European Fund and Asset Management Association

EFAMA reply to CESR's Consultation Paper on
Trade Repositories in the European Union

EFAMA[1] is grateful for the opportunity to comment on this topic, as trade repositories ("TRs") are an important part of the infrastructure for OTC derivatives clearing.

EFAMA fully supports the European Commission's initiatives to improve the transparency and stability of OTC derivatives markets and reduce systemic risk. We also favour the creation of EU-based CCPs for the clearing of CDS contracts, as CCPs can significantly reduce counterparty as well as operational risk linked to OTC CDS contracts.

We are, however, greatly concerned by the risks to confidentiality raised by access to TR data. While fully supporting access to information by regulators, we believe that data should be strictly segregated and protected, and any use closely monitored. Different levels of granularity should be established for different categories of users.

Lastly, EFAMA considers it important that TRs should provide scalable solutions, and differentiated access solutions, including some for smaller financial institutions and/or "lighter" derivatives users, at lower cost and requiring less infrastructure investment.

Do you agree with the functional definition of what constitutes a trade repository? What other characteristics of a TR do you consider essential?

EFAMA agrees with CESR's analysis.

Some EFAMA members, however, are of the opinion that the statement "Contracts maintained in a TR can be considered the sole "official legal record" (the so-called 'golden copy') of a transaction, depending on the legal arrangements in operation with regards to the contracts in question" should be clarified. They believe that recording a transaction with the TR should not be a condition of validity of the

[1] EFAMA is the representative association for the European investment management industry. It represents through its 26 member associations and 44 corporate members approximately EUR 11 trillion in assets under management of which EUR 6.1 trillion was managed by approximately 53,000 funds by the end of 2008. Just over 37,000 of these funds were UCITS funds. For more information about EFAMA, please visit www.efama.org.

transaction, and a contract may be amended between parties and the amendment should be valid regardless of its being recorded with the TR. In other words, the normal rules of proof and validity of contract would continue to apply. It should therefore be made clear that the "golden copy" ***may*** be considered as the sole official legal record, but normal contract rules would continue to apply.

Some of our members also believe that a TR should be genuinely independent of any market participants.

In your opinion, what kind of information should be available to: regulators, market participants and the general public respectively? Please differentiate by asset class where appropriate.

As stated in our general comments, it is essential to guarantee confidentiality of contract information stored in TRs, due to its commercial sensitivity. EU regulators should have full access to information, subject to strict privacy and data transmission/storage regulation. In case of transmission to non-EU regulators, agreements should be in place to ensure that similar levels of privacy and confidentiality are maintained by authorities outside the EU.

TR users should have access to their own transactions, and be able to grant access to their service providers (for example depositaries).

Market participants in general could benefit from the publication of aggregated market information (similarly to what is currently done by regulated markets). Some of our members also suggest the possible development of a service to supply better pricing information (on the basis of actual trade data in the TR), to be used for valuation purposes.

Do you agree that trade repositories should provide adequate processes to ensure the reliability of the data provided? How could reliability be ensured?

EFAMA agrees that TRs should provide robust and adequate processes to ensure reliable data provision and aggregation, but the quality of the data relies on the accuracy and timeliness of underlying information provided by market participants.

Do you see any other entity with legitimate information needs with regard to OTC derivatives trades recorded in a trade repository? If yes, please explain.

Please see our answer above.

Do you see a need for establishing TR facilities in Europe if a global repository already exists elsewhere? Do you believe that a European repository is needed for each OTC asset class as described above (ie CDS, interest rate and equity derivative markets)? Please give reasons.

If yes, what form should the trade repository facilities to be established in Europe take (eg single point of information, back-up facility) and which trades should be registered in such facilities (eg trades of European market participants, trades referring to European underlying entities)? Please specify.

A majority of EFAMA members have a clear opinion regarding the location of TRs. For most, a single global TR has clear advantages (economies of scale, uniformity, certainty, ease of information aggregation for supervisory purposes), in spite of its disadvantages (monopolistic position, timezone location, possible issues regarding multiple supervisory access).

With regard to the location, some do not see the need for establishing a TR in Europe as a global TR already exists elsewhere, while others express a preference for a single TR in the EU.

Some of our members support the creation of a single global TR for each asset class, and as a TR for CDS contracts already exists in the US, they believe it is most urgent to promote the creation in the EU of TRs for equity and fixed income derivatives.

The preference for a single TR model arises from the desire to avoid a proliferation of TRs with different requirements, rules, and reporting systems, which would not only make more difficult regulatory oversight, but also greatly increase operational costs and risks for the industry.

Other EFAMA members point to the fact that CESR has not made clear its preferences with regard to market reform, regulation of OTC derivatives and the place of TRs. As a result, it is not possible for them to answer definitively CESR's questions. Should TRs be subject to regulation, different issues would have to be dealt with. The aim could be achieved in different ways: either by granting jurisdictional reach to regulators, or by incentivising market participants to ensure that services provided from outside the EU were fit for purpose. In the latter case, it would be important to impose such requirements on all regulated participants in the execution chain. Should TRs not be specifically regulated and remain simple providers of a commercial service, there would be no reason to restrict the location.

Do you think there should be harmonised EU requirements for the regulation and supervision of trade repositories?

The future development of the EU regulatory framework has not been entirely clarified – although the European Commission has published a blueprint in its Communication published on 20 October[2]. US regulation has not been finalized either.

It is therefore unclear whether TRs shall remain purely commercial service providers, or whether they shall become regulated infrastructure entities. In the latter case, a large majority of EFAMA members believes there should clearly be harmonized EU requirements for the regulation and supervision of TRs, while others only see the need for EU requirements when the TRs are set up in the EU.

In general, centralization of recordkeeping might require regulatory standards, especially if it leads to monopolies or quasi-monopolies: in that respect, the systemic risk concentration and potentially serious consequences in terms of pricing should be carefully evaluated and managed. Governance structures at TRs would be key to ensure fair treatment of all users.

To what extent do you expect that protocols, common market practices and the like, surrounding proposed solutions for trade repositories, could promote harmonisation and foster safety and efficiency in the post-trading process? Please provide reasons for your position.

In this case we do not believe that market solutions should become a substitute for regulation, as they do not necessarily encourage harmonization and efficiency gains.

We remain at your complete disposal for any clarification.

Peter De Proft
Director General

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[2] Communication COM(2009) 563: "Ensuring efficient, safe and sound derivatives markets: Future policy actions"