19 MARCH 2012

**Response by Cargill to the ESMA Discussion paper on draft technical Standards for the Regulation on OTC derivatives, CCPs and Trade Repositories.**

## Introduction of Cargill

Cargill is an international company with 142,000 employees in 66 countries. About half of our employees are in developing countries. More than 23,000 are in Europe. We produce and market food, agricultural, financial and industrial products and services. However, the core of our business is in the agri-food chain, working to feed the world by moving agricultural raw materials from where they are produced to where they are needed and processing them from their raw state into ingredients that can be used in foods and animal feed.

We need to be able to hedge the real risks involved in moving many millions of tonnes of raw and processed agricultural materials, food and feed ingredients, and energy products around the world every year effectively and efficiently.

More information about Cargill can be found on www.cargill.com and on the EU's Transparency Register.

We support the proposal to push standardised OTC products to clearing. In some of the markets we deal in, e.g. ocean freight transportation, this is already happening and is a sensible way to reduce counterparty risk in the system. Equally, we think there is a place for bespoke OTC products which would be difficult to clear because of their non-standard terms.

The definition of "intra-group" activity is critical for us as well as how EMIR will be aligned with third country regulations.

## Responses to questions

Note: our main concerns are with questions 4-7, 10 – 22 around non-financial counterparties and clearing and questions 69-71 and 82-83 on reporting.

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## Clearing obligation procedure (Article 4)

*ESMA para 12 – Q7*

*12. ESMA will analyse classes of OTC derivatives in order to assess the application of the clearing obligation. In order for ESMA to identify the relevant class of OTC derivatives, EMIR provides for a bottom up approach where when a competent authority authorises a CCP to clear a class of OTC derivatives, it will notify ESMA. For the determination of the classes of derivatives, ESMA will, in a first stage, use as a basis the classes of derivatives defined by the CCP and the competent authorities. In a second stage, ESMA may adopt a more granular approach within these classes of derivatives.*

*Notification from the competent authority to ESMA*
*13. A competent authority shall notify ESMA when it authorises a CCP to clear a class of OTC derivatives.*

*14. The CCP having requested authorisation to clear the class of derivatives to which the notification refers to should provide the information set out below to the competent authority, which will include such information in its notification to ESMA. The competent authority may complement this information as it considers appropriate including with its decision and analysis. ESMA acknowledges that all this information may not always be available, especially for new products.*

*15. For the purpose of assessing whether a class of OTC derivatives should be subject to the clearing obligation, ESMA considers at this time that the notification should include at least:*

*a. A clear identification of the OTC derivative contracts and of the relevant class of OTC derivatives they belong to i.e. the characteristics and the range of derivative contracts within the class of derivative contracts, as well as all*

*the elements to be included in the ESMA register and any further characteristics necessary to distinguish the OTC derivative contracts within the relevant class from derivative contracts outside of the relevant class of assets;*

*b. Evidence of the degree of standardisation of the relevant class of OTC derivatives " contractual terms and operational processes;*

*c. Data on the volume of the relevant class of OTC derivatives;*

*d. Data on the liquidity of the relevant class of OTC derivatives; and*

*e. Evidence of availability to market participants of fair, reliable, and generally accepted pricing information in the relevant class of OTC derivatives and any available evidence of the impact of the clearing obligation on availability to market participants of pricing information.*

*16. For the purpose of assessing the date or dates from which the clearing obligation takes effect, including any phasing-in and the categories of counterparties to which the clearing obligation applies, ESMA considers at this time that the notification should include at least:*

*a. Data on the expected volume of the relevant class of derivatives following the application of the clearing obligation;*

*b. Information on whether other CCPs already clear the same class of OTC derivatives;*

*c. Evidence of the ability of the CCP to handle the expected volume as a result of the clearing obligation and to manage the risk arising from the clearing of the relevant class of OTC derivatives;*

*d. Information on the type and number of counterparties active and expected to be active within the market for the relevant class of OTC derivatives;*

