of the German investment fund and asset management industry. Its 82 members currently handle assets of EUR 1.8 trillion in both investment funds and mandates. BVI's members directly and indirectly manage the capital of 50 million private clients in 21 million households. (BVI's ID number in the EU register of interest representatives is 96816064173-47). For more information, please visit www.bvi.de.

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In order to achieve a solid level of investor protection in the OTC derivative market we think that ESMA has to take into consideration the following points when they draft the technical standards:

- Full individual and omnibus segregation to ensure that a client's assets and positions are protected in the case of the default of a clearing member.
- CCPs should have transparent arrangements to facilitate portability of contracts (both in clearing member default and at a client's choice when no default has occurred).
- A national competent authority should only approve a new class of OTC products as clearing eligible once a year, at a maximum twice a year. Our members need sufficient time in order to set up the legal arrangements with all market participants and to connect to the relevant central counterparty.

We would like to make the following specific comments:

Q1: In your views, how should ESMA specify contracts that are considered to have a direct, substantial and foreseeable effect within the EU?

BVI believes that the issue could arise under the EMIR and the Dodd Frank regime. The conclusion of an OTC derivative contract between the counterparties and the application of the appropriate regulation regime could be different from the law used for the underlying asset.

Examples:

- Single name CDS BMW; Plain Vanilla Interest Rate Swap: Underlying is in the scope of EMIR, counterparties of the OTC derivatives could be located in the EMIR (e.g. Deutsche Bank) or outside the EMIR region (e.g. Goldman Sachs International; Affiliate of a US bank with UK law)
- CD index contract of US CDS index: Underlyings refer to US underlyings. Counterparties of such OTC products could be US counterparties (e.g. US banks or Affiliates with a location in the EMIR region) or counterparties located in the EMIR region.



We think that ESMA should bear in mind that OTC contracts have to incorporate the regulation regime of the underlying asset as the regulation requirements of the appropriated counterparties of the OTC derivative transactions. We feel that EMIR/ESMA has to recognize equivalent regimes. If a trade is executed, cleared and reported under EMIR there should be no obligation to adhere to the Dodd Frank regime. Therefore we believe that the clearing obligation under EMIR for centrally cleared OTC contracts with non-EU underlyings and between third country entities should be fulfilled if the clearing takes place by recognized third country CCPs (e.g. CME in the US). Non centrally cleared OTC contracts with non EU underlyings should be in the scope of EMIR if the third country entities fulfill the requirements made by EMIR in regards to article 8 (e.g. daily valuation).

Q2: In your views, how should ESMA specify cases where it is necessary or appropriate to prevent the evasion of any provision of EMIR for contracts entered into between counterparties located in a third country?

Please see our answer to question 1. We think that the conflict of different regulation regimes (e.g. EMIR and Dodd Frank) for transactions with European underlyings but with counterparties located outside Europe needs to be avoided. As soon as OTC derivative transactions use overlapping regulatory regimes, a clear conflict resolution procedure needs to be in place in order to have legal certainty for all market participants.

Q3: In your views, what should be the characteristics of these indirect contractual arrangements?

We agree with ESMA positions that the indirect contractual arrangements have to include segregation, portability and default procedures in order to avoid an increase in the counterparty exposure against the clearing members.

According to investment fund law restrictions, German investment fund management companies are obliged to separate assets and positions belonging to different investment funds. Therefore we demand that CCPs and Clearing Members offer their indirect members (e.g. investment fund management companies) also in the indirect contractual arrangements a



specific level of segregation, either in the form as individual client/fund segregation or as omnibus client segregation.

We think that the indirect contractual arrangements also have to cover in the area of collateral management a three party agreement between the investment fund management company, the custodian and a specialized collateral manager. The three party agreements could enable the collateral manager to provide other highly liquid financial instruments (e.g. government bonds and equities) rather than cash to the clearing members in cases when the custodian is not able to deliver the collateral in the timeframe set by the CCPs.

BVI believes that CCPs will not be able to provide individual segregated accounts in a sufficient number for the investment funds in time as that could hamper investment fund management companies from entering into OTC derivatives that are clearing eligible. We do not know whether or not ESMA will consider the CCPs ability to offer a sufficient number of individual segregated accounts before determining any class of OTC derivative as clearing eligible. Therefore we feel that there should be an alternative to clear OTC derivatives that could not be cleared by a CCP due to the mentioned segregation requirements. In light of that, we would appreciate if ESMA could determine requirements for indirect contractual arrangements, which might be fulfilled by all market participants.

Q4: What are your views on the required information? Do you have specific recommendations of specific information useful for any of the criteria? Would you recommend considering other information?

