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European Securities and Markets Authority
103, rue de Grenelle
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Purpose: Consultation Paper ESMA
Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories

Natixis Asset Management (NAM) thanks the European Securities and Markets Authority for giving the opportunity to respond to the consultation on the technical standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories.

With assets under management of 293 billions euros (31/03/2012), NAM ranks among the leading European asset managers. It offers a wide range of effective management solutions, based on extensive expertise in European and specialized asset management including mandates, UCITS and AIF. NAM provides services to a diverse client base: institutional investors, large companies, distributors, Banque Populaire and Caisse d'Epargne clients.

For more information about NAM, please visit www.am.natixis.fr

NAM actively participated to discussion rounds with the "*Association Française de Gestion*" (AFG) and the European Fund and Asset Management Association (EFAMA) and attended the ESMA open hearing on 12 July 2012. NAM supports AFG's response to ESMA consultation on the Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories and also wishes to express its own views of asset manager on the aforementioned consultation.

As a general comment, NAM wishes to stress the complex structure of the Consultation Paper and thus the difficulty to have a complete and clear overview of the proposed measures.

NAM would also like to note the short deadline for market participants to implement these news rules and the difficulty to evaluate the real costs of all these measures. Indeed, the deadline of 31 December 2012 may be too tight to implement this entirely new market structure.

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Finally, the Discussion Paper implements a new contract chain between a CCP, direct clients and indirect clients. We would like to draw ESMA's attention on the fact that **this contract chain should not affect the provision set out in article 50 of UCITS Directive 2009/65/EC** on the coordination of laws, regulations and administrative provisions relating to UCITS, which allows UCITS to sell, liquidate or close any OTC derivative by an offsetting transaction at any time at its fair value.

With respect to the Consultation Paper, NAM has decided to focus its contribution on the following points:

1. Indirect Client - Indirect clearing arrangements (art. 4 of EMIR and Annex II Chapter I and II, (*ICA*))[1]:

Firstly, we think that the concept of indirect clearing arrangements needs to be clarified. ESMA defines "indirect client" in article 2 of chapter I as a "client of a client of a clearing member" and develops in chapter II the indirect clearing arrangements by referring to the second subparagraph of paragraph 3 of the article 4 of EMIR. We note that, in fact, ESMA creates a framework for a new entity which could be referred to as "sub clearing broker" and which would have its own requirements. **However, we believe that the implementation of such new status is not provided by article 4 of EMIR**, but may result from the Langen Amendment to MIFID II which clarifies that an "entity can satisfy its clearing obligation either by becoming a clearing member or by clearing through an investment firm or credit institution subject to the requirements of MiFID (Article 3(2))". In our opinion, EMIR is just contemplating the possibility to delegate the clearing obligation to others entities. **It means, in our view, that sub-clearing brokers should comply with the same requirements as clearing members.**

Furthermore, we understand that the objective of the ESMA is to facilitate access to CCPs to small clients that clearing members would not be interested in to serve. However, we do not understand how indirect clearing arrangements would facilitate access to CCPs. Indeed, we do not see how the same level of protection between clients and indirect clients will be provided, notably because of the costs linked to the level of protection that would be offered to a client of an indirect client, which will certainly be higher than the costs of such protection in a direct clearing arrangement. After analysis, we feel that this new concept is above all a tool for banks that would want to develop their own offer of clearing services or for the purposes of providing clearing services in/from the US. We acknowledge the difficulties for the market to be in phase with EMIR's short deadlines but we are not certain that this constraint justifies the indirect clearing implementation as described in Annex II – Chapter I and II which would not, in our point of view, guarantee a similar level of protection between indirect and direct clients.

[1] CP Pages 8/66/178

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2. Clearing obligation (Annex II - Chapter IV (*CRI*))[2]:

2.1 We understand that Foreign Exchange Transactions are out of scope of the clearing obligation at this stage. It is also the point of view taken by BCBS and IOSCO in their consultation on Margin requirements for non-centrally-cleared derivatives[3]. **We would appreciate if ESMA could confirm our understanding, in light of the position taken by BCBS/IOSCO, as it is crucial that the three entities are in phase on this topic.**

2.2 With respect to the **Clearing obligation procedure**, criteria used by ESMA to pronounce a mandatory clearing are rightly different from those used by the local authority to authorize clearing by a CCP. It then belongs to ESMA to regularly assess that the criteria are still met in order to reaffirm or dismiss the mandatory clearing. This point, if correct, should be mentioned in the text and a proper procedure defined in the RTS or in each RTS relevant to any new derivative submitted to mandatory clearing.