*e. An outline of the different tasks to be completed in order to start clearing with the CCP, together with the determination of the time required to fulfil each task; and*

*f. Information on the risk management, legal and operational capacity of the range of counterparties active in the market for the relevant class of derivative contracts that would be subject to the clearing obligation.*

*17. For the class of OTC derivatives and for each derivative contract within such class, ESMA considers that the notification by the competent authority should at least include the following relevant market information:*

*a. Number of transactions;*

*b. Total volume and trend;*

*c. Total open interest and trend;*

*d. Depth of orders including the average number of orders and of requests for quotes;*

*e. Tightness of spread;*

*f. Measures of liquidity under stressed market conditions; and*

*g. Measures of liquidity for the execution of default procedures.*

*18. In order to prove the existence of fair reliable and generally accepted pricing information in the relevant class of OTC derivatives, the CCP should provide to the competent authority, for the class of derivatives and for each derivative contract within such class, at least data on daily reference price as well as the number of days per year with reliable reference price.*

*19. The evidence and information provided by the competent authority above should be analysed by ESMA which would also give due consideration to :*

*a. The evidence provided in the course of the public consultation;*

*b. Where available, information gathered from trade repositories and execution venues;*

*c. Where appropriate, information gathered from any other sources, including information gathered from the consultation with third country competent authorities.*

**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?**

**A4-7: The information listed above seems generally appropriate for the task. We would stress however that we think at some point in the process of determining what should be mandatorily cleared there should be consultation with the market users on ESMA and CCP proposals to clear or not clear particular derivative contracts. This would allow users to point out any issues which otherwise might not be apparent. Such a consultation would need to be per contract as within a derivative class, some contracts might be more appropriate to clear than others. As currently drafted there does not appear to be a place in the process for market users to comment on the accuracy or completeness of information, or on factors that should be considered by ESMA in making its decision.**

**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?**

*20. ESMA considers that where, following a negative assessment of the eligibility for the clearing obligation of a given class of derivative contracts, the competent authority is informed that market conditions or any of the information provided above change, such competent authority should have the ability to submit a new notification with updated information to ESMA. The CCPs will likely inform the competent authorities of such changes. As a result, ESMA should perform a new assessment on the eligibility of that class of OTC derivative for the clearing obligation on the basis of the updated information notified to it.*

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

*Criteria to be assessed by ESMA under the clearing obligation procedure*

*21. In developing the draft technical standards related to the class of derivatives that should be subject to the clearing obligation, ESMA shall take into consideration criteria defined in EMIR, i.e. the degree of standardisation of the relevant class of OTC derivatives " contractual terms and operational processes, the volume and the liquidity of the relevant contracts within the relevant class of derivatives and the availability of pricing information.*

*22. In assessing these criteria ESMA should consider:*

*a. That the contractual terms standardisation refers to the use of common legal documentation, including master netting agreements, definitions and confirmations which set forth contract specifications commonly used by counterparties and operational processes standardisation refers to the extent to which product trade processing and lifecycle events are managed in a common manner to a widely agreed-upon timetable;*

*b. Whether the margins would be proportionate to the risk that the clearing obligation intends to mitigate and the historical stability of the liquidity through time, the likelihood that liquidity would remain sufficient in case of default of a clearing member;*

*c. Whether the relevant information to correctly price the contracts within the relevant class of derivatives is easily accessible to counterparties on a reasonable commercial basis including once the obligation to clear is in force.*

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

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## Non-financial counterparties

*ESMA paras 29, 30, 31*

*29. By reference to European accounting rules, ESMA considers that an OTC derivative entered into by a non-financial counterparty is deemed to be objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of that non-financial counterparty or of that group, when, whether individually or in combination with other derivative contracts, its objective is to reduce the following risks:*

*a. The potential change in the value of assets, service, inputs, products, commodities, liabilities that the non-financial counterparty or its group owns, produces, manufactures, processes, provides, purchases, merchandises leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the ordinary course of its business; or*