BVI considers the definition and the determination of the clearing obligation procedure as one of the most relevant questions. BVI believes that ESMA should focus its work on a detailed description and definition of the relevant class of OTC derivatives as clearing eligible. We think that a detailed definition of the relevant class of clearing eligible OTC derivative will enhance legal certainty to all market participants.

Our members are of the opinion that the information provided by the competent authority to ESMA when it authorizes a CCP to clear a class of derivative have to include a description about the capability of a central counterparty to provide a detailed level of segregation on assets and



positions for the indirect clearing members (e.g. investment fund management companies).

We think that ESMA should obtain all information which are relevant if CCPs offer clearing for a class of OTC derivatives. The relevant information should also be provided to market participants (e.g. investment fund management companies) and should include at least information on the level of segregation, e.g. a detailed description on individual segregated accounts.

We think that all relevant information obtained by ESMA to fulfill their duties of the clearing obligation procedure should only be used for these purposes. We believe that the national competent authority or ESMA should not be allowed to publish individual information on OTC contracts, positions etc. for counterparties as this could reveal investment strategies used by investment fund managers

BVI feels that the information on page 7, para 15 to 17 provided by the competent authority to ESMA should also include statistical details on the proportion by the Sell Side, Buy Side and non financial entities in regards to aggregated transactions, positions and volume.

In Germany, investment fund management companies, managing numerous investment funds established in accordance with contract law (article 1 para. 3 of Directive 2009/65/EC), are requested by the national supervisory authority to segregate assets belonging to different investment funds by way of individual segregation. Without a clarification by ESMA that a segregation of the assets of different investment funds can also take place via omnibus accounts, some investment funds are already discriminated because individual segregation seems to be more expensive than omnibus segregation.

The discrimination of those investment funds subject to a stricter national supervision becomes even worse if ESMA determines a class of OTC derivatives as clearing eligible for which the relevant CCPs are unable to provide a sufficient number of individual segregated accounts prior to the validation of the clearing obligation.

We think that ESMA either has to clarify that it is sufficient that an omnibus segregation fulfills the requirements under article 8 para. 1 of the Directive 2010/43/EC, or it shall ensure that it will only determine a class of OTC



derivatives as clearing eligible if the relevant CCP is able to provide a sufficient number of individual segregated accounts in time.

Q5: For a reasonable assessment by ESMA on the basis of the information provided in the notification, what period of time should historical data cover?

We think that ESMA should use in its assessment historical data covering a sufficient time, at a minimum a three year term. We believe that a main factor might be the volume of an OTC instrument.

Q6: What are your views on the review process following a negative assessment?

BVI supports the review process. However, we believe that the principal framework of a negative assessment of the eligibility for the clearing obligation should be clearly defined, e.g. one parameter might be the potential volume of the specific OTC transaction. If the competent authority has made a negative assessment regarding the clearing obligation, then the CCP should only be allowed to submit a new request for the clearing eligibility of the OTC contract after one year.

We think that the authorization of a new CCP by a competent authority should be made only once a year, at a maximum twice a year, as the investment fund management companies need sufficient time in order to prepare the contractual arrangements and to build up connection to the new central counterparty.

We think that to the extent that an application is reconsidered following a resubmission, the new application should be treated as a new submission and the entire review process should start again including a public consultation.

Q7: What are your views regarding the specifications for assessing standardisation, volume and liquidity, availability of pricing information?

BVI agrees with ESMA's assessments. However, we believe that when identifying OTC derivative contracts respectively a class of OTC derivatives, ESMA should include in its assessment the kind of product related



provisions applicable to the specific OTC derivatives. Market participants agree on product related provisions, such as the so-called ISDA Equity Derivatives Definitions or the Annex for Equity Derivatives Transactions issued by the Association of German Banks.

We think that the contractual standardization of OTC products should not only refer to the ISDA master agreements. Market participants use different master agreements as the language of the documentation and the governing laws (e.g. why should two market participants both located in Germany agree on derivatives in English subject to UK or even US laws?) are different. Therefore we believe that ESMA has to incorporate in their assessment of the contractual standardization different national master agreements. CCPs should be obliged to accept different master agreements (e.g. Deutscher Rahmenvertrag).

Nevertheless, market participants are facing problems when they try to incorporate an OTC derivative into the clearing process. For getting the trade data required for clearing to the CCP, a software, selected by each CCP, is required. The software provider uses terms and conditions which impose market participants to use definitions issued by ISDA and having foreign law governing the transaction. Therefore, even if market participants agree on the product related terms issued by the Association of German Banks, CCPs only receive trade data identifying the ISDA terms as applicable. If ESMA determines a class of OTC derivatives as clearing eligible without considering the applicable terms and the related provisions to the transactions, market participants would lose their ability to agree on terms in their mother language as well as on the applicability of Non-UK / Non-US law.