Standardisation includes a reference to both common legal documentation and (automated) post trade common practices. Legal templates should be able to be developed under different national laws provided they are sufficiently adaptable to common international dealings and accepted by the relevant CCP's. It should not be considered as a requirement to execute all trades under one unique law. More specifically use of French FBF contracts should be accepted if compliant with the rule book of a CCP.

3. Risk mitigation for OTC derivative contracts not cleared by a CCP[4]

3.1 Timely Confirmation (Annex II - Chapter VIII – Article 1 (*RM*))[5] :

3.1.1. "Confirmation" is defined in annex V on page 138 of the Paper as "the moment when the full terms of the contract and any relevant master agreement are agreed between both counterparties to the contract". Firstly, we think it would be more appropriate to incorporate such definition under Annex II.

We appreciate the fact that ESMA took into consideration the remarks expressed by the profession to extend the delay for confirmation of non cleared contracts. But if the term "confirmation" includes the signature of a document by both parties to the transaction, we believe that the one-day period is then still too short. Indeed, the time period for obtaining a document executed by both parties is slow and variable and may take longer, depending on the complexity of the product and the efficiency of the parties involved. Today, the confirmation of non-structured product can take one month, whereas the confirmation of structured products can take up to six months.

[2] CP Pages 8/69/180
[3] BCBS / IOSCO Consultative document "Margin requirements for non-centrally-cleared derivatives" issued in July 2012 for comment by 28 September 2012
[4] CP pages 16/73/188
[5] CP pages 16/73/188

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We are conscious of the necessity to reduce the confirmation timing. But if the ESMA wishes to retain the one-day period, we suggest that the term "confirmation" then refers to the term-sheet that is usually sent on the same day as the trade and which is a non-executed document reflecting the financial terms of the trade as agreed between the parties.

3.1.2. The sentence "where available via electronic means" in point 2 of the article 1 RM Chapter VIII annex II should be modified. Indeed, we feel that the term available means the electronic confirmation should be an obligation and not a possibility. **Thus, we propose to replace "available" with "relevant" or "if applicable":**

"(…) 4. An OTC derivative contract concluded with a financial counterparty or a non-financial counterparty that meets the conditions referred to in Article 10(1)(b) of Regulation (EU no xxx/2012 [EMIR] and which is not cleared by a CCP shall be confirmed, ~~where available~~ ***if relevant / if applicable,*** *via electronic means, as soon as possible and at the latest by the end of the sane business day*."

We would suggest that the monthly report should comply with the FED requirement: financial counterparties shall report on a monthly basis to the competent authority the number of unconfirmed OTC derivative transactions that have been outstanding for more than 30 business days (instead of 5 business days). Such reporting is appropriate to support authorities in supervising market participants.

3.2 Portfolio Reconciliation (Chapter VIII - Article 2 (*RM*))[6]:

Even if NAM agrees with the different Portfolio Reconciliation thresholds as set forth in the Discussion Paper, we think that the provisions are still unclear on whether the counterparty should be understood as being the fund or its asset manager.
So could it be possible to clarify that the number of OTC derivatives should be determined at the level of a fund and not at the level of its Investment Manager?

3.3 Dispute Resolution (Chapter VIII - Article 4 (*RM*))[7]:

First of all, NAM thinks that ESMA should give a definition of the term "dispute" between counterparties.

Multiple mechanisms already exist on the market to resolve any dispute between counterparties. Indeed, most counterparties have already set up internal processes and procedures to resolve disputes on OTC Derivatives and organised their disputes on a bilateral basis by incorporating provisions/clauses within the master agreements and/or the confirmations. These clauses regulate the timing of dispute settlements, the way how the amount should be determined, how the costs should be born...

Moreover, ISDA provides different tools to resolve disputes:

[6] CP Pages 17/73/192
[7] CP Pages 19/74/196

- 2011 Convention on portfolio reconciliation and the investigation of disputed margin calls
- 2011 Format market polling procedure.

These documents are designed to be used by the industry as suggested methodology for resolving collateral disputes.

Generally, the dispute timing will depend on the complexity of the relevant transaction, the time difference applying to the counterparties and the number of third parties involved in the discussions. Furthermore, the dispute process in itself is divided in several liaising steps, where parties exchange and discuss information. So we believe that in practice five days is a too short time limit for resolving disputes.