*b. The potential change in the value of assets, service, inputs, products, commodities, liabilities referred to in letter a, resulting from fluctuation of interest rates, inflation rates or foreign exchange rates.*

*30. ESMA also considers that an OTC derivative entered into by a non-financial counterparty is deemed to be objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of that non-financial counterparty or of that group, when, the accounting treatment of the derivative contract is that of a hedging contract pursuant to IFRS principles as referred to in IAS 39 paragraph 71-102 on hedge accounting as endorsed by the European Commission.*

*31. Nevertheless, ESMA considers that an OTC derivative which is used for a purpose in the nature of speculation, investing, or trading should not be an OTC derivative objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of a non-financial counterparty or of a group as provided above.*

**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?**

**A10: We welcome the recognition that this definition must be all encompassing. We agree that it is too narrow to rely on the use of IFRS principles in relation to hedge accounting as the only basis for establishing whether an activity is objectively measurable as reducing risks. Many hedging transactions will not actually be accounted for by using the hedge accounting rules although most of our activities are related to reducing risks in the value of inputs, products, etc. In addition hedge accounting is complex requiring resources and investments that are not feasible to implement for SME's.**

**While we think the broad definition in paragraph 29 a. and b. is a reasonable definition of hedging, we do not think that the words "*in the ordinary course of its business*" add anything to the definition, because if a company owns something, for example, and wishes to use an OTC derivative to manage risk relating to its value then that seems to be sufficient to meet the ordinary meaning of the words "directly related to the commercial activity or treasury financing activity of that non-financial counterparty or of that group". The additional requirement that it be in the ordinary course of its business is sufficiently vague, particularly for companies or groups of companies with diverse business affairs, that it will give rise to uncertainty.**

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## Clearing Threshold

*ESMA paras 32-36*

*32. For the purpose of setting the clearing threshold, ESMA considers referring to the notional value of OTC derivatives subject to the clearing obligation.*

*33. As there is a broad definition of the OTC derivatives that do not enter into the calculation of the clearing threshold because they relate to the non-financials "activity directly reducing commercial risks or treasury financing activity, ESMA considers that the clearing threshold should be set at a low level. It should also be simple to implement by non-financials.*

*34. The clearing threshold could be set across asset classes or per asset class. Nevertheless, referring to a clearing threshold per asset class and per legal entity and group would be difficult to implement. ESMA therefore suggests using a threshold across all asset classes.*

*35. One may consider that if the threshold is set at the level of the legal entity, a mechanism preventing circumvention of the clearing obligation may be required so that groups cannot multiply the number of their legal entities to use the threshold several times. The mechanism could articulate a double clearing threshold set at the level of the legal entity and of the group. Indeed, application of a total global clearing threshold for all legal entities or groups combined would lead to a situation where the first entities to enter into OTC derivative transactions could consume the full threshold to the detriment of other participants.*

*36. In order to set up the exact value of the clearing threshold, more data should be gathered, including net positions and exposures related to the OTC derivative contracts that are not centrally cleared by counterparties.*

**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?**

**A11: We approve of the use of notional value of OTC derivatives as reference for the clearing threshold. We also agree that the threshold needs to be set both across the individual group of companies and by individual legal entity and it will be the responsibility of groups to allocate the headroom they have below the threshold. We are unable to comment on the level of the setting of the clearing threshold without having a sense of the actual figures. If the objective is to exclude hedging of real risks from the rules regardless of the size of the company, the purpose of the clearing threshold should only be to include in the system, subject to many of these financial rules, non-financial companies whose activities could pose some systemic risk to the financial system. That is the only logical justification for including non-financial companies in financial rules. In addition, if the threshold is too low, non-financial counterparties, including SMEs, may well fall in and out of the clearing obligation on a regular basis significantly increasing compliance costs with limited benefit. That would not suggest a particularly low threshold.**

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## Timely confirmation of OTC transactions

