



European Securities and
Markets Authority

EMIR Review Report no.4

ESMA input as part of the Commission consultation on the EMIR
Review



Table of Contents

1	Executive Summary	3
2	Introduction	4
2.1	Additional input in the context of the consultation for the EMIR review	4
2.2	Previous publications as additional contributions to the EMIR review	4
3	Definitions and scope	5
4	Clearing obligation.....	6
4.1	Improvements to the clearing obligation procedure	7
4.2	Removal of Frontloading	10
4.3	Improvements to the notification procedure	13
5	Exemptions for Intragroup Transactions	14
6	Trade reporting.....	15
7	Third-country CCP recognition process	19
8	EU CCP authorisation process	21
8.1	Definition of 'activities and services covered by the initial authorisation'	22
8.2	Definition of 'significant change'.....	23
8.3	Procedure for the review of significant changes under article 49	23
9	Trade repositories	23
9.1	Access by national competent authorities to TR data	23
9.2	Fines that can be imposed by ESMA on TRs	24
9.3	Enforcement procedure.....	26
9.4	On-site inspections: No judicial authorisation before non-coercive on-site inspections.....	27
9.5	Clarification of TRs' obligations	29
9.6	Tools for ESMA's supervision.....	30
9.7	Registration process.....	33
9.8	Relationships with third countries	34

Acronyms used

AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	Alternative Investment Fund Managers Directive (Directive 2011/61/EU)
CCP	Central Counterparty
CFTC	Commodity Futures Trading Commission
CRA	Credit Rating Agency
CRR	Capital Requirements Directive (Regulation (EU) No 575/2013)
EMIR	European Market Infrastructures Regulation (Regulation (EU) 648/2012)
ESA	European Supervisory Authorities
ESMA	European Securities and Markets Authority
ETD	Exchange Traded Derivatives
FAQ	Frequently Asked Question
FCA	Financial Conduct Authority
LEI	Legal Entity Identifier
MAR	Market Abuse Regulation (Regulation (EU) No 596/2014)
MiFID	Markets in Financial Instruments Directive (Directive 2004/39/EC)
MiFIR	Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014)
MoU	Memorandum of Understanding
NCA	National Competent Authority
OTC	Over-the-counter
QCCP	Qualifying Central Counterparty
RTS	Regulatory Technical Standards
TC-CCP	Third-country Central Counterparty
TR	Trade Repository
SFTR	Securities Financing Transactions Regulation
UCITS	Undertakings for Collective Investment in Transferable Securities
UTC	Coordinated Universal Time

1 Executive Summary

Reasons for publication

The European Market Infrastructures Regulation (“EMIR”) entered into force in August 2012. EMIR constituted the main part of the European response to the commitment by G-20 leaders in September 2009 that: "All standardised OTC derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at latest. OTC derivatives contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements".

In accordance with Article 85(1) of EMIR, the Commission is required to prepare a general report on EMIR which shall be submitted to the European Parliament and the Council, together with any appropriate proposals. Among other things, the Commission published a consultation paper to receive input from all stakeholders on the different aspects of EMIR. The Commission indicated to ESMA they would welcome input on the EMIR review beyond the three reports indicated in Article 85(1) that ESMA is required to contribute to. The present report constitutes ESMA's contribution as part of the Commission's consultation on the EMIR review.

Contents

The report on EMIR review no.4 flags in Section 3 the issues related to the articles of EMIR on scope and definitions, and addresses in particular the case of municipalities and regional governments. The report then provides in Section 4 for a description of the rigidity of the clearing obligation procedure and the related consequences of this lack of flexibility, indicating key changes to improve it. In Section 5, the report raises the issues associated to the drafting of Article 3 on the intragroup exemptions and the need for increased clarity. Section 6 addresses the trade reporting requirements and lists a series of concerns and associated proposals that should be taken into account during the review in order to better adapt the process to the variety of counterparties that need to report and the need for accuracy and transparency on the trading and clearing activity in Derivatives in the EU. The report flags in Section 7 the limitations of the recognition process for Third Country central counterparties (CCPs) and therefore the need to have a robust process ensuring both investor protection and a level playing field for all authorised and recognised CCPs. In Section 8, the report indicates some issues related to what constitutes the scope for an authorisation for EU CCPs and more precisely the issues related to the introduction of changes following the initial authorisation, thus proposing a way forward to strengthen supervisory convergence. Finally, Section 9 provides for an analysis of the various requirements related to trade repositories (TRs) that would benefit from some changes and suggest some specific amendments to address these.

Next Steps

This report is being submitted to the European Commission and is expected to feed into the general report on EMIR that the European Commission shall prepare and submit to the European Parliament and the Council.

2 Introduction

2.1 Additional input in the context of the consultation for the EMIR review

- 1 On 23 March 2015 the European Commission wrote to ESMA to request its input on 3 specific topics covered by other reports. The Commission also indicated its willingness to receive ESMA's input as part of the EMIR Review Consultation¹.
- 2 The purpose of this report is to provide the European Commission with ESMA input on various issues that in ESMA's view should be considered in the context of the EMIR review in order to enhance the effectiveness and the consistent application of the EMIR provisions.
- 3 In line with ESMA's statutory role and significant interest in EMIR and its effective implementation more generally, ESMA is very supportive of the current work taking place in the context of the EMIR review. Through this response, ESMA's intent is therefore to make an important contribution to the consultation as it is building on ESMA's experience of working with EMIR.
- 4 The issues identified by ESMA in this report and covered in sections 3 to 9, where changes to the current EMIR provisions would be advisable, relate to the following topics:
 - Definitions and scope
 - Clearing obligation
 - Exemptions for Intragroup Transactions
 - Trade reporting
 - Third-country CCP (TC-CCP) recognition process
 - EU CCP authorisation process
 - TR supervision

2.2 Previous publications as additional contributions to the EMIR review

- 5 Although Article 85(1) of EMIR highlights a series of specific topics, the ongoing review is with regard to the full scope of EMIR. Therefore, the consultation paper includes a) questions covering these specific topics of Article 85(1) in Part I, as well as b) questions related to all parts of the Regulation, in Part II, including questions not specifically addressed in this report or the other three reports that ESMA is now submitting.

¹ The European Commission webpage for the consultation on the EMIR review is available at the following address: <https://ec.europa.eu/eusurvey/runner/emir-revision-2015>

- 6 However, for most of these other questions, ESMA has already been able to contribute, as the topics have either :
 - been covered in prior ESMA publications (for example Question 1.3), therefore these documents can also serve as reference in the context of the EMIR review; or
 - are related to technical standards submitted or to be submitted by ESMA following public consultations (for example Question 2.4), and ESMA would be able to initiate work in order to propose certain new amendments of the RTS, where necessary and justified, outside the context of the EMIR review.
- 7 Two topics from these additional questions are briefly commented further in the following paragraphs.
- 8 With regard to the functioning of CCP colleges (Question 1.3), ESMA published a review document on CCP colleges under EMIR on 8 January 2015 as well as two opinions on voting procedures². The report on CCP colleges was a review report on the supervisory activities of competent authorities in relation to the authorisation of CCPs under EMIR based on the experience of ESMA in the CCP colleges formed pursuant to Article 18 of EMIR.
- 9 This review focused on the initial phase of the college process, namely the colleges' establishment, review of CCP applications for authorisation under EMIR, review of the competent authorities' risk assessments, and adoption of joint opinions on CCP authorisations. ESMA's review had not identified any issues in respect of which it should issue guidelines and recommendations pursuant to Article 16 of the ESMA Regulation, or any other form of legal instrument.
- 10 In relation to the exchange of collateral (Question 2.5), it should be noted that on 10 June 2015 the European Supervisory Authorities (ESAs) launched a new consultation on the technical standards for bilateral margining³ and ESMA's current focus on this topic is thus on the finalisation of these technical standards.

3 Definitions and scope

- 11 Various questions have been raised since EMIR entered into force with regards to definitions, scope, and with regard to the meaning of certain terms for which no definition was provided in EMIR. ESMA has been able to provide clarity on most of these questions, and thus facilitate supervisory convergence, via the publication of Q&As on the implementation of EMIR. These Q&As allowed to provide responses and clarifications in a quicker and more timely manner to stakeholders for the implementation of EMIR than new Level 2 requirements would have allowed.