Besides, NAM as asset manager is highly regulated and already complies with ESMA purpose which is to ensure that a specific treatment is organised at the level of the counterparties in a timely manner.

However, we do not understand the ESMA proposal of a report being sent to the ESMA, describing the outstanding disputes. We doubt that in the end, such report to ESMA brings much in the resolution of such disputes and do not see the rationale of it

Indeed, we rather think that the question is whether procedures should be set up directly by ESMA as a technical standard for disputes remaining unsettled after [five] business days in order to have harmonized procedures across all counterparties.

3.4 Marking to market and marking to model (Chapter VIII - Articles 5 and 6(*RM*))[8]:

It is referred to circumstances under which valuation will move from a marked to market to a marked to model approach. Its wording in very general terms is not a concern for an asset manager who is daily confronted with valuation issues. We insist that regulators should take a coherent approach between requirements for valuation of a derivative with a view to compute a NAV and in order to determine margin calls and adjust collateral. For example, under AIFM Directive an asset manager is required to refer to market prices, which might be produced by the counterparty for OTC derivatives, and challenges them by an independent valuation, generally based on internal models.

4. CCP requirements (Annex III)

4.1 General comments:

We note that the minimum capital requirements need to be specified in the draft technical standards to be drafted by EBA, on which ESMA will be consulted. For this reason, NAM would like to stress the importance of the CCP risk management rules, particularly with respect to minimum capital requirements for clearing members. **In our opinion, a high level of minimum capital requirements applying to**

[8] CP Pages 20/75/198

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clearing members is the only way to ensure the robustness of the clearing mechanism and capacity of CCP to react rapidly in case of evolution of its risk exposure.
Thus, the technical standards as drafted by EBA will need to provide for such minimum capital requirements for the clearing members.

Please note that we regret that our suggestion to have a bank status for CCPs has not been taken into consideration.

4.2 Margins (Annex III - Chapter VII) (*MAR*) [9]:

We believe that a minimum percentage of 99.5% for OTC derivates applied to the calculation of the margin is appropriate. However, we understand that, pursuant to Clause 3 of Article 1 (*MAR*), the CCP shall inform its competent authority of the criteria considered for the determination of the percentage applying to the calculation of the margins for each class of financial instruments. **For transparency purposes, such criteria should also be published on the relevant CCP's website. It will allow counterparties to anticipate the calculation of the margins and to determine its level quickly.**

We suggest that such publication obligation is inserted under article 1.3 of the Chapter VII.

4.3 Collateral (Annex III - Chapter XI) (*COL*)[10]:

At this stage, CCPs are only accepting a **restrictive list of eligible assets, such as cash or "govies" instruments with a minimum rating.**

But, a restrictive list of eligible assets as collateral entails the risk of the decline of their liquidity and has in a certain sense a procyclical effect.

Furthermore, Collective Investments Funds do not always possess sufficient cash or relevant "govies" instruments to satisfy highly liquid collateral requirements. This would trigger an additional step (and linked additional costs) for such funds, as they would be required to transform their assets into eligible assets. In addition, Collective Investments Funds have to respect investments rules and ratios and thus would not always be allowed to proceed with such transformation of assets. **In the end, UCITS and AIF could, in several cases, not satisfy these collateral requirements.**

We reiterate our view that larger is the eligible collateral, lower are the market impact and the procyclicality. This implies however an adequate policy of haircuts and a strict monitoring of market conditions to act immediately, but progressively, through higher level of haircut and not discontinuously through a ban from the eligibility list. It should be clearly specified that equity are eligible collateral.

[9] CP pages 29/104/218
[10] CP pages 36/111/236

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The inclusion of covered bonds within the list of eligible collateral is another positive move. But the ban of real estate companies seems too severe as it stigmatises a type of companies on conjuncture's and not structure's considerations.

Funds, UCITS or AIFs should also be eligible. We insist that funds shares or stakes be accepted as collateral if the fund invests only in instruments that are themselves individually accepted as collateral. The level of haircut for the fund would be the highest applicable to any instrument the fund may invest in. Using funds as collateral helps dealing with concentration and liquidity issues about collateral and indirectly procyclicality.

Therefore, ESMA should ensure that the CCPs accept a less restrictive list of assets eligible or alternatively that the funds are allowed by the CCPs to post directly the securities they hold.