*ESMA paras 38 -41*

*38. ESMA considers financial counterparties and non-financial counterparties exceeding the clearing threshold should confirm, where available via electronic means, the terms of any OTC derivative they have entered into with each other and which is not cleared by a CCP:*

*a. within 15 minutes from the execution of the derivative contract, when the transaction is electronically executed;*

*b. within 30 minutes from the execution of the derivative contract when the transaction is not electronically executed but is electronically processed;*

*c. on the same calendar day for transactions that are not executed or processed electronically.*

*39. ESMA also considers that parties to transactions executed with counterparties other than those indicated above should confirm, where available via electronic means, the terms of any OTC derivative they have entered into and which is not cleared by a CCP:*

*a. no later than the business day following the execution of the OTC derivative when the transaction is electronically executed or processed;*

*b. no later than the[x] business days following the execution of the OTC derivative when the transaction is not executed or processed electronically.*

*40. Financial counterparties should also report to the competent authority designated in accordance with Article 48 of Directive 2004/39/EC the number of unconfirmed OTC derivative transactions that have been outstanding for more than [x] days.*

*41. ESMA recognises that proposals above would entail a modification of the current practice related to execution of transactions on the OTC derivative markets as the legal terms of the contracts are generally agreed after the execution, but considers they would contribute to a low level of log of unconfirmed trades and thus a reduction of risk of potential legal disputes.*

**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?**

**A12: As a non-financial counterparty we are not currently set up to be able to meet the timelines in paragraphs 38 and 39 and do not believe that these are currently realistic. We therefore believe there should be a phasing-in period of say 3 years before such timelines apply. We also agree with the view that the timelines could vary according to the type of transaction concerned.**

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

**A13: We suggest more needs to be done here to look at current practice in the individual markets. Again, a phasing in period for anything beyond current practice will be needed.**

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## Marking to market and marking to model

*ESMA paras 42-45*

*42. ESMA is required to develop draft technical standards specifying the market conditions preventing marking-to-market and the criteria for using marking-to-model.*

*43. ESMA is of the view that the choice between marking-to-market or marking-to-model of contracts that have been assessed as insufficiently standardised for central clearing seems to heavily push towards the second option. Indeed, the*

*fact that standardisation of the class of OTC derivative is deemed insufficient shows that there is a limited number of other similar products in the OTC market and therefore marking-to-market may be difficult to achieve.*

*44. ESMA considers, by reference to European accounting rules, that market conditions would prevent marking-to-market of an OTC derivative, when:*

*a. the market is inactive, or*

*b. the range of reasonable fair value estimates is significant and the probabilities of the various esti-mates cannot be reasonably assessed.*

*A market would be deemed inactive when quoted prices are not readily and regularly available and those prices do not represent actual and regularly occurring market transactions on an arm's length basis.*

*45. Where market conditions prevent marking-to-market, financials and non-financials exceeding the clearing threshold shall use reliable and prudent marking-to-model. ESMA considers that the marking-to-model valuation technique should:*

*a. incorporate all factors that counterparties would consider in setting a price,*

*b. be consistent with accepted economic methodologies for pricing financial instruments,*

*c. be calibrated and tested for validity using prices from any observable current market transactions in the same financial instrument or based on any available observable market data,*

*d. be validated and monitored by a unit independent from the risk taking unit, and*

*e. be duly documented and approved by the board as frequently as necessary and at least annually.*

**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?**

**A14: We regard the proposals here as reasonable.**

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

**A15: These proposals are reasonable.**

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## Reconciliation of non-cleared OTC derivative contracts

*ESMA paras 46 – 49*

*46. ESMA considers that financial and non-financial counterparties should agree in writing or in other equivalent electronic means with each of their counterparties on the terms of their portfolio reconciliation.*

*47. Also ESMA considers that portfolio reconciliation should be performed by the counterparties to the OTC derivatives with each other, or by a qualified third party duly mandated to this effect by a counterparty. The portfolio reconciliation should cover key trade terms that identify a particular derivative transaction.*