² The document 'ESMA review of CCP colleges under EMIR' is accessible at the following link:

http://www.esma.europa.eu/system/files/2015-20-report_on_esma_review_of_ccp_colleges.pdf

The opinion on voting procedures for CCP colleges under EMIR is accessible at the following link:

<http://www.esma.europa.eu/system/files/2014-576.pdf>

The opinion on the composition of CCP colleges under EMIR is accessible at the following link:

http://www.esma.europa.eu/system/files/2015-838_esma_opinion_on_the_composition_of_the_colleges.pdf

³ The consultation paper is available at the following link: <http://www.esma.europa.eu/news/ESAS-consult-margin-requirements-non-ce%E2%80%8Entrally-cleared-derivatives?t=326&o=home>

- 12 Nonetheless, in a few selected areas, especially where legal certainty can be reinforced, ESMA is of the opinion that some of these questions addressed in the Q&A would benefit from being analysed in the context of the EMIR review. There are a few of these important issues that are being raised in the reports ESMA is publishing in the context of the EMIR review, including one in this section, which serves as an answer to Question 2.1 of the consultation paper.
- 13 Specifically, ESMA has considered that a clarification on whether municipalities and regional governments fall under the scope of the exempted entities in Article 1(4) or 1(5) would contribute to further enhance supervisory convergence.
- 14 ESMA has been addressed with several questions on the scope of the exemptions provided in Article 1 of EMIR, in particular on whether municipalities and regional governments are covered by the exemptions therein.
- 15 The issue of municipalities has been the subject of a frequently asked question (FAQ) by the European Commission (see FAQ 15). However, FAQ 15 did not clarify when municipalities qualify under Article 1(4)(a) or 1(5)(b), leaving national competent authorities with the task to determine the regime applying to municipalities in their own jurisdiction in an uncoordinated manner.
- 16 ESMA analysed the regime that different Member States apply to municipalities and identified various differences, in view of the different national legislations that regulate the sector and the absence of a clear reference in EMIR. Some national competent authorities (NCAs) consider that Article 1(4)(a) should apply to their municipalities, other that Article 1(5)(b) should apply and some consider that given that municipalities are not undertakings, EMIR does not apply to them at all, without the need for the specific exemptions.
- 17 Given that the rules applicable to municipalities and regional governments are set in national laws, there is limited scope for ESMA to use supervisory convergence measures.
- 18 The review of EMIR could offer the possibility to clarify whether and when municipalities and regional governments across the EU fall within which of the exemptions provided in Article 1 and which provisions should apply to them, if any.

4 Clearing obligation

- 19 This section covers various issues related to the clearing obligation. The following paragraphs are an answer to Question 2.2 of the consultation paper.
- 20 Since the first CCP authorisation in March 2014, which fired the starting gun for the clearing obligation under Article 5 of EMIR, four clearing obligation procedures have been launched by ESMA on various sets of OTC derivative classes, but none of these procedures have yet reached the stage of the entry into force of an RTS on the clearing obligation⁴.
- 21 The time it is taking so far for a first RTS to see the end of the process is actually a first indication of the rigidity of the procedure and the related difficulty to have a swift implementation for this key

⁴ Please note that the European Commission endorsed on 6 August 2015 the first RTS on the clearing obligation for certain classes of interest rate derivatives, see http://europa.eu/rapid/press-release_IP-15-5459_en.htm?locale=en

component of EMIR. Overall, the process to manage the clearing obligation would benefit from greater flexibility.

- 22 Although the clearing obligation has not entered into force, the experience and information gained so far through these four clearing obligation procedures have allowed ESMA to raise some specific issues that are developed in this report.

4.1 Improvements to the clearing obligation procedure

Rigidity in the trigger to launch the procedure and the timeframe to complete it

- 23 The clearing obligation relies on a pre-condition, which is the authorisation of CCPs or the recognition of TC-CCPs under EMIR. Indeed, counterparties can only be mandated to clear certain classes of OTC derivatives when there are CCPs meeting certain standards and that have been authorised to clear these classes. The bottom-up procedure of Article 5(2) is built on this principle. Indeed, the authorisation or the recognition of a CCP is the trigger of the bottom-up procedure to determine the classes, amongst those classes the CCP is authorised to clear, that should become subject to the clearing obligation. However, certain aspects of the procedure would benefit from greater flexibility as outlined below.
- 24 In addition, once the bottom-up procedure has been triggered, Article 5(2) of EMIR then requires this procedure to be completed within six months. This systematic trigger coupled with the six month deadline introduces rigidity in the process that makes it difficult to take into account a larger set of parameters.
- 25 With regard to the systematic trigger, as developed in the consultation papers, there are certain classes that benefit from being analysed together. This led to the grouping approach explained and used by ESMA in the four consultation papers. Instead of triggering the procedure each time a CCP was authorised, as long as the different authorisations were not too far apart and as long as the classes were in the same asset class or in the same product type range, ESMA would analyse and consult on sets of classes that would span across a range of CCPs.
- 26 The grouping approach had the benefit to enable ESMA to consider whether more than one authorised or recognised CCP was clearing a given class, to increase clarity to stakeholders and to add efficiency to the process. For instance, five CCPs have been authorised to clear certain classes of OTC interest rate derivatives, although not clearing the exact same set of classes, but with some overlap between each set cleared by these five CCPs. Instead of consulting five times on partial sets of classes, ESMA was able to analyse at once the largest set of classes cleared by one or more CCPs and consult on a draft RTS encompassing classes cleared by one or more CCPs.
- 27 When several CCPs have applied or are about to apply to clear a similar set of classes of OTC derivatives, in several cases it can be beneficial to wait until more than one CCP has been authorised to clear it. In addition, the automatic trigger of the bottom-up procedure makes the process too dependent on the first CCP looking to be authorised. Indeed, the procedure should be more dependent on the criteria of EMIR and the analysis of regulators of the classes than on the strategic decisions of individual CCPs with regard to their business development.
- 28 Furthermore, the OTC derivative market is a global market in many respects and regulators are in contact at the international level to try to coordinate, where possible and where applicable,

clearing mandates. Rigidity in the process minimises the ability to facilitate this international convergence.

- 29 Respondents to the consultations on the clearing obligation have expressed support for the grouping approach, in many cases have indicated that at least two CCPs should be authorised to clear a given class for this class to become subject to the clearing obligation, and are also in support of international coordination. This feedback is in support of increased flexibility in the procedure.
- 30 In addition, the trigger of the bottom-up process being the notification, when a CCP starts clearing a new class without having triggered the process of extension of activities and services of Article 15, then there is no such notification. In practice, this would mean that these additional classes cannot be taken into account for the clearing obligation procedure. This issue is for a good part related to the difference in terminology used for the scope of authorisation (Article 14 of EMIR refers to 'classes of financial instruments', which is not defined in Article 2) and the scope of classes to be included in the notification (Article 5 of EMIR refers to 'class of derivatives', which is defined in Article 2). However, the rigidity around what constitutes the trigger for ESMA to consider which classes could be made subject to the clearing obligation is limiting how this issue can be addressed.
- 31 Finally, the focus of the clearing obligation should be on what is going to be in the clearing obligation rather than on what is not going to be in the clearing obligation for the moment. When the analysis of the classes against the criteria of EMIR do not lead to a positive result, given the conditions may change in the medium term, it should not be required to communicate a negative decision. When indeed the conditions change, or additional information is obtained or certain market developments then justify reconsidering these classes, communicating a negative decisions first and then not too long after communicating a positive one, would send conflicting messages, whereas counterparties would benefit from clear expectations.
- 32 ESMA considers that these are valid reasons for reviewing the clearing obligation procedure and make it more agile to manage the clearing obligation at EU level.

Lack of a mechanism to temporarily suspend the clearing obligation

- 33 The most problematic issue with regard to the EMIR text on the clearing obligation is the lack of a mechanism to temporarily suspend the clearing obligation when the situation would require such suspension.
- 34 The mandate under EMIR has been for ESMA to develop the scope of classes and the actual requirements for counterparties with regard to the clearing obligation through an RTS. As a result, any subsequent changes to the scope or the requirements of the clearing obligation must then go through the process of an amendment of the RTS. However, the process to amend an RTS can be a rather lengthy process compared to sudden changes that can take place in the market and for which a much more reactive measure would be required.
- 35 On the one hand, in terms of process, an amendment of an RTS on the clearing obligation would be similar to developing a new RTS, i.e. it would require a consultation and to go through the normal validation cycle (adoption by the European Commission, non-objection by the European Parliament and the Council). In terms of timeframe, the steps required for an amendment would thus add up to several months.