Q8: What are your views, regarding the details to be included in ESMA Register of classes of derivatives subject to the clearing obligation (Article 4b)?

BVI supports the identification of the CCPs, especially the usage of the LEI. We believe that ESMA should also determine the type of legal documentation (definitions) in the public register.

We think that the identification of the clearing eligible OTC contracts should be made mandatory with the ISIN Code.



Q9: Do you consider that the data above sufficiently identify a class of derivatives subject to the clearing obligation and the CCPs authorised or recognised to clear the classes of derivatives subject to the clearing obligation?

Please see our answer to question 8. We estimate that the data mentioned above are overall sufficient.

Q10: In your view, does the above definition appropriately capture the derivative contracts that are objectively measurable as reducing risk directly related to the commercial or treasury financing activity?

Q11: In your views, do the above considerations allow an appropriate setting of the clearing threshold or should other criteria be considered? In particular, do you agree that the broad definition of the activity directly reducing commercial risks or treasury financing activity balances a clearing threshold set at a low level?

BVI has no comment.

Q12: What are your views regarding the timing for the confirmation and the differentiating criteria? Is a transaction that is electronically executed, electronically processed or electronically confirmed generally able to be confirmed more quickly than one that is not?

BVI supports the electronic (legal) confirmation and execution of OTC derivatives via electronic means which are not cleared by a CCP. We think that the time frame of 30 minutes does not leave any reserves to resolve possible discrepancies in the confirmation process between the counterparties. The same applies for the confirmation of electronic execution by 15 minutes. We think that the electronic confirmation of OTC transactions not cleared by a CCP should be done no later than the same business day.

BVI thinks that handling of the electronic confirmation and execution of OTC derivatives in the back office by investment fund management companies are slightly different from that by credit institutions. Credit institutions have



more capabilities and resources (e.g. more staff than in back office by the Buy Side) in the electronic confirmation of OTC derivatives than the buy side.

Q13: What period of time should we consider for reporting unconfirmed OTC derivatives to the competent authorities?

BVI thinks that all OTC transactions should be confirmed in time. We are of the opinion that unconfirmed trades should be reported to a competent authority until 30 days after the trade date (Fed target timeframe) depending on the relevant OTC instrument.

Q14: In your views, is the definition of market conditions preventing marking-to market complete? How should European accounting rules be used for this purpose?

BVI believes that ESMA has to approve the relevant models and should allow market participants to use its approved models instead of using models by market participants which refer to European accounting rules.

Q15: Do you think additional criteria for marking-to-model should be added?

Mark-to-model is a standard process applied to many OTC derivatives for which prices are not delivered on a daily basis due to individual conditions like the maturity. For these instruments market interest rates or exchange rates are used to feed standard models used in the market to get a pricing for them. The definition of an inactive market therefore should be widened regarding this practice or an additional criterion for marking-to-model should be added.

We think that market participants should be able to use also evaluated pricing services (e.g. Markit, Interactive Data, Telekurs etc) which should be approved by the competent authority for this purpose.

Q16: What are your views regarding the frequency of the reconciliation? What should be the size of the portfolio for each reconciliation frequency?



Where investment funds are established in accordance with contract law (Article. 1 para. 3 of Directive 2009/65/EC), it is the investment management company that agrees on OTC derivatives acting for the joint account of the investors of the respective investment fund. Due to the segregation requirements, the basis for OTC derivatives is a separate master agreement with the counterparty with respect to each investment fund managed by the investment management company. ESMA should clarify that the suggested number of 300 contracts applies on the level of the individual investment fund rather than on the level of the investment fund management company.

We think that this is compliant with EMIR, where each investment fund (UCITS and AIF, Article 2 para 6 EMIR) is deemed to be a separate financial counterparty. A differentiation between funds established in accordance with contract law (which do not have a distinct legal personality) and those constituted as companies does not take place in EMIR. If an investment fund management company managing investment funds established in accordance with contract law has to consider 300 contracts total for all funds, it would be a discrimination since each investment fund constituted as company could consider up to 300 contracts without sharing this volume with any other investment fund..

Our members think that the proposed timing for the portfolio reconciliation each business day needs to be amended as the investment fund management companies have to reconcile their portfolios with the custodian banks which takes usually more time than one business day.

Q17: What are your views regarding the threshold to mandate portfolio compression and the frequency for performing portfolio compression?

BVI believes that a portfolio compression of a fund by fund basis is not necessary as investment funds are not allowed to commingle asset and position from different investment fund with each other. The client portfolio could be fragmented across a number of agents/ fund managers.

Q18: What are your views regarding the procedure counterparties shall have in place for resolving disputes?