*48. Furthermore, ESMAs " view is that, for the early identification of any discrepancy in the material term of a contract or in its valuation, the portfolio reconciliation should be performed at least:*

*a. each business day when the counterparties have 300 or more OTC derivatives with each other; or*

*b. at an appropriate time period based on the size and volatility of the OTC derivative portfolio of the counterparties with each other and at least once per quarter for portfolio of less than x derivative contract with a counterparty*

*and at least once per week for portfolio between x and 300 derivative contracts with a counterparty for any other OTC derivative transaction not captured under (a) above.*

*49. Finally, and without prejudice to provisions related to dispute resolution, ESMA considers that all counterparties should also have in place the necessary arrangements to timely resolve any discrepancy in a material term of a contract or in its valuation identified as part of the portfolio reconciliation.*

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

**A16: The proposals here seem more appropriate for financial counterparties than non-financial counterparties.**

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## Portfolio compression

*ESMA paras 50 – 53*

*50.ESMA considers that portfolio compression is a risk-reducing exercise which should be run on a regular basis.*

*51. Where multilateral portfolio compression services are proposed for a class of OTC derivatives, counterparties, especially when they already use services of that service provider, should include in the portfolio compression cycle all the OTC derivatives in their portfolio that are eligible for such cycle.*

*52. ESMA contemplates that financial counterparties and non-financial counterparties with at least 500 or more non centrally cleared derivative transactions should conduct at least twice a year a portfolio compression exercise for their full portfolio, or provide a reasonable and valid explanation to the relevant competent authority for not conducting such an exercise.*

*53. Financial and non-financial counterparties should terminate each of the fully offset derivative contract no later than the day following the execution of the fully offsetting derivative contract*

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

**A17: Again, this seems more appropriate for financial counterparties rather than non-financials. Portfolio compression is a complex and expensive exercise. Large financial counterparties find this useful because they tend to have a large number of transactions with several other financial counterparties. Non-financial counterparties tend to have little or no concentration of transactions with particular counterparties.**

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## Dispute resolution

*ESMA paras 54-55*

*54. ESMA contemplates that in order to identify and resolve any dispute, financial counterparties and non-financial counterparties when concluding an OTC derivative with each other should have:*

*a. Detailed procedures and process in place for identifying, recording, and monitoring disputes relating to the recognition, valuation of the contract or to the exchange of collateral between the two counterparties. Those*

*procedures should at least record the length of time for which the dispute remains outstanding, the counterparty, and the amount which is disputed;*

*b. Detailed procedures and process in place for resolving disputes in a timely manner;*

*c. Procedures agreed by the counterparties to deal with disputes that are not resolved within 5 business days. This should include, but not be limited to, a combination of legal settlement, third party arbitration and/or a market polling mechanism.*

*55. ESMA also contemplates that financial counterparties should report to the competent authority designated in accordance with Article 48 of MiFID any disputes between counterparties relating to an OTC derivative, its valuation or the exchange of collateral for an amount or a value higher than EUR 15m and where the dispute is outstanding for at least 15 business days.*

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

**A18: As far as dispute resolution is concerned, different commodities have different procedures which are commonly used for a particular market or with counterparties in particular jurisdictions. It would not be appropriate to apply a one-size-fits all system here. There are no obvious problems with the current dispute resolution systems and therefore we recommend that no new system is imposed on the markets at this point .**

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

**A19: See response to Q18. Existing dispute mechanisms for various commodity asset classes are market driven and work well and we do not think they should be disrupted. Dispute resolution is a key component of a commercial relationship and commercial parties should be free to agree a mechanism that contributes to their relationship.**

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

**A20. We see no added value in reporting commercial disputes to the competent authority; we cannot see what this would achieve in relation to the proper functioning of the markets.**

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## Intra-group exemptions

*ESMA paras 56-58*

*56. For the application of the intragroup exemption to the exchange of collateral, two sets of draft technical standards are required:*