- 36 On the other hand, a market event such as a default could take place very rapidly and may require a decision in a matter of days. If there was the need to suspend or withdraw the clearing obligation because of such a rapid market event, an amendment to an RTS would not be swift enough. An agile, supervisory type, mechanism is instead required at EU level.
- 37 As a matter of fact, there are multiple situations when authorities would need the ability to react quickly. Amongst others, it includes situations such as a CCP failing to operate, especially if a majority of the volume in a given class is cleared by this CCP, or one or several key clearing members defaulting. Indeed, if many counterparties were relying on this CCP or this clearing member to meet their clearing obligation requirements, as a consequence they could become shut out from the market if they can no longer clear their trades. There is a need for some discretion and swiftness in the decision on whether a situation requires the clearing obligation to be lifted temporarily. To the contrary, an amendment of an RTS does not allow a rapid reaction.
- 38 This concern with regard to the lack of a mechanism to suspend the clearing obligation is shared by market participants. Respondents raised this issue in all the consultations on the clearing obligation. They often gave the example of the US, where the Commodity Futures Trading Commission (CFTC) can issue no-action letters to take immediate decisions on regulatory requirements. Respondents expressed the concern that such tool or any alternative mechanism do not exist for the clearing obligation in the EU and suggested that ESMA should have such a mechanism. Respondents indicated that following such a suspension, ESMA could then reflect and communicate the changes via the Public Register to amend the scope of the clearing obligation and communicate it.
- 39 ESMA agrees there is a need for a mechanism at EU level to suspend temporarily the clearing obligation when required. However, the exact mechanism that would provide the ability to take swift actions needs to be chosen in such a way that it would also ensure the right level of accountability in the related decisions.

Different approaches can be envisaged to better adapt the procedure to specificities of the OTC derivative market and the clearing landscape

- 40 Different possibilities could be envisaged to increase the flexibility and the effectiveness of the procedure, including the following approaches:

- a) Approach 1: move the procedure from an RTS based approach to a decision based approach.

Specific conditions and criteria would need to be detailed so that ESMA would be given a clear and limited framework to exercise its discretion on this topic. Then, under these conditions and criteria delimiting the framework for ESMA, decisions by the board could be envisaged to determine for instance which classes are added and which classes are suspended, this would not prevent including consultations for decisions. These consultations would be essential so all relevant parties have an input in the process towards the final decision.

- b) Approach 2: keep the RTS based approach but with increased flexibility for the procedure and coupled with a decision based approach for temporary suspensions.

With this approach, some flexibility would be introduced so the procedure can take into account wider considerations than is currently intended for when determining what

classes are made subject to the clearing obligation and all the other requirements. This could include: providing a longer timeframe, modifying or adding criteria to take into account when deciding on whether a class is fit for a clearing obligation and for ESMA to submit a draft RTS, modifying the trigger such as making it dependent on a second CCP being authorised to clear a given class, etc. In addition, coupling the RTS with a decision based process for temporary suspension would help address the sudden situation when there is a need to lift the clearing obligation for a limited period of time.

- 41 The choice for the right approach would need to be decided after careful consideration of the operational and legal aspects, with the objective to have a clear process for the clearing obligation procedure as well as a clear decision making process for suspensions.

4.2 Removal of Frontloading

- 42 Article 4(1)(b)(ii) of EMIR requires that under certain conditions, even contracts entered into or novated before the date from which the clearing obligation takes effect get cleared. More specifically, the requirement is to clear contracts entered into or novated on or after the notification of a CCP authorisation of Article 5(1) but before the date from which the clearing obligation takes effect, as long as those contracts have a remaining maturity above the minimum determined in the related RTS. This is referred to as 'frontloading'.

Issues associated to frontloading previously detailed in prior publications

- 43 Recital 20 of EMIR lists the reasons for frontloading: (a) to ensure a uniform and coherent application of the clearing obligation, as well as (b) to ensure a level playing field for market participants when a class of OTC derivative contract is declared subject to the clearing obligation. However, the benefits of frontloading can be undermined by the uncertainty it creates and the costs it generates.
- 44 This issue is not new, in fact (a) frontloading has been already covered in many prior documents and (b) ESMA, in collaboration with the European Commission, has addressed to the extent possible some of the related issues in the last version of the draft RTS included in the ESMA opinion of 29 January 2015. Specifically, here is below the list of the main papers that have described the issues related to frontloading, the constraints around it and how it has been addressed up to now:
- An exchange of letters agreeing a framework on how to handle frontloading, with a letter from ESMA (ESMA/2014//483) dated 8 May 2014 and a reply from the European Commission dated 8 July 2014;
 - The consultation paper on the clearing obligation no.1 (ESMA/2014/111) dated 11 July 2014, summarising the issues raised by respondents following the publication of the discussion paper and presenting an approach within the framework agreed with the European Commission;
 - The Final report on the clearing obligation no.1 (ESMA/2014/222) dated 1 October 2014, summarising the feedback received following the publication of the consultation paper and finalising the requirements for the draft RTS; and finally,

- The letter from the European Commission dated 18 December 2014, extending the approach beyond the framework previously agreed, followed by an ESMA Opinion (ESMA/2015/223) dated 29 January 2015 supporting an increased flexibility in how frontloading is applied.

45 However, although the latest version of the draft RTS already significantly minimises the issues associated to frontloading, ESMA is of the opinion that all the issues associated with frontloading should be taken into consideration in the review of EMIR.

The EMIR review should take into account that no frontloading requirement should be applied for trades executed between the first notification and the date of application of the relevant RTS

46 As a reminder, in all these documents mentioned in paragraph 44, frontloading has been described as being made up of two parts, two periods. The first period corresponds to the period between the first notification of a CCP authorisation for a given class and the final RTS, while the second period corresponds to the period between the final RTS and the relevant dates for each category of counterparty when the clearing obligation takes effect.

47 There is legal uncertainty throughout the entire first period. Indeed, until the RTS is finalised, counterparties do not know which classes will be subject to the clearing obligation, when they will be required to clear them, etc. This uncertainty has significant implications for counterparties in their trading activities, in particular for their processes, pricing algorithms and contractual terms.

48 The problematic first period has been addressed in the draft RTS. In the current version of the draft RTS, no frontloading requirement is applied to contracts executed during the first period. This approach should also be reflected in EMIR.

The EMIR review should also take into account the issues associated with frontloading that exist even after the requirements of the RTS are set and known, i.e. in the second period

49 In relation to the second period, once the RTS is made final, with regard to what the exact requirements in terms of scope of classes and timing are, most of the uncertainty is removed. However, several issues associated to frontloading still continue to exist.

50 First of all, time is required for counterparties to prepare for when the clearing obligation takes effect for them. This implies that there are several steps required in between knowing what the final requirements are and being able to clear immediately any new trades falling in the scope of the clearing obligation, thus the idea of a phase-in as envisaged in EMIR.

51 Aside from the steps required to establish access to clearing, which explain for the most part the timing provided for the phase-in, some of the initial steps that are also necessary are for example: (a) the self-determination of which category a counterparty belongs to and thus knowing the applicable phase-in period, (b) being able to communicate its category as well as establishing what the categories of other counterparties are, (c) applying for exemptions where applicable, etc. Knowing which category a counterparty belongs to and thus when trades will need to be cleared, whether some transactions can benefit from exemptions, etc. also has implications for counterparties' processes, pricing algorithms and contractual terms in their trading activity.

52 The time required to implement some of the necessary steps once the RTS requirements are set and known have been taken into consideration in the draft RTS and this should be reflected in EMIR. In the current version of the draft RTS, no frontloading requirement is applied during the

first two months after the entry into force of the RTS for counterparties of category 1, and no frontloading requirement is applied during the first five months after the entry into force of the RTS for counterparties of category 2.

