



ADVICE TO ESMA

Securities and Markets Stakeholder Group –

Advice on Discussion Paper – The Clearing Obligation under EMIR

I. Executive summary

The objective of this paper is to provide advice to ESMA on the discussion paper on the preparation of the regulatory technical standards ESMA is required to draft under Article 5 (2) “Clearing Obligation Procedure” of the Regulation (EU) No 648/ 2012 of the Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (EMIR).

The SMSG very much welcomes ESMA’s efforts to allow for a sound discussion on that challenging topic in preparation for one or more possible consultations after the admission of at least one CCP that is authorized or recognized to clear certain classes of OTC derivatives.

The key messages the SMSG would like to highlight towards ESMA for consideration in their work going forward regarding finalizing regulatory technical standards for the clearing Obligation under EMIR are:

- Deviations from International Standards with respect to the clearing obligation should be carefully monitored and addressed when finalizing the regulatory technical standards. Differences in the application of the clearing obligation might create a competitive disadvantage for European market participants as well as a higher administrative burden. The approach as outlined in section 3 (number 88) can serve as a perfect starting point.
 - The chosen approach of ESMA to strike the appropriate balance between the proposed key characteristic and other characteristics could lead to the envisioned results. The regulatory technical standards need to cater clear definitions to ensure legal certainty and leave sufficient flexibility to avoid circumvention of the clearing obligation as well as stipulate a short time frame for the introduction of additional derivatives into the clearing obligation.
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II. Introduction

1. On 12 July 2013 ESMA has published a discussion paper in order to seek stakeholders' views on the preparation of the regulatory technical standards ESMA is required to draft under Article 5(2) "Clearing Obligation Procedure" of the Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (EMIR).
2. The input from stakeholders will help ESMA in the development of the relevant technical standards to be drafted and submitted to the European Commission for endorsement. ESMA invited for comments on the discussion paper through a separate template to be returned no later than 12 September 2013.
3. The introduction of the discussion paper briefly summarizes the conditions under which ESMA shall develop and submit to the European Commission for endorsement draft technical standards for the Clearing Obligation (CO) Procedure defined in Article 5(2) of EMIR, specifying the following:
 - the class of OTC derivatives that should be subject to the clearing obligation referred to in Article 4;
 - the date or dates from which the clearing obligation takes effect, including any phase in and the categories of counterparties to which the obligation applies; and
 - the minimum remaining maturity of the OTC derivative contracts referred to in Article 4(1) (b) (ii).
4. ESMA further clarifies in certain parts of the discussion paper that the Clearing Obligation Procedure shall only begin when a CCP clearing OTC derivatives is authorized under EMIR, or when ESMA has accomplished a procedure for recognition of a third-country CCP set out in EMIR Article 25. The document further perfectly summarizes the various regulatory documents related to that matter and outlines the next steps to be taken by ESMA indicating the expected timeline until when regulatory technical standards ESMA is required to draft under Article 5(2) "Clearing Obligation Procedure" can be expected.
5. The SMSG notes that the discussion paper should be seen as a preliminary public consultation which will be followed by one or more consultation papers to be issued by ESMA after CCPs are authorized under EMIR. However, since the discussion paper already contains detailed aspects on the Clearing Obligation Procedure the SMSG will only refer to high level comments.

III. General remarks

6. The SMSG appreciates the opportunity to provide comments based on the discussion paper published for consultation on 12 July 2013. As explained in the introduction, this section will outline the comments on specific aspects of the discussion paper.
7. The SMSG welcomes the summary of the Clearing Obligation Procedure giving a clear indication on the time frame from the notification of a class of derivatives to ESMA until when the clearing obligation enters into force. The above is in particular to be seen in light of the already received notifications from 13 CCPs providing clearing services in Europe located in 9 countries. These notifications contained all information that enables CCPs to clear the respective OTC derivatives already. Together with the information gathered through the current discussion paper ESMA will be in an excellent position to draft the regulatory technical standards as required under Article 5(2).
8. The SMSG supports the general approach ESMA has taken to define classes of OTC derivatives to be subject to the clearing obligation (Class+). The distinction between defined key characteristics and

other characteristics of a class of derivatives will lead to a transparent process. The options outlined for the respective class of derivatives can add clarity and certainty to the Clearing Obligation Procedure.