BVI supports the idea made by ESMA that the financial counterparties should have in place a dispute resolution framework. The introduction of a



dispute resolution framework will enhance legal certainty for all market participants and improves the protection of investors. We believe that disputes should be solved on the following business day at the latest. Otherwise, unresolved disputes could create a problem in the follow on valuation- and reconciliation process.

We think that the dispute resolution framework should be based on accepted standards, e.g. under those provided by the Credit Support Annex of the ISDA Master agreement.

Q19: Do you consider that legal settlement, third party arbitration and/or a market polling mechanism are sufficient to manage disputes?

Please see our answer to question 18.

Q20: What are your views regarding the thresholds to report a dispute to the competent authority?

BVI agrees with the threshold mentioned by ESMA.

Q21: In your views, what are the details of the intragroup transactions that should be included in the notifications to the competent authority?

BVI believes that intragroup transactions concluded with market participants outside the group should be reported to competent authorities.

ESMA has to determine in close consultation with the relevant market participants which OTC transactions concluded within this group should be reported to the authorities.

Q22: In your views what details of the intragroup transactions should be included in the information to be publicly disclosed by counterparty of exempted intragroup transactions?

According to Article 8 para 1n (d) and para. 1j EMIR the counterparty of an intragroup transaction which has been exempted from the requirement laid down in para. 1b, shall publicly disclose information on the exemption. From



our point of view, the cited provision does not impose an obligation to publicly disclose any details of the transactions subject to the exemption.

ESMA should consider that the details of the exempted intragroup transactions are only published if one of the parties is a non-financial counterparty (cf. Article 8 para. 1n (c) EMIR).

Q23: What are your views on the notion of liquidity fragmentation?

BVI has no comment.

Q24: What are your views on the possible requirements that CCP governance arrangements should specify? In particular, what is your view on the need to clearly name a chief risk officer, a chief technology officer and a chief compliance officer?

Yes –the mentioned officers should be appointed.

BVI believes that the CCPs and the clearing members have to offer full individual and/or omnibus segregation to indirect clearing members (e.g. investment fund management companies) in order to ensure that a client's assets and positions are protected in the case of the default of a clearing member.

We believe that CCPs have to accept cash and highly liquid financial instruments (e.g. government bonds and main market index equities) for initial and variation margin. Due to investment fund law provisions, investment funds are not allowed to hold e.g. government bonds if the fund is set up as an equity fund.

The specific interests of buy-side users, such as investment firms, UCITS management companies and alternative investment fund managers must be adequately reflected in the CCP's governance rules and structures. Buy-side representation on the Board of CCPs is needed to ensure fair treatment of all users in view of the dominant position of the few CCPs and of possible conflicts of interest deriving from CCP ownership by large financial institutions.

A robust risk management system for the CCP is vital to protect both its clearing and nonclearing members. BVI believes that the interests of buy-



side users must be adequately reflected in the CCP's governance rules and structures, including its risk committee.

Q25: Are potential conflicts of interests inherent to the organisation of CCPs appropriately addressed?

Please see our answer to question 24.

Q26: Do the reporting lines – as required – appropriately complement the organisation of the CCP so as to promote its sound and prudent management?

Please see our answer to question 24.

Q27: Do the criteria to be applied in the CCP remuneration policy promote sound and prudent risk management? Which additional criteria should be applied, in particular for risk managers, senior management and board members?

BVI agrees with the proposal. Please see our answer to question 24.

Q28: What are your views on the possible organisational requirements described above? What are the potential costs involved for implementing such requirements?

Please see our answer to question 24.

Q29: Should a principle of full disclosure to the public of all information necessary to be able to understand whether and how the CCP meets its legal obligations be included in the RTS? If yes, which should be the exceptions of such disclosure requirements? Has the information CCP should disclose to clearing members been appropriately identified? Should clients, when known by the CCP, receive the same level of information?

Please see our answer to question 24.

Q30: What are your views on the possible records CCPs might be required to maintain?



Our members think that the proposed data requirements for CCPs are sufficient. We think that the identification of an OTC instrument should be made by the ISIN Code. The identification of the trading venue should be made by the Market Identifier Code (MIC).

BVI believes that the CCP should at any time know their indirect clearing members, e.g. the clients. This knowledge about the clients (e.g. the investment fund and the investment fund management company) is necessary in order to fulfill the requirements for segregation by investment funds.

Q31: What are your view on the modality for maintaining and making available the above records? How does the modality of maintaining and making available the records impact the costs of record keeping?

Q32: What are your views on the possible requirements for the business continuity and disaster recovery plan and in particular on the requirements for the secondary site? Would it be appropriate to mandate the establishment of a third processing site, at least when the conditions described above apply? What are the potential costs and time necessary for the establishment of a third processing site and for immediate access to a secondary business site?