The EMIR review should take into consideration the challenges of frontloading for less sophisticated counterparties against the share of systemic risk attributed to their trading activity in these classes

- 53 Even once counterparties know the final requirements and have had time to establish what phase-in is applicable to them and for which transactions; some issues remain during the remainder of the frontloading period.
- 54 The first type of issue is a pricing issue. Bilateral trades and cleared trades can differ from a pricing point of view as the discounting curves counterparties will use to price each type of trades may differ. Therefore there may be cleared prices and bilateral prices offered with different liquidity levels and possibly different bid-ask spreads. There is even further complexity in pricing forward clearing trades, as the pricing would need to take into account that the trade would be kept bilateral initially during the frontloading period but that it would get cleared at some point in the future, possibly up until the clearing obligation takes effect for these counterparties.
- 55 The second type of issue is an issue for contractual terms. For the same reason as mentioned in the previous paragraph, forward clearing trades will likely lead to changes in the documentation between counterparties to take into consideration this aspect of forward clearing and the conditions around it.
- 56 The third type of issue is in terms of access to the market. The phase-in included in the draft RTS has been determined so that counterparties can benefit from a certain period of time to establish their access to clearing based on their profile, resources and overall their level of sophistication. However, due to the complexities associated to the two issues mentioned in paragraphs 54 and 55, some counterparties, especially the least sophisticated ones, may find it harder to find counterparties who will agree to trade forward clearing trades and may be pressured to execute cleared trades instead, i.e. trades meant to clear immediately at a cleared price. Therefore, counterparties that may need the longest time to establish access to clearing may not be able to benefit from the phase-in period that they were provided with.
- 57 In addition, these counterparties that may be pressured to execute cleared trades would likely correspond in general to counterparties with smaller levels of trading volumes in these classes, in line with how categories 2 and 3 have been defined (i.e. distinguishing counterparties based on their activity above or below a certain threshold). As a result, not only do they most likely correspond to counterparties that require longer times to manage getting access to clearing, but in addition are only responsible for a limited share of the volume of these classes and the systemic risk associated to these classes.
- 58 Some of these elements have been taken into consideration in the draft RTS, notably by removing frontloading requirements for counterparties in category 3, and this should be reflected in EMIR.

The EMIR review may consider weighting further the pros and cons of frontloading and decide whether this requirement should be kept at all

- 59 First of all, given the length of the phase-in for category 1 (6 months) and for category 2 (12 months), and given the period from when frontloading starts to apply for category 1 (2 months) and category 2 (5 months) as defined in the draft RTS, frontloading will only capture a limited time period of trading activity for these counterparties, in effect only months.
- 60 Secondly, backloading groups of bilateral trades to CCPs also present some challenges. Unless counterparties prefer to accelerate their clearing set-up and start clearing earlier to minimise the impact of frontloading but therefore not benefitting from the full period of phase-in provided to them; frontloading will most likely imply that counterparties will need to backload groups of trades executed during frontloading to CCPs sometime before the end of the phase-in.
- 61 Backloading of trades will need to be agreed between pairs of counterparties, and they will likely need to involve the CCPs and/or their clearing members when they are not direct members, in order to discuss the operational process, the funding requirements, and any other aspects of backloading. This will need to be done between all pairs of counterparties in a limited period of time, which can represent a large number of pairs, putting some stress onto these participants and the CCPs, including possible margin swings, operational errors and capacity issues.
- 62 In conclusion, ESMA is of the view that the EMIR review should take all of these issues detailed above into consideration to at least align level 1 with the way forward developed in the RTS, and compare the challenges and costs linked to frontloading to the limited period of activity frontloading would actually bring to clearing. As a matter of fact, ESMA believes that the benefits of frontloading are undermined by these different issues. Many respondents to the different consultations on the clearing obligation raised the point that frontloading raises significant issues and that they would support as well removing this requirement.

4.3 Improvements to the notification procedure

- 63 Certain OTC derivative products are cleared without having been subject to the procedures of authorisation (Article 14 of EMIR) or extension of activities and services (Article 15 of EMIR), even when they belong to a different class of OTC derivatives than the classes notified to ESMA under Article 5(1). Indeed, the process of extension of activities and services of Article 15 is not triggered when the changes associated with the addition of certain new OTC derivative products to the clearing offering of an authorised CCP are small. However, this absence of a formal authorisation in the process impacts the clearing obligation procedure and the maintenance of the public register as is explained in the paragraphs below.
- 64 Although the two procedures (the authorisation procedure of Articles 14 and 15, and the clearing obligation procedure of Article 5) are separate and different and the clearing obligation only covers a subset of the possible classes of financial instruments that a CCP is authorised to clear, namely the classes of OTC derivatives, the two procedures are linked. Indeed, the first procedure is the trigger of the second one. The notification from Article 5(1) is only triggered in two cases: a) an authorisation under Article 14 or (b) an extension of activities and services under Article 15.
- 65 However, different terminologies are used in EMIR to define the classes covered by the CCP authorisation procedure and to define the classes in scope for the clearing obligation procedure.
- 66 EMIR refers to 'classes of financial instruments' in Article 14 for the purpose of authorisations, whereas it refers to 'classes of OTC derivatives' in Article 5 for the purpose of the clearing obligation. Moreover, a 'class of derivatives' is a defined term under Article 2, whereas a 'class of

financial instruments' is not. ESMA addressed this question in CCP question 6(a), providing clarity on the scope of authorisation and the trigger for an extension of activities and services.

- 67 In practice, this has often led to the situation where the classes covered by the authorisation were defined in much less granular terms than the classes of OTC derivatives notified to ESMA for the purpose of the clearing obligation. For example, there could be a case where the authorisation is defined at the product level (e.g. the CCP is authorised to clear EUR fixed-to-float interest rate swaps), whereas the notification is much more specific of the exact classes and product attributes cleared by the authorised CCP (e.g. the exact set of indices, maturities, etc. of the classes). But when the CCP looked to clear a larger product set (for example longer maturities) and when it did not expose the CCP to new or increased risk, this new product set did not necessarily trigger the process of extension of activities and services of Article 15.
- 68 In the cases where the CCP extends its activities and services to clear additional products without triggering the process of extension of activities and services of Article 15, then the competent authority would not be allowed to properly notify ESMA of the full list of OTC derivatives cleared by the CCP (Article 5(1) of EMIR only refers to authorisation or extension of activity, the notification is triggered by one of them).
- 69 The absence of notification has two consequences. Firstly, the absence of the notification means that the new product cannot be taken into account for the clearing obligation, although it can be cleared by an authorised CCP. Secondly the absence of the notification also means that it cannot be added to the public register.
- 70 As a result, the bottom-up procedure should be reviewed to become more effective and to appropriately take into account the exact range of OTC derivatives cleared by CCPs.
- 71 In particular, ESMA is of the opinion that the bottom-up procedure should no longer be linked to the authorisation process or to the extension process via the notification. Instead, ESMA should be allowed to identify the exact set of cleared OTC derivative classes for the clearing obligation and for the maintenance of the public register, irrespective of the fact that these derivatives are cleared as the result of the initial authorisation, or an extension, or a simple addition to the product eligibility that did not trigger the process of extension.

5 Exemptions for Intragroup Transactions

- 72 EMIR provides that intragroup transactions can be exempted from the clearing obligation and from the bilateral exchange of margins under certain conditions. The issue raised in the following paragraphs is thus additional input in relation to Questions 2.2 and 2.5.
- 73 The first condition to be verified is that the intragroup transaction meets the definition of Article 3, which raises serious interpretation issues linked to (1) the references to non-EU entities, (2) the condition on the equivalence of the country of establishment of the non-EU counterparty.
- 74 On the first issue, we note that in Article 3, third-country entities are referred to with the terms "financial counterparty" and "non-financial counterparty": Article 3(2)(a)(i) mentions "the financial counterparty is established in the Union or, if it is established in a third country, (...)" and Article 3(2)(d) refers to a "non-financial counterparty (...) established in the Union or in a third country jurisdiction".