Please note that this proposal is in phase with BCBS/IOSCO consultation on Margin requirements for non-centrally-cleared derivatives aforementioned. **Indeed, it provides, as a guide, examples of the types of eligible collateral and clearly indicates that equities should be eligible collateral. So, we would like to stress the need for the industry to have a consistency between both rules.**

5. Trade Repositories - Contents of reporting by parties to the contract (Annex V)[11] :

We are strongly of the opinion limiting the table of fields to the main characteristics of the contracts, including at least the parties to the contract, the beneficiaries, instrument type, underlying, maturity, notional, value, price and settlement date, is the most adequate solution. The more granular the information has to be, the more expensive necessary developments will be. This cost impact is not only expected at the counterparties level, but as well as for trade repositories and regulators to effectively analyse additional complex data with respect to potential systemic risks.

We do not see to what extent the inclusion of a reporting field giving the information that the contract was concluded with a counterparty not located within the EEA will bring anything more to monitor the systemic risk that could be built up between non-EU and EU entities. As the trades are reported, the TR has already all the information needed to monitor the risks with non-EEA counterparties. Adding this field creates higher reporting implementation costs for market participants.

As we mentioned it in our answer to the ESMA Discussion Paper of March 2012, ESMA shall ensure to implement synergies between the transaction reporting mechanisms already in place under Markets in Financial Instruments Directive (MIFID) and under EMIR. **The two data sets need to be aligned as much as possible to avoid duplication for asset managers.**

This could also be the opportunity to simplify the content of such report, in order to mention relevant and useful information only.

[11] CP pages 43/138/258

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Concerning the transmission of data, we think that Trade Repositories should be the basis for reporting under MIFID and under EMIR. We are pleased to note that ESMA will work towards the objective of a common reporting mechanism.

For information purposes, we add the following table which compares MIFID and EMIR reporting requirements:

	Trade Repositories (EMIR) = TR	**RDT (MIFID)**
Scope	Cleared and not cleared OTC Derivatives, notwithstanding the underlying	**For Asset Managers**: buy and sell of financial instruments admitted to trading on a regulated market or on an organised multilateral trading facility in a member state of the European Economic Area, notwithstanding the venue of execution **For Investment Service Providers**: same as above + derivative transactions on shares admitted on a regulated market or an organised multilateral trading facility of the European Economic Area.
Entities concerned	Parties to the OTC derivative transaction	Investment Service Providers
Content	High granularity of received data : Some data will need to be supplied by both counterparties, whereas other data can be provided by one counterparty only, on behalf of both parties. Some data will cover all types of transactions, whereas other data will be specific to a type of transaction. N.B: the collateral which is posted is also subject to the reporting obligation.	Identity of counterparties, reporting counterparties, ISIN code, venue, quantity of the financial instruments/agreements/notional amount, buy/sell, collateral type, amount, timing, scheduled maturity date… Additional fields for OTC derivatives: derivative type, option type, strike price, and termination date.
Timing	1 business day following trade date or amendment	1 business day following trade date
Transmission	Via a Trade Repository (TR) with reconciliation of data between TR	To the competent authority (AMF in France) via a Direct Transaction Reporting System (RDT) or via file transfer

In addition, synergies should also be considered with respect to other international requirements and particularly with Dodd Frank rules.

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We also want to highlight that the implementation of this reporting will entail high costs for asset managers as they will need to develop information systems and procedures to comply with this reporting obligation.

Taking into account all the comments as mentioned above and the one-day period which may be too short for some information, **we think that some details as required under Annex V – Annex 1 (Table 1 and Table 2) are not necessary to respect the purpose of EMIR and that the list could be reduced in order to focus on the financial terms of the trade** only.

As a matter of examples, the information as requested under Fields 20, 21 and 28 of Table 2 are difficult to obtain within one day. Regarding the information under Fields 28, 29 and 30 of Table 2, we do not see the rationale of such request (29 and 30 could also be merged) and do not understand the purpose of reporting the revaluation of the contract (fields 34 and 35 of Table 2).
With respect to the amount of collateral as requested under Field 31 of Table 2, it should be clarified that such amount should be reported for each counterparty.
Please note that it seems there is a mistake under "Table 2 - Common Data" at the field n°19 concerning Master Agreement date which refers to the date of the master agreement version, but should refer to the date of execution of such master agreement.

Finally, we feel that the identification of counterparties is complex to envisage and to implement (for example, for confidentiality purposes, name of funds may not be disclosed in some cases to counterparties)**.** So, we suggest to ESMA to develop all details relating to this issue under the draft ITS.

In a nutshell, we really think that the content of the report should be simplified, in order to mention useful information only and focus on the financial terms of the transaction.

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