Q33: Is the 2 hours maximum recovery time for critical functions a proportionate requirement? What are the potential costs associated with that requirement?

BVI has no comment.

Q34: Are the criteria outlined above appropriate to ensure that the adequate percentage above 99 per cent is applied in CCP's margin models? Should a criteria based approach be complemented by an approach based on fixed percentages? If so, which percentages should be mandated and for which instruments?



BVI believes that the confidence interval should be made mandatory for all financial instruments and not be applied on a criteria based approach for all financial instruments. We think that the confidence interval applied shall be set at 99,99 per cent. This could lead to comparably different CCPs margin models for market participants.

Q35: Taking into account both the avoidance of procyclicality effects and the need to ensure a balance distribution of the financial resources at the CCP disposal, what it is in your view the preferred option for the calculation of the lookback period.

We prefer option c.

Q36: Is in your view the approach described above for the calculation of the liquidation period the appropriate one? Should a table with the exact number of days be included in the technical standards? Should other criteria for determining the liquidation period be considered?

BVI believes that the determination of the liquidation period should be harmonized and made mandatory in order to achieve a high comparability between the CCPs which offer clearing services for the same OTC product.

Q37: Is procyclicality duly taken into account in the definition of the margin requirements?

We are of the opinion that procyclicality should be avoided if the definition of the margin requirements includes parameter stress market conditions.

Q38: What is your view of the elements to be included in the framework for the definition of extreme but plausible market conditions?

We think that the most important scenario for a CCP is the systemic risk involving a global financial crisis with a domino effect ("Lehmann without Fed support").

Q39: Do you believe that the elements outlined above would rightly outline the framework for managing CCPs' liquidity risk?



We agree. However we consider that CCP reinvestments of collateral obtained by the clearing members and their clients should be restricted to highly liquid financial instruments in order to allow the central counterparty at any time to sell the assets and to meet their payment obligations for the clearing members.

We think that the CCP should only be allowed to deposit the cash received as collateral with the central bank. Securities obtained as collateral should only be kept in insolvency protected securities accounts. This should allow the CCP to recall the securities as soon as possible in order to meet their obligations for the clearing members.

Q40: Do you consider that the liquid financial resources have been rightly identified? Should ESMA consider other type of assets, such as time deposits or money market funds? If so, please provide evidences of their liquidity and minimum market and credit risk.

BVI thinks that a CCP should have access to central bank liquidity. As the CCP might be pose systemic risks in case of the insolvency of clearing members or itself, the central counterparty should have access to central bank liquidity. Our members are of the opinion that a CCP should be allowed to invest its financial resources in highly liquid "Short Term Money Market Funds" according to the CESR/ESMA money market definition on 19 May 2010. Short Term Money Market Funds have a lower credit risk than deposit accounts and usually carry a high credit rating by at least one of the three leading rating agencies.

Q41: Should the CCP maintain a minimum amount of liquid assets in cash? If so, how this minimum should be calculated?

We believe that a CCP should be allowed to invest its liquidity in Short Term Money Market Funds.

Q42: What is your preferred option for the determination of the quantum of dedicated own resources of CCPs in the default waterfall? What is the appropriate percentage for the chosen option? Should in option a, the margins or the default fund have a different weight, if so how? Should different criteria or a combination of the above criteria be considered?



Q43: What should be the appropriate frequency of calculation and adaptation of the skin in the game?

BVI has no comment

Q44: Do you consider that financial instruments which are highly liquid have been rightly identified? Should ESMA consider other elements in defining highly liquid collateral in respect of cash of financial instruments? Do you consider that the bank guarantees or gold which is highly liquid has been rightly identified? Should ESMA consider other elements in defining highly liquid collateral in respect of bank guarantees or gold?

BVI believes that the scope of highly liquid financial instruments as collateral also has to include besides government bonds also and main market index equities. Investment funds are subject to investment fund law restrictions; e.g. they are not allowed to buy bonds on behalf of an equity fund. In addition, investment funds must observe contractually-agreed investment objectives (e.g. with the DAX used as a benchmark). According to such legal requirements, the volume of CCP-eligible collateral available to funds is therefore restricted.

Real estate investment funds will face problems to hedge existing currency risks via OTC derivatives if those are determined to be clearing eligible. Real estate investment funds are obliged to be invested in real estate and have to maintain liquidity for the redemption of fund units. Therefore real estate investment funds might not be able to provide highly liquid financial instruments as collateral to a CCP. We believe that in such circumstances a real estate investment fund should be allowed to provide a bank guarantee as collateral (such possibility should not be limited to non-financial clearing members but also offered to clients).