- 75 The reading of Article 3 together with the definitions of financial and non-financial counterparties provided in Article 2(8) and 2(9) reveals a certain contradiction. Indeed, Article 2(9) of EMIR specifies that non-financial counterparties are undertakings established in the Union, and Article 2(8) of EMIR defines financial counterparties with references to various European legislations, with the outcome that most financial counterparties⁵ will be established in the Union.
- 76 As a result, it is suggested that third-country entities are referred to either with the wording “counterparties (or entities) established in a third country”⁶ or, if it is necessary to introduce a reference to the financial or non-financial nature of the third country counterparties, to use the wording “counterparties that would qualify as financial/non-financial counterparties if they were established in the Union”, consistently with Regulation (EU) no 285/2014 on direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations⁷.
- 77 On the second issue, Article 3(2)(a)(ii) states that “the other counterparty is a financial counterparty, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements”.
- 78 Since “financial counterparties” may be established in third countries (either because of the explicit reference in Article 3(2)(a)(i), or implicitly because of the definition of Article 2(8) as explained in footnote 5), it could be the case that the financial counterparty referred to in Article 3(2)(a)(ii) is established in a third country.
- 79 But the condition on the equivalence of the third country is absent from Article 3(2)(a)(ii). This may have the unintended consequence that a transaction between two counterparties in the same group, one established in the EU and the other established in a non-equivalent third country, meets the definition of intragroup transaction.
- 80 Besides, the fact that the condition on the equivalence of the third country is absent from (ii) seems to indicate that the counterparties captured under the list “a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements” should be established in the EU, but this element is absent from the corresponding definitions in Article 2(17) to 2(19).
- 81 As a result, ESMA would like to propose that the drafting of Article 3 is revised to ensure that the country of establishment (EU or equivalent third-country) and the nature (financial or non-financial) of both parties to the intragroup transactions are identified unambiguously.

6 Trade reporting

- 82 The EMIR reporting obligation under Article 9 of Regulation (EU) No 648/2012 became applicable on 12 February 2014. Since then, ESMA has put a considerable effort on the overall improvement of the quality of the data reported to the European Trade Repositories (TRs). Based on the

⁵ Some financial counterparties meeting the definition of Article 2(8) of EMIR can be established in third-countries e.g. non-EU AIFs managed by authorised or registered EU AIFMs, see General Question 4 of the ESMA Q&A on the implementation of EMIR).

⁶ This would be consistent with e.g. Article 10(3) of EMIR which refers to “non-financial entities within the group”

⁷ OJ L 201, 27.7.2012, p. 1.

experience from the work on EMIR data quality, ESMA has a few issues to raise that are elaborated in this section. This section is an answer to Question 2.3 of the consultation paper.

- 83 For each issue raised below, the rationale of the proposed change is described. The suggested amendments are also included.

Reporting of Exchange traded derivatives contracts

- 84 The current Article 9(1) requires counterparties and CCPs to report to TRs the details of any derivative contract, including both OTC derivative and exchange traded derivatives (ETDs) contracts. Article 2(7) defines 'OTC' as any contract that is not executed on a Regulated Market⁸ or on a third country market considered as equivalent.
- 85 ESMA acknowledges that the requirement to report ETDs on a trade-by-trade basis poses a rather significant burden in terms of costs of reporting and data storage capacity⁹ of counterparties and trade repositories. These costs are due to the substantial number of ETDs trades being transacted on a daily basis and the significant number of positions that are opened and closed intraday.
- 86 For the above reasons, ESMA considers that there might be merits in reviewing the obligation to report ETD contracts. However, ESMA also recognizes that there are other elements in EMIR that would need to be considered in this regard due to their interaction with the EMIR reporting obligation, in particular the definition of 'OTC' in Article 2(7) and the analysis of trading outside Regulated Markets for other purposes like, for instance, the clearing and trading obligation. There are also informational needs from other EU authorities that do benefit from EMIR trade reporting due to their regulatory mandates. Hence, ESMA is not in a position at this stage to make a recommendation to scale down the reporting of ETD transactions, but stands ready to advise the Commission on that matter, depending on any other modifications in the above related matters that the Commission might consider.

Reporting obligations for non-financial counterparties

- 87 The current Article 9(1) imposes the reporting obligation on all types of counterparties and on the CCPs.
- 88 The compromise text of the regulation on securities financing transactions¹⁰ (SFTR) to be reported to Trade Repositories obliges financial counterparties to report on behalf of their smaller non-financial counterparties. If those entities are subject to both EMIR and SFTR, they will have to maintain different reporting infrastructures and operational processes depending on the type of trade reported to the Trade Repositories. This will lead to errors in reporting to the detriment of the overall quality of the data.

⁸ As defined in the Markets in Financial Instruments Directive 2004/39/EC

⁹ EMIR imposes record keeping requirements on both counterparties and TRs. Article 9 obliges counterparties to maintain record of the information reported for at least five years from the termination of the contract. In addition, Article 80(3) requires Trade Repositories to maintain record of the information received for at least ten years following the termination of the relevant contracts.

¹⁰ 2014/0017(COD): <http://www.consilium.europa.eu/en/press/press-releases/2015/06/29-securities-financing-transactions/>

- 89 In principle, ESMA believes that in EMIR double sided reporting is preferable to now changing to single sided reporting, as it also ensures better data quality. Obliging to report both sides of a trade guarantees that counterparties have systems in place to ensure that the values reported for each side of the trade are consistent and that any mismatch between the values reported is promptly identified and corrected. However, ESMA considers that the SFTR approach is acceptable as it obliges financial counterparties to report on behalf of their smaller non-financial counterparty¹¹ whilst maintaining the double sided reporting logic, i.e. the financial counterparty will be obliged to report both sides of the trade and the non-financial counterparty will remain responsible for the accuracy and completeness of their side of the reported trade. Consequently, non-financial counterparties should be in a position to periodically check that they are in agreement with the values submitted on their behalf. Therefore, the financial counterparties and CCPs that reported on behalf of their non-financial counterparties will need to be obliged to provide their non-financial counterparties with a proof of the report submitted on their behalf.
- 90 Considering the data quality issues and the need to avoid inconsistencies between reporting regimes to the extent feasible, ESMA recommends alignment with the SFTR requirements concerning the reporting obligations of the smaller non-financials. Importantly, these entities will still be subject to the obligation to report their trades with other non-financial counterparties and non-EU counterparties.

Proposed amendment:

The following new paragraph is added to Article 9(1) of Regulation (EU) No 648/2012:

Where a financial counterparty or CCP concludes a derivative contract with a non-financial counterparty which on its balance sheet dates does not exceed the limits of at least two of the three criteria defined in Article 3(3) of Directive 2013/34/EU, the financial counterparty or CCP shall be responsible for reporting on behalf of both counterparties and shall provide their non-financial counterparty with a proof of the report submitted on its behalf.

Back loading

- 91 Under Article 9 of EMIR ESMA has been mandated to phase in the reporting obligation for contracts entered into before the reporting obligation applies. In accordance with this mandate ESMA has developed implementing technical standards specifying that those contracts must be reported to a trade repository within 3 years provided that they expired before or on the reporting start date.
- 92 Since the TRs have already started receiving historical trades, those trades have been subject to TR reconciliations. ESMA is concerned about the particularly high number of reconciliation failures concerning those trades and, therefore, the limited usefulness of such data.
- 93 In addition, ESMA has worked on the review of the technical standards on EMIR reporting to ensure further consistency of the data reported by counterparties. The review introduces

¹¹ ESMA considers appropriate to rely on the definition of smaller non-financial of the EU Accounting Directive (2013/34/EU), which is the concept used in the SFTR. This is due to the fact the EMIR concept of non-financial minus would also include some of the more sophisticated entities, which would be in a position to independently fulfil their reporting obligation (see EMIR Review Report no. 1 for a full analysis on the concept of non-financial minus).

significant amendments to reflect market best practices that meet regulatory needs but were not necessarily widespread when EMIR became applicable. For example, codes other than the Legal Entity Identifier (LEI) to identify the counterparties and other entities in the report are no longer allowed as the LEI code is now widely used by market participants. Therefore, ESMA expects the number of failures to reconcile backloaded trades to further increase as a result of the introduction of the reviewed standards.

- 94 For the above reasons, ESMA would recommend waiving the obligation to report contracts which were terminated before the reporting start date (i.e. 12 February 2014).

Proposed amendment to Article 9(1) of Regulation (EU) No 648/2012 (second paragraph):

The reporting obligation shall apply to derivative contracts which:

(a) were entered into before 12 February 2014 and remain outstanding on that date,

or

(b) were entered into on or after 12 February 2014

Empowerment to specify the content and format of EMIR reports

- 95 Under Article 9 of EMIR ESMA has been mandated to develop regulatory technical standards specifying the details and type of reports of derivative contracts and implementing technical standards specifying the format and frequency of such reports. In accordance with this mandate ESMA has developed regulatory and implementing technical standards, specifying:

- the details of the reports, i.e. a list of data elements that must be included in the report and their definitions.
- the format of the data elements, including (where applicable) datatype, length, structure and list of allowable values.