*a. in relation to criteria to be used and in particular practical and legal impediments to the prompt transfer of own funds or repayment of liabilities between counterparties;*

*b. in relation to the details of the intragroup OTC derivatives to be included in the notifications to the competent authority, the details of the information to be publicly disclosed by counterparty of exempted intragroup transaction on the exemption.*

*57. Draft technical standards under letter a. are expected to be developed jointly by EBA, EIOPA and ESMA and related considerations will be included in the joint discussion paper.*

*58. Draft technical standards under letter b. are under ESMA sole responsibility. These draft RTS have been added at a late stage in EMIR negotiations and therefore ESMA has only recently started the analysis in this respect. Stakeholders' views would however be valuable in this context.*

**Q21: In your views, what are the details of the intragroup transactions that should be included in the notifications to the competent authority? Note: ESMA is preparing drafts on these but is seeking views in advance.**

**A21: It is difficult to comment on the level of detail required on intra group transactions for a primarily non-financial counterparty. In order to avoid administrative overload and delay with very limited added value we think the requirements on what should be reported to a competent authority should be kept to a minimum and allow for a very fast exemption authorisation. We would want general exemption rules to be in place so that each individual transaction did not need to be separately authorised.**

**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?**

**A22: We are not comfortable with the concept of public disclosure of any details of exempted intergroup transactions as we understand such transactions to be commercially confidential. We also understand an international initiative, to this end, is underway and we should maintain consistency with regulations on global level.**

**We have a major concern about confidentiality of data and would be seeking real assurances that our commercially sensitive positions would not become public. We are concerned that regulators may publish information, even amalgamated information, that reveals commercially sensitive positions or gives a false picture.**

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## Reporting Obligation - article 6/7

*ESMA paras 166-173*

*166. In developing draft RTS regarding the details and type of reporting to TRs, ESMA considered the following key elements:*

*a. the purpose and content of reporting;*

*b. the elements to correctly identify the contracts and the corresponding counterparties; and*

*c. the level of granularity.*

*167. In developing draft ITS on format and frequency, ESMA considered:*

*a. what would the actual fields to be used to report each element; and*

*b. standard codes for the identification of contracts, trades, counterparties/clients, etc..*

*168. ESMA preliminary view is that the fields indicated in the table attached to this report (Annex II) should be reported by counterparties to TRs in order to comply with Article 7. Some of these fields will require some guidance to ensure consistency among reporting entities. This is particularly relevant for the items highlighted in this Discussion Paper.*

*169. The table is divided in two sub-sets: (i) Table 1 - counterparty data (to be reported separately by each counterparty or their appointed reporting entity); and (ii) Table 2 - common data (that may be reported by only one counterparty, if reporting also on behalf of the other, or an appointed reporting entity).*

*170. The items below follows the sequence of the table as much as possible and the contents for technical standards as described in EMIR under this point notably:*

*a. purpose of reporting;*

*b. contents of reporting;*

*c. format of reporting;*

*whereas on contents, the table is organised as follows with the format details embedded under each appropriate item:*

*a. parties to the contract;*

*b. contract type;*

*c. details on the transaction;*

*d. risk mitigation and clearing;*

*e. specific derivatives classes.*

*171. EMIR already indicates a minimum set of information to be required and developed under the standards: the parties to the contract, beneficiaries and the main characteristics of the contract, notably type, underlying, maturity, notional value, price and settlement date.*

*172. On the purpose of reporting, ESMA has considered the G20 Pittsburgh declaration and the objectives of EMIR. Besides transparency, protection against market abuse and systemic risk mitigation, ESMA has also considered that TR data could be useful to ensure firms comply with other requirements in EMIR.*