9. The SMSG believes that the determination of a Clearing Obligation can be effective where there is only one CCP offering clearing in that class of derivatives and therefore does not see any need to wait for several CCPS to clear that class before imposing the obligation. EMIR only requires ESMA to consider whether more than one CCP clears a specific class of derivatives when determining phasing-in and SMSG strongly recommends ESMA not to diverge from this approach.
10. The SMSG encourages ESMA to aim at ensuring that a maximum of products fall under the clearing obligation. This does not mean that absolutely all products will have in fine to be centrally cleared: in parallel to this general requirement, ESMA should adopt a pragmatic procedure to deal with instances where no CCP is available or ready to clear a specific product class¹. In such a case, ESMA could initiate discussions and consultations with the risk committees of CCPs, and then decide to exclude from the scope of the clearing obligation the set of products at stake.
11. As an example we may refer to section 2.1 Credit Derivatives of the discussion paper. With respect to question 1 on Index CDS and the preference for the options A, B or C a tendency would lead to option A. This option provides the most certainty to the market and also would lead on a transparent procedure on the inclusion of new series for that class of derivatives (Class +). All other options would lead to uncertainty in the market since a posteriori exclusion (option B) leaves the market potentially with cleared and not-cleared transaction and a criteria based approach (option C) also adds complexity to the application of the Clearing Obligation Procedure. However, based on the above, it must be ensured that a CCP is willing and able to clear a certain series of a Class+. Hence, close interaction between the respective CCP and ESMA might be advantageous.
12. In addition, as ESMA points out, several clearing obligation processes will run in parallel and ESMA has no flexibility to wait until all CCPs clearing the same class have been authorized. The RTS to be enforced should therefore leave enough flexibility to cater for the OTC derivatives specifics of CCPs that will be authorized at a later stage.
13. The role of the public register according to Art. 6 EMIR becomes not entirely clear. It would be helpful to further elaborate and structure the aspect in further publications.
14. The SMSG supports the approach taken in section 3 of the discussion paper with respect to the availability of data and the existing and developing standardization of OTC derivative products. In particular,
 - i. the data sources will improve with mandatory reporting of all derivatives under EMIR. This will ease the task for ESMA in developing the parameters for the Clearing Obligation in the RTS and the details for the public register and should be used as a model to develop other trade registration mechanisms and providers (cf. MiFID II consolidated tape mechanisms); and
 - ii. OTC derivatives must be standardized to facilitate monitoring and risk assessment of OTC derivatives but the capacity to develop bespoke structures must also be maintained to facilitate hedg-

¹ Please refer to 15, (ii)

ing of futures ways to finance Europe (e.g. securitization to support EIB projects backed by a dedicated derivative).

15. With respect to the determination of the phase in of the clearing obligation the SMSG would like to highlight that – after determination of the RTS – a properly chosen phase in is appropriate. The phase in however should consider the readiness of the market for clearing specific products. An example would be interest rate derivatives which have already a highly standardized and processes are automated.
16. With respect to the readiness of CCPs notifying certain OTC derivatives for the clearing obligation it should be noted that those CCPs already clear such contracts in the majority of cases. After having received the approval by their national competent authority and the college of regulators those CCPs should be prepared to handle also larger volumes of cleared transactions and Clearing Members shouldn't be allowed to increase barriers, such as additional costs or restrictive collateral eligibility or valuation.
17. With respect to the counterparties active in the market, the SMSG questions why a deviation of the already existing and established definitions between financial and non-financial counterparties is deemed necessary. This potentially will lead to further inconsistencies and intransparency on the clearing obligation.

Adopted on 26 September 2013

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