- 96 Although the regulatory and implementing technical standards set out detailed provisions on reporting, quality of data reported so far to Trade Repositories could benefit from further improvement.

- 97 In particular, the methods and arrangements for reporting and the form of the reports to be submitted by the reporting entities have been left to the discretion of the TRs, leading often to situations where TRs have to manipulate the data provided by the reporting entities in order to make them compliant with EMIR requirements or even where the reporting entities cannot report all the information as required in the technical standards.

- 98 ESMA believes that empowerment to specify the methods and arrangements for reporting and the form of reports would provide additional clarity to the reporting community, would help enforce compliance with the reporting requirements and would further harmonise the information reported to TRs, ultimately enhancing the quality of the data.

- 99 Furthermore, ESMA believes that the mandate under Article 9 should include empowerment to specify both “standards and formats” where standard is the internationally recognized code to be

used when referring to a specific data element (e.g. the Coordinated Universal Time (UTC) for timestamps) and formats is the way such element is represented in the field (e.g. YYYY-MM-DDThh:mm:ss.0Z to represent the UTC time).

100 This would be consistent with the empowerment given to ESMA under Article 26 of MiFIR¹² on Obligation to report transactions, under which ESMA is given a mandate to specify “data standards and formats for the information to be reported (...), including the methods and arrangements for reporting financial transactions and the form and content of such reports”.

101 Therefore, ESMA recommends amending Article 9(5) and (6) of Regulation (EU) No 648/2012 in the following way:

Proposed amendments to Article 9(5) of Regulation (EU) No 648/2012

In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details, and type and form of the reports referred to in paragraphs 1 and 3 for the different classes of derivatives. (...)

Proposed amendments to Article 9(6) of Regulation (EU) No 648/2012:

In order to ensure uniform conditions of application of paragraphs 1 and 3, ESMA shall develop draft implementing technical standards specifying:

(a) the data standards and formats for the information to be reported in accordance with paragraphs 1 and 3 for the different classes of derivatives

(b) the methods and arrangements for reporting;

(c) frequency of the reports referred to in paragraphs 1 and 3;

(d) the date by which derivative contracts are to be reported, including any phase-in for contracts entered into before the reporting obligation applies.

7 Third-country CCP recognition process

102 ESMA received a large number of applications for recognition from CCPs established outside the Union¹³. They either did so to be able to provide activities and services in the Union, or with the objective to receive the more favourable Qualifying Central Counterparty (QCCP) status for their members from the perspective of the Capital Requirement Regulation (CRR), or for both. This large interest for recognition demonstrates the global nature of the derivatives market and thus

¹² Regulation (EU) No 600/2014

¹³ A list of TC-CCPs that have applied is available on the ESMA website at the following address: <http://www.esma.europa.eu/page/Registries-and-Databases>

the importance of a solid process to determine from a European perspective the list of third country CCPs (TC-CCPs) that meet the necessary standards.

- 103 ESMA has been involved in this process since the start, with the definition of technical standards specifying the information to be provided by TC-CCPs, subsequently by providing advice to the European Commission on a number of third country jurisdictions¹⁴ and more recently having finalised the first batch¹⁵ of TC-CCPs recognition earlier this year. Based on this experience ESMA is raising a series of items in this report. This section is an answer to Question 2.6 from the consultation paper.
- 104 Article 25 of EMIR provides that ESMA may recognise a CCP where the conditions listed in Article 25(2) are met and that ESMA may withdraw recognition where those conditions are no longer met and in the same circumstances as those described in article 20.
- 105 The process for the recognition of TC-CCP is extremely rigid and burdensome, as demonstrated by the limited number of recognition decisions taken so far. The equivalence decision process is taking much more time than expected. ESMA delivered its technical advice in September and October 2013 and as of today the equivalence determinations covered only a limited number of countries. Three years after the entry into force of EMIR, the majority of the TC-CCPs are still operating under a transitional regime. This puts at risk European clearing members and their subsidiaries clearing with these TC-CCPs and creates the potential for regulatory arbitrage between European and third country CCPs.
- 106 In addition, the European approach toward TC-CCPs is extremely open, with full reliance on third country rules and supervisory arrangements. The cooperation arrangements that ESMA concluded and will continue to conclude give ESMA very limited powers to intervene should an emergency situation arise in a TC-CCP.
- 107 Furthermore, in EMIR there is no provision that allows ESMA to deny recognition on the basis of any material risk emerging from its review of a CCP application under Article 22, even though the 4 conditions from Article 25(2) are met. It cannot indeed be ruled out that ESMA may spot a significant risk through the processing of the applications for a specific TC-CCP, or that the consulted authorities may flag significant concerns, but as long as the 4 conditions are met, ESMA has to recognise the applicant CCP.
- 108 The majority of third country jurisdictions consider TC-CCPs as systemically relevant infrastructures and apply to them a much closer scrutiny. In general, the process envisages a full registration in the relevant jurisdiction and as part of such authorisation process the third country authority might decide to rely on certain rules of the home jurisdiction of the CCP and of certain cooperation arrangements with the home authority of the CCPs, but the CCP would become subject to the rules and the authority of the jurisdiction registering it. Therefore, although the current European approach should be a model in terms of mutual reliance, if Europe remains the

¹⁴ Links to the documents published by ESMA with regards to TC-CCPs, including the technical standards and the technical advice mentioned in the paragraph, are available from the CCP portal of the ESMA website: <http://www.esma.europa.eu/page/Central-Counterparties>

¹⁵ The first batch of TC-CCP recognitions is in relation to the first batch of countries for which the European Commission took equivalence decisions with regards to the third country regime for CCPs, i.e. Australia, Hong Kong, Japan and Singapore as detailed in the following link: <http://www.esma.europa.eu/page/Third-non-EU-countries>
The list of the corresponding 10 recognised TC-CCPs is available at the following address: <http://www.esma.europa.eu/news/ESMA-recognises-third-country-CCPs?t=579&o=page%2FCentral-Counterparties>

only jurisdiction relying extensively on third country rules and authorities, this might put Europe at risk and does not benefit European CCPs.

109 The review of EMIR provides an opportunity to rethink the approach toward TC-CCPs. Considerations should be given to the following:

- Whether to keep a system of full reliance on third country rules and supervisory arrangements, or whether a system as the one applicable in the majority of the third countries should be envisaged;
- If the system of equivalence is maintained, whether such equivalence determinations should be rather adopted via Regulatory Technical Standards. This would provide for technical considerations to be fully reflected and it would ensure a more defined calendar. Whatever legislative process is decided upon, it would be important to ensure the equivalence assessment, while being outcome based, is sufficiently granular and, where necessary, is able to contain conditions to mitigate possible risks for European market participants.

110 Should the process for the recognition be maintained as under the current EMIR, ESMA believes that it should as a minimum be complemented with a defined legal basis for not recognising a CCP. In particular, the Commission could consider revising Article 25 in order to:

- Identify the circumstances under which ESMA may decide not to recognise a TC-CCP (even though the 4 conditions are met).
- Foresee that the review of recognition under article 25(5) with respect to the extension of activities and services in the Union should be performed ex-ante and not ex-post. For instance, it could be foreseen that information on extension of activity should be provided prior to the actual extension rather than afterwards, to allow ESMA to react efficiently.
- Establish that the conditions (a) and (d) in Article 25(2) shall be met before a TC-CCP can submit an application for recognition.
- Reconsider whether for the assessment of the 4 conditions currently envisaged under EMIR, the wider consultation of many European and national authorities is valuable.

111 Finally, ESMA would like to point out that the recognition of third country CCPs implies a significant administrative burden. Therefore, in line with other direct responsibilities ESMA performs, fees for recognition of TC-CCPs should be envisaged to cover ESMA costs.

8 EU CCP authorisation process

112 As a complement to the conclusions from the review report on CCP colleges, ESMA believes that some clarifications related to the definition of 'activities and services covered by the initial authorisation' for the purpose of Article 15 and of 'significant change' for the purpose of Article 49, including the procedure for the college review of significant changes, could be helpful in order to enhance supervisory convergence and the functioning of CCP colleges. This relates to Question 2.8 of the consultation paper.