We think that the indirect contractual arrangements also have to cover a three party agreement between the investment fund management company, the custodian and a specialized collateral manager. The three party agreements could enable the collateral manager to provide other highly liquid financial instruments (e.g. government bonds and equities) than cash to the clearing members in cases where the custodian is not able to deliver the collateral within the timeframe set by the CCPs.



Q45: In respect of the proposed criteria regarding a CCP not accepting as collateral financial instruments issued by the clearing member seeking to lodge those financial instruments, is it appropriate to accept covered bonds as collateral issued by the clearing member?

Yes, if it is ensured that this kind of collateral can be realized without a significant decrease in value without any delay.

Q46: Do you consider that the proposed criteria regarding the currency of cash, financial instruments or bank guarantees accepted by a CCP have been rightly identified in the context of defining highly liquid collateral? Should ESMA consider other elements in defining the currency of cash, financial instruments or bank guarantees accepted by a CCP as collateral? Please justify your answer.

BVI agrees. Please see our answer to question 44. The proposed criteria should also be used for the equities to be accepted as collateral by a CCP.

Q47: Do you consider that the elements outlined above would rightly outline the framework for determining haircuts? Should ESMA consider other elements?

BVI agrees.

Q48: Do you believe that the elements outlined above would rightly outline the framework for assessing the adequacy of its haircuts? Should ESMA consider other elements?

Yes.

Q49: Do you consider that the elements outlined above would rightly outline the framework for determining concentration limits? Should ESMA consider other elements?

We think that ESMA has to determine the concentration limit for collateral only on the clearing member level. A determination of the concentration limit across all clearing members could lead



to retroactive adjustments for the individual clearing members. If the determination of the concentration limits across all clearing members should be used, the investment fund management companies could be obliged to enhance the value of their collateral retroactively.

Q50: Should a CCP require that a minimum percentage of collateral received from a clearing member is provided in the form of cash? If yes, what factors should ESMA take into account in defining that minimum percentage? What would be the potential costs of that requirement?

We think that a clearing member should not be obliged to hold a minimum proportion as collateral in cash. The clearing member could pass the minimum cash quotes to its clients (e.g. investment fund management companies). Due to investment fund restrictions and investment policies, some investment funds may not be able to hold minimum cash quotes passed through by the clearing member. In these cases investment funds could be effectively excluded from accessing a CCP although they may be able to provide other forms of liquid collateral.

Q51: Do you consider that financial instruments and cash equivalent financial instruments which are highly liquid with minimal market and credit risk have been rightly identified? Should ESMA consider other elements in defining highly liquid financial instruments with minimal market and credit risk? What should be the timeframe for the maximum average duration of debt instrument investments?

Please see our answer to question 44. We think that the CCP should only be allowed to deposit cash received as collateral with the central bank. Securities obtained as collateral should only be kept in insolvency protected securities accounts. This should allow the CCP to recall either the cash or the securities as soon as possible in order to meet the payment obligations of the clearing members.

Q52: Do you think there should be limits on the amount of cash placed on an unsecured basis?

We feel that a CCP should be allowed to invest its financial resources on an unsecured basis only in highly liquid Short Term Money Market Funds.



Q53: Do you consider that CCP should be allowed to invest in derivatives for hedging purposes? If so, under which conditions and limitations.

The CCP should not be allowed to use its financial resources (e.g the collateral) for speculative purpose. Therefore a CCP should not invest their financial resources in derivative using it for the hedging of a CCP portfolio.

Q54: Do you consider that the proposed criteria regarding the currency of financial instruments in which a CCP invests has been rightly identified in the context of defining highly liquid financial instruments with minimal market and credit risk? Should ESMA consider other elements in defining the currency of highly liquid financial instruments with minimal market and credit risk? Please justify your answer.

Our members are of the opinion that a CCP should – wherever possible – avoid holding a currency risk. If the CCP decides to hold financial instruments with a foreign currency risk, the central counterparty should requires more collateral from the clearing members. In these cases the CCP should increase the haircuts for the financial instruments.

Q55: Do you consider that the elements outlined above would rightly outline the framework for determining the highly secured arrangements in respect of which financial instruments lodged by clearing members should be deposited? Should ESMA consider other elements? Please justify your answer.

We think that the requirements to deposit financial instruments by a credit institution should only be made in solvent securities account (para 140 (d)). This will enable the CCP to recall the securities in time.

Q56: Do you consider that the elements outlined above would rightly outline the appropriate framework for determining concentration limits? Should ESMA consider other elements? Please justify your answer.

Yes.



Q57: What are your views on the definitions of back and stress testing?

BVI agrees with the definition proposed by ESMA.