*173. Also following the above mentioned objectives, a consistency check was made between EMIR and reporting to TRs, on the one hand, and the transaction reporting mechanisms already in place in the EU under MiFID, on the other hand. CESR had in the past advocated the synergies between existing transaction reporting mechanisms and TRs and the usage of TRs, if wished by counterparties, for simultaneous reporting under EMIR and MiFID. The draft MiFID proposal notes that TRs may seek authorisation as an ARM under MiFID, and if this authorisation is granted, then the reporting of a trade to the TR/ARM would ensure compliance with both EMIR and MiFID reporting requirements. The ability for a TR to qualify as an ARM will be assisted by the compatibility of the dataset required to be reported to TRs with that under MiFID transaction reporting requirements (and which is currently under review as part of the MiFID review process). Reporting under EMIR, as understood by ESMA when considering technical options for the drafting of technical standards, is more extensive in scope than the current MiFID reporting obligations.*

Please see attached tables (annex ii).

**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?**

**A 69: We have two general points to make about reporting. One is that as far as possible it should be possible to delegate reporting to one counterparty so that both do not have to report the same trade. This is the approach that seems to be being adopted globally and we think the EU should remain consistent with that. The other point is to stress once again the need for confidentiality on the part of trade repositories.**

*ESMA para 174*

*174. Under EMIR, the reporting obligation in placed on both counterparties to a derivative contract (including CCPs), without prejudice to the fact that counterparties may delegate reporting to one of the two counterparties or to a third entity inside or outside the EU. Such delegation to a third party does not affect the liability of the individual counterparty under the duty to report nor the need for it to ensure any outsourcee or delegate follows all applicable requirements under EMIR and its implementing measures. The attached two-part table includes:*

*a. Table 1: Counterparty data - which must be reported in relation to each counterparty for each derivatives transaction; and*

*b. Table 2: Common data - that may be reported by the two counterparties separately or that may be reported only once and on behalf of both counterparties.*

**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?**

**A70: The tables of data attached to the questionnaire imply a considerable administrative burden on businesses, a burden that non-financial businesses are not currently set up to deal with. Consideration needs to be given on the impact of this imposition on a range of businesses as this goes beyond the normal financial businesses. Red tape should be minimised wherever possible and adequate time allowed for adaptation.**

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## Beneficiaries

*ESMA para 175-176*

*175. Where the economic beneficiary of a derivatives trade is not the counterparty, the beneficiary should be identified. While back-to-back trades would be reported separately, transparency of other trading techniques must be ensured, notably those including the use of structures where there may be morphing of beneficiaries. In practice identification of a specific beneficiary or beneficiaries may be complex, particularly where there is a chain of beneficiaries.*

*176. In the case of certain structures, such as funds, the identification of beneficiaries could prove difficult. It is useful to define beneficiary (e.g. an individual or entity in a financial contract as the recipient of the assets or proceeds of the contract) and most importantly the level of disclosure in the case of a chain of beneficiaries. The ultimate beneficiaries in the*

*case of certain structures could be multiple and in turn, the reporting and supervision proves more complex. ESMA preliminarily considers that not identifying beneficiaries could incentivise the use of certain legal and business structures to morph economic beneficiaries. This would hamper transparency and investigation of market abuse and other wrongdoing.*

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

**A71: Care needs to be taken here not so much in what is reported to trade respoitories but in what they then may use for any public reporting. Public reporting needs to be done in such a way that individual positions or instruments traded by individual companies are not discernible from the public data. This is for reasons of competition as such disclosure would provide valuable information to our competitors.**

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

**A82: In order for regulators to obtain a picture of real exposure in the system they need to receive a picture of the net positions of a group. This would mean amalgamating data across exchanges and OTC, from different legal entities in different European counties that tie back to one company. We have questions how this would be done on 3rd country markets and**

**how this interrelates. Aggregation to the public should be aggregated on the highest level in order to safeguard confidentiality of data.**

**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?**

**A83: Future exchanges in the US disclose public information on a weekly basis and (most) exchanges in EU are following this approach. However when liquidity and sensitivity of information becomes a concern, for example bespoke OTC contracts, disclosure of information once a month/quarter should be considered.**

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