113 Indeed, CCPs and their national competent authorities have showed heterogeneous approaches towards new activities and services and changes to risk models and parameters and the involvement of the CCP colleges according to the processes defined under Articles 15 and 49. The review of EMIR could provide an opportunity to clarify when new activities and services are not covered by the initial authorisation and changes to model and parameter are to be classified as significant. As further detailed below, Article 15 and Article 49 could be amended to add a mandate to ESMA to develop RTS clarifying these two processes. Moreover, Article 49(1) could be amended to clarify the sequence of the steps of the review procedures, including the validation by the competent authority, the validation by ESMA and the opinion of the college.

8.1 Definition of 'activities and services covered by the initial authorisation'

114 ESMA issued a Q&A CCP6(a) to clarify what constitutes an activity or service covered by the initial authorisation of a CCP as referred to in Article 15(1) of EMIR (see Box 1 below).

Box 1: ESMA Q&A on EMIR implementation: Q&A CCP 6(a)

What constitutes an activity or service covered by the initial authorisation of a CCP as referred to in Article 15(1) of EMIR?

Article 14(3) of EMIR provides that an authorisation shall specify the services or activities which the CCP is authorised to provide or perform including the classes of financial instruments covered by such authorisation. 'Classes of derivatives' is a defined term in EMIR and reference to 'classes of financial instrument' provides a guide as to granularity at which the services or activities authorised will be granted. Applying this definition to activities and services suggests that authorisation should be granted on the basis of activities or services which share a common risk profile. Therefore, an extension of authorisation would be needed where the CCP intends to undertake additional activities or services which expose the CCP to new or increased risks, e.g. on classes of financial instruments with a different risk profile or that have material differences from the CCP's existing product set

As a practical example, a CCP might be authorised to clear single-name Credit Default Swaps contracts where the reference entities are corporate entities. In this example, the CCP would need to apply for an extension of authorisation where it intends to clear single-name Credit Default Swaps contracts where the reference entities are sovereigns or Credit Default Swaps contracts where the reference is an index.

115 Although the authorisation of most EU CCPs was concluded only in the course of 2014, some authorised CCPs have been very active in expanding the scope of their services and activities and, in some case, CCPs and their national competent authorities had heterogeneous approaches on how to consider the differences between the risk profile of the new class of financial instruments from the CCP's existing product set.

116 In order to ensure a harmonised approach towards the need for an extension of the authorisation for new activities and services, ESMA suggests amending Article 15 of EMIR to include a mandate for ESMA to develop RTS specifying the conditions under which new services and activities can be considered to be covered by the initial authorisation of the CCP as well as a process to involve the college in determining when these conditions are met.

8.2 Definition of 'significant change'

117 ESMA has developed a best practice for the review of significant changes to CCP models and parameters in order to promote a consistent approach across colleges with respect to the determination of what changes are significant and to facilitate a timely sharing of information of potentially significant changes and, where needed, a smooth review process of the significance of these changes through the college. This best practice also included a check list to guide national competent authorities in assessing whether a proposed change was to be considered significant for the purpose of Article 49. However, CCPs and national competent authorities had heterogeneous approaches on how to determine when a change is to be considered significant for the purpose of Article 49.

118 Against this background, ESMA suggests amending Article 49 of EMIR to include a mandate for ESMA to develop RTS specifying the conditions under which changes to risk models and parameters shall be considered to be significant as well as a process to involve the college in determining when these conditions are met, in order to ensure a harmonised approach across colleges.

8.3 Procedure for the review of significant changes under article 49

119 National competent authorities raised different views on the sequence of the review procedure of significant changes to model and parameters prescribed in article 49(1).

120 While Article 49(1) requires that the CCP shall obtain the validation by its competent authority and ESMA before adopting any significant change to its models and parameters, it only prescribes that adopted models and parameters, including any significant changes thereto, shall be subject to an opinion of the college. The wording of Article 49 suggests that the opinion of the college is taken after the changes are already implemented.

121 Several CCP college members questioned the value of an opinion that is adopted by the college after the changes have already been validated by both the NCA and ESMA and already implemented. The EMIR review would offer the possibility to amend Article 49(1) to clarify whether the college opinion is due before the CCP can adopt a significant change already validated by the competent authority and ESMA.

9 Trade repositories

122 Six trade repositories (TRs) were registered by ESMA at the end of 2013. Based on the experience from the registration process and the supervision work that has been conducted since the reporting start date, ESMA has a series of points to raise that are developed in the following section. This section is an answer to Questions 2.7 and 2.9 of the consultation paper.

123 For every issue raised below, the rationale of the proposed change is described. The suggested amendments are also included.

9.1 Access by national competent authorities to TR data

Terms and conditions to be signed by NCA before on-boarding to TRs

124 Regarding the on-boarding of authorities by TRs, the experience has shown that authorities were asked to fill in and sign different type of documentation depending on the TR that they wanted to on-board. This raised some concerns also having in mind that TRs are in most cases established in a jurisdiction that is different from the one of the authorities that are willing to on-board.

125 It would therefore be very useful for ESMA to receive an empowerment to define the terms and conditions (e.g. documentation) that TRs can require the authorities to sign before being on-boarded. It would enable ESMA to define and harmonise these terms and conditions and would significantly speed up the process of on-boarding the individual authorities to the TRs. This would be consistent with Article 12(3)(d) of the SFTR which provides for such a mandate of ESMA regarding SFTs.

Proposed amendment:

At the end of Article 81(5) first subparagraph of Regulation (EU) No 648/2012, the following sentence is added:

“Those draft regulatory technical standards shall also specify and harmonize the terms and conditions, arrangements and documentation subject to which the trade repositories are to grant direct and immediate access to the entities referred to in paragraph 3.”

Financing of ESMA's TR hub by all the authorities that are entitled to access TR data under Article 81(3) of EMIR

126 A number of NCAs delegated to ESMA the establishment of a TR hub that allows for a standardisation of the formats and a centralisation of the requests that NCAs will send to TRs, as well as the following submissions of TR data to NCAs by TRs. However, for the time being, not all the authorities that have access to TR data under Article 81(3) of EMIR can finance and therefore participate to this ESMA's hub. Indeed, according to ESMA's regulation, the revenues of ESMA consist of a subsidy from the EU, contributions from NCAs, and fees if specified in the relevant regulations. It would thus be useful to have a provision in EMIR which establishes that all the authorities entitled to have access to TR data under Article 81(3) of EMIR can finance and participate to ESMA's TR hub.

Proposed amendment:

A paragraph 6 is added in Article 81 of Regulation (EU) No 648/2012:

“All the entities referred to in paragraph 3 can participate and finance projects led by ESMA in order to standardise the formats and centralise the requests of information to trade repositories and the submission by them of this information.”

9.2 Fines that can be imposed by ESMA on TRs

Increase in the level of fines that can be imposed by ESMA on TRs

127 The amounts of the fines indicated in Article 65(2)(a) and (b) of EMIR (5,000, 10,000 or 20,000 EUR) and the related aggravating factors are clearly not adequate in view of the current turnover of the TRs. Most of the TRs have a turnover between 1 MEUR and 10 MEUR.

128 This will be especially a problem when these TRs will extend their activities following the adoption of the SFTR, the start of the reporting obligations under REMIT, as well as potential new activities under MiFID for TRs.

129 The fines that ESMA can impose on TRs are also clearly disproportionate compared to the fines that could be imposed by ESMA on Credit Rating Agencies (CRAs) (up to EUR 750,000) or by the Commission regarding antitrust matters (up to 10% of total turnover).

130 In addition, having in mind that there are significant discrepancies between turnovers of the TRs, it would be useful to add a provision setting a minimum fine as a percentage of the TR's turnover. Even with an increase of the basis amount of the fines, these amounts may still be too low to be a deterrent for the TRs with the biggest turnover. Article 65(4) of EMIR lays down that "the amount of the fine shall not exceed 20% of the annual turnover of the trade repository concerned in the preceding business year". Given the highlighted differences in the turnover of the different TRs, basic amounts might not be proportionate, i.e. if increased, they might be too high for small TRs for which the maximum 20% of the turnover could have an effect, but for big TRs, the basic amounts would only represent a very limited percentage of the turnover. Therefore, it would be useful to add the possibility for ESMA to impose a minimum fine calculated as a percentage of the turnover of the incriminated TR (for example, 2%).