Q58: What are your views on the possible requirements for a CCP's validation process?

CCPs should only use such models to assess the validity and the adequacy of its risk management which have been authorized by the regulators. The regulators should be capable to validate the models used by the CCPs in order to fulfill their supervisory functions.

Q59: What are your views on the possible back testing requirements?

Please see our answer to question 58.

Q60: Would it be appropriate to mandate the disclosure of back testing results and analysis to clients if they request to see such information?

If the central counterparty uses its own model validation, the stress and back testing results should be disclosed to all relevant market participants.

Q61: Should the time horizons for back tests specified under 144(e) be more granular? If so, what should the minimum time horizon be? Should this be different for different classes of financial instruments?

BVI has no comment.

62: What are your views on the possible stress testing requirements?

BVI believes that the stress test requirements used by the CCPs should be authorized by the regulators.

Q63: Would it be appropriate to mandate the disclosure of stress testing results and analysis to clients if they request to see such information?



If the central counterparty uses its own stress testing model, the results should be disclosed to the public.

Q64: What are your views on the possible requirements for reverse stress tests? And what impact do you think such requirements would have on industry?

If the stress testing model is approved by the regulators, a reverse stress testing model is not necessary.

Q65: Should there be any other parties involved in the definition and review of tests? Please justify your answer and explain the extent to which suggested parties should be involved?

BVI agrees with ESMA's position that the CCPs risk committee provides for appropriate representation of clearing members and clients (e.g. investment fund management companies).

Q66: Should the testing of default procedures involve a simulation process?

We agree.

Q67: Are the frequencies specified above appropriate? If no, please justify your answer.

We agree.

Q68: In your view what key information regarding CCP risk management models and assumptions adopted to perform stress tests should be publicly disclosed?

BVI agrees with ESMA's proposal to disclose information to the public. Based on the information disclosed by a CCP the relevant market participants should be enabled to make their own risk management assessment of their portfolio.

Q69: What is your view on the need to ensure consistency between different transaction reporting mechanisms and the best ways to



address it, having in mind any specific items to be reported where particular challenges could be anticipated?

BVI welcomes ESMA's proposal that the double reporting of OTC derivative transactions under the intended MiFID transaction reporting regime and the proposed reporting requirements to trade repositories under EMIR will be avoided. It needs to be clarified whether sell side firms should be primarily responsible for reporting the transactions to TRs.

Q70: Are the possible fields included in the attached table, under Parties to the Contract, sufficient to accurately identify counterparties for the purposes listed above? What other fields or formats could be considered?

BVI thinks that the fields listed in the Annex are sufficient. In this context our members specifically support the use of globally accepted identifiers for all trades/counterparties in all reporting. In particular, the required identifiers should be available on a license and fee free basis. Primarily ISO standards should be considered for this purpose. The International Securities Identification Number (ISIN) for the identification of securities/transactions. Identification of the counterparties to the trade or the underlying entities should be based exclusively on a globally agreed Legal Entity Identifier (LEI).

BVI strongly supports the introduction of developing and implementing a system of LEIs. We believe that the recommendations will enhance the transparency of information to relevant authorities and the public and will therefore improve financial stability. BVI acknowledges the efforts made by the industry to develop the introduction of LEIs

Q71: How should beneficiaries be identified for the purpose of reporting to a TR, notably in the case of long chains of beneficiaries?

We think that the identification of beneficiaries which are non natural persons should be made on the basis of the LEI. However, we think that the identification of the beneficiaries in the fund industry should stop at the level of the individual investment fund and should include individual investors in the investment fund.



Q72: What are the main challenges and possible solutions associated to counterparty codes? Do you consider that a better identifier than a client code could be used for the purpose of identifying individuals?

Our members feel that counterparty codes should be amended as they do not allow for a global, unique and standardized identification. The counterparty code for non natural persons should be the LEI only.

Natural persons should be identified on the basis of tax, social security or passport number. ESMA should agree on the relevant identifiers applicable for this purpose to each country.

Q73: What taxonomy and codes should be used for identifying derivatives products when reporting to TRs, particularly as regards commodities or other assets for which ISIN cannot be used? In which circumstances should baskets be flagged as such, or should their composition be identified as well and how? Is there any particular aspect to be considered as regards a possible UPI?

BVI believes that the identification of OTC derivatives should only be based on the ISIN Code. Also commodity (indicies) can be identified with the ISIN. However, our members feel that for the description of the OTC products the ISDA taxonomy could be used.

Q74: How complex would be for counterparties to agree on a trade ID to be communicated to the TR for bilaterally executed transactions? If such a procedure is unfeasible, what would the best solution be to generate the trade ID?

The TR should be able to produce a trade ID scheme which enables one counterparty (e.g. the sell side) to get the number for an individual trade at any time directly from the TR in order to be able to communicate it to the other counterparty.

Q75: Would information about fees incorporated into pricing of trades be feasible to extract, in your view?

No, only expressly disclosed fees can be easily extracted.



Q76: What is your view of the granularity level of the information to be requested under these fields and in particular the format as suggested in the attached table?

Q77: Are the elements in the attached table appropriate in number and scope for each of these classes? Would there be any additional class-specific elements that should be considered, particularly as regards credit, equity and commodity derivatives? As regards format, comments are welcome on the possible codes listed in the table.

BVI has no further comments.

Q78: Given that daily mark-to-market valuations are required to be calculated by counterparties under [Article 6/8] of EMIR, how complex would it be to report data on exposures and how could this be made possible, particularly in the case of bilateral trades, and in which implementation timeline? Would the same arguments also apply to the reporting of collateral?

BVI thinks that sell side firms should be primarily responsible for the fulfillment of the reporting obligation to TRs.

We believe that if the CCP is acting also as the valuation agent of all OTC contracts, then ESMA should oblige the central counterparties to publish all relevant information necessary in order to enable all market participants (e.g. the investment fund management companies) to review the pricing and the valuation process of all derivative products. We think that the indirect clearing members (e.g. investment fund management companies) should have the option to dispute the pricing and the valuation of OTC products provided by a CCP if they detect a discrepancy in the evaluation of an OTC derivative contract compared to the CCP. We think that ESMA should put in place a dispute resolution framework in order to clarify the mentioned discrepancies in the pricing and evaluation process.

BVI believes that the reporting of the valuation (e.g. the valuation models) of the collateral for non-cleared OTC derivatives to trade repositories is too complex and should not be made mandatory. For such reporting the buy side would need to collect all



relevant information on the valuation of the collateral from different market participants. Therefore, the German buy side would not be able to provide the TR in time with relevant information.

Q79: Do you agree with this proposed approach? What are in your view the main challenges in third party reporting and the best ways to address them?

We think that the sell side should be primarily responsible for the reporting obligation to a TR in order to avoid double reporting and unnecessary reconciliation efforts.

Q80: Do you envisage any issues in providing the information/documentation as outlined above? In particular:

a) what would the appropriate timeline over which ESMA should be requesting business plans (e.g. 1, 3, 5 years?)

b) what would the appropriate and prudent length of time for which a TR must have sufficient financial resources enabling it to cover its operating costs (e.g. 6 months / 1 year)?

Q81: What is your view on these concerns and the ways proposed to address them? Would there be any other concerns to be addressed under the application for registration and tools that could be used?

BVI has no comment.

Q82: What level of aggregation should be considered for data being disclosed to the public?

Trade repositories should be required, among other things, to provide aggregated data and statistics on types of transactions and types of counterparties to the public and to the competent authorities.

Supervisory authorities and public policy should recognize that there are reasons for the coexistence of different levels of transparency, and should push for higher transparency only in those cases where it can remarkably increase market efficiency as well as benefits for participants.



Any information given to the general public should be carefully considered. A publication of e.g. individual open positions may influence the price formation process in the OTC markets and may reduce liquidity.

A trade repository should provide individual counterparty data on open positions, trading volumes and prices only to competent supervisory authorities for the purpose of maintaining financial stability.

This detailed disclosure should also include information on the largest exposure to certain products and parties in order to be better able to assess the level of risk concentration in the market.

BVI feels that disclosure of individual company positions to the general public should be avoided in order to protect proprietary portfolio information. The level of granularity of information needs to be considered carefully.

Only disclosure of statistics on standard products aggregated at a sufficiently high level to the public should be considered. BVI believes that transparency is good, but only if it does not reduce liquidity. The reporting of positions and transactions on a daily basis may be difficult as many products are not daily priced, valuations may differ between counterparties, and reconciliation within a TR may require additional rules and requirements.

We think that an important aim is to achieve a consistent and compatible reporting standard and message formats between the reporting parties, TRs, CCPs, regulators and other service providers (e.g. collateral management agents). A reduction in the number of required reports and the use of centralized information platforms is absolutely necessary. Otherwise cost and complexity of the system may become unmanageable.

Q83: What should the frequency of public disclosure be (weekly? monthly?); and should it vary depending on the class of derivatives or liquidity impact concerns; if yes, how?

BVI believes that the frequency of the public disclosure should be made as close as possible in order to have a clear picture of the situation of the OTC derivative market and to avoid an asymmetric public disclosure made by the sell side in comparison to the buy side.



We hope that our suggestions are helpful. We are happy to answer any questions you may have in the context with this matter.

Yours sincerely

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