131 We would therefore strongly support a review of the basic amounts of the fines indicated in Article 65(2)(a) and (b) of EMIR as well as a provision complementing the basic amounts of fines by establishing a minimum fine calculated as a percentage of the turnover of the TR.

Proposed amendment:

Article 65(2) (a) and (b) of Regulation (EU) No 648/2012 is amended as follows:

EUR 5 000 is replaced by 50 000; EUR 10 000 is replaced by EUR 100 000; EUR 20 000 is replaced by EUR 200 000.

In Article 65(4), 1st sentence, of Regulation (EU) No 648/2012, the following is added after 'the amount of the fine': "shall not be less than 2% and"

Correction of an oversight in EMIR regarding the amount of the fines in case of opposition to ESMA's investigatory powers

132 There is an oversight in Article 65(2) of EMIR because there is no specification of the limits applicable to the amount of fines for infringements related to obstacles to ESMA's supervisory activities.

133 This oversight was already acknowledged by the Commission (see letter from M. Barnier to S. Maijoor on 9 April 2014) and discussed with the European Parliament.

Proposed amendment:

In Article 65(2) of Regulation (EU) No 648/2012, the following paragraph is added:

(c) for the infringements referred to in Section IV of Annex I, the amounts of fines shall be at least 5 000 EUR and shall not exceed 10 000 EUR.

Review of the mitigating and aggravating factors

134 The mitigating and aggravating factors that are applied to respectively reduce or increase the basic amount of the fine are defined in Annex II of EMIR. The list of the current mitigating and aggravating factors should be reviewed to be more appropriate with the TR industry and the type of infringements at stake.

135 In particular, the factors which relate to the duration of the infringement should be reviewed because they are not adapted to the TR industry. The significance of a confidentiality breach is for example not linked to its duration, which can be very short. Therefore, on the basis of the current drafting, too many infringements (e.g. confidentiality breach) can benefit from the mitigating factor that the infringement lasted for less than 10 days. On the contrary, the aggravating factor that the infringement has been committed for more than six months would be applicable in only very few cases.

Proposed amendment:

In Point I (b) of Annex II of Regulation (EU) No 648/2012, “six months” is replaced by “one month”.

In Point II (a) of Annex II of Regulation (EU) No 648/2012, “10 working days” is replaced by “24 hours”.

9.3 Enforcement procedure

Extension of the type of enforcement decisions that can be adopted by ESMA and accelerated procedure for adoption when needed

136 The enforcement procedure under Articles 64 and 73 of EMIR is currently very heavy and slow. This procedure is much more burdensome than the one followed by the Commission for the adoption of antitrust decisions, which imposes fines of a significant higher amount. This brings ESMA’s procedure very close to the one applicable to criminal sanctions, whereas ESMA’s sanctions are of an administrative nature.

137 The aim should be to simplify as much as possible the enforcement procedure in case a TR is infringing EMIR and to allow ESMA to adopt urgent measures when needed. In the current drafting of EMIR, there is no accelerated enforcement procedure even when an urgent action is needed by ESMA in order to prevent significant and imminent damage. For example, a public notice under Article 73(1) (c) of EMIR cannot be adopted in a quick way by ESMA even when an urgent action is needed, because the same enforcement procedure should be followed by ESMA irrespective of the type of enforcement measures to be taken (public notice, imposition of fine, withdrawal of registration) and irrespective of the urgency of the situation at stake. In this respect, we would strongly support the possibility for ESMA to adopt urgent measures when needed on the basis of an accelerated enforcement procedure. Such an accelerated enforcement procedure already exists in the case of ESMA’s enforcement powers regarding credit rating agencies (Article 25(1) 2nd para of the CRA Regulation 1060/2009).

138 In addition, EMIR should be amended so as to broaden the type of decisions that ESMA can adopt, including (i) the power for ESMA to require the temporary cessation of any practice that ESMA considers contrary to EMIR / SFTR, (ii) the power to adopt any type of measures to ensure that a TR continues to comply with legal requirements under EMIR / SFTR, (iii) the power to

impose a temporary prohibition on the acceptance of new reporting counterparties or the extension of the services that the TR offers, when these would compromise the stability or the accuracy of data, and (iv) the power to require the removal of a natural person from the governing bodies of a TR.

139 Similar powers are accepted in MiFID II (Article 69(k), (f) and (u) for the supervision of entities like Approved Reporting Mechanisms or Authorised Publication Arrangements, both of very similar nature to TRs), as well as under Article 23(k) and (l) of the Market Abuse Regulation (MAR). This should be extended to TRs supervised by ESMA.

Proposed amendment:

In Article 73(1) of Regulation (EU) No 648/2012, the following paragraphs are added:

(e) requiring the temporary cessation of any practice that is contrary to this Regulation;

(f) adopting any measures to ensure that a trade repository continues to comply with legal requirements under this Regulation;

(g) imposing a temporary prohibition on the acceptance of new reporting counterparties or the extension of the services that the trade repository offers, when these would compromise the stability or the accuracy of data;

(h) requiring the removal of a natural person from the governing bodies of a trade repository.

In Article 67(1) of Regulation (EU) No 648/2012, the following subparagraph is added:

The first subparagraph shall not apply if urgent action is needed in order to prevent significant and imminent damage to the financial system or significant and imminent damage to the integrity, transparency, efficiency and orderly functioning of financial markets, including the stability or the accuracy of data reported to trade repository. In such a case, ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision.

9.4 On-site inspections: No judicial authorisation before non-coercive on-site inspections

140 Because of Article 63(8) and 63(9) of EMIR, the conditions under which ESMA can go on-site under EMIR are more restrictive than (i) the ones applying for example to the Commission where it goes on-site in the antitrust area, or (ii) the ones applying to National Competent Authorities where they go on-site regarding financial matters.

141 This is very burdensome because ESMA needs to ask for a judicial authorisation to go on-site e.g. in the UK (where most of the TRs are located), including in the cases where there is no risk of opposition from the TR and therefore no need for ESMA to use coercive powers, and despite the fact that the UK Financial Conduct Authority (FCA) or the Bank of England do not have to ask for a judicial authorisation when going on-site in the entities that they supervise.

- 142 This is clearly disproportionate in view of ESMA's role as supervisor and is also a discrimination against a European Authority that faces higher requirement for performing an on-site inspection than a National Competent Authority supervising the same (in case TR are registered as service providers) or similar (other market infrastructures) entities.
- 143 In particular, the current requirement for ESMA to ask for a judicial authorisation also of its simple inspections is disproportionate compared to the situation of the Commission in antitrust matters. ESMA must ask for a judicial authorisation even for 'simple' inspection under Article 63(1) of the entities that it supervises whereas the Commission (which has stronger enforcement powers) must ask for an authorisation under the antitrust Regulation 1/2003 only where the assistance of the police is requested because of the opposition of the inspected entity (Articles 20(6) and 20(7) of Regulation 1/2003).
- 144 Therefore, Article 63(8) of EMIR should be amended so that the judicial authorisation of the inspection shall only be requested in cases of inspection under Article 63(7) where the assistance of the police is needed, and not for simple inspection under Article 63(1).
- 145 Furthermore, in order to avoid discrimination against European authorities, Article 63(8) of EMIR should be amended to ensure alignment with national requirement applicable to national authorities, i.e. the national legislation shall require the judicial authorisation of an ESMA inspection when the assistance of the police is needed only if this is also required for National Competent Authorities.
- 146 In addition, Article 63(9) of EMIR should be revised in order to adapt the checks performed by the national judge to the supervisory functions of ESMA which should be able to go on-site even if he has no ground to think that an infringement is taking place. The current drafting of Article 63(9) EMIR comes from Article 20(8) of the Antitrust Regulation 1/2003. However, the two situations are different: antitrust inspections are based on suspicions of antitrust infringements, whereas ESMA's role as supervisor is broader and ESMA should be able to go on-site without specific grounds for suspecting an infringement. ESMA should not be required to have grounds for suspecting an infringement for performing simple inspections of supervised entities within its normal supervisory duties.

Proposed amendment:

"Article 63(8) of Regulation (EU) No 648/2012 is replaced by the following paragraph:

If the assistance provided for in paragraph 7 requires a national competent authority to apply for an authorisation by a judicial authority according to a national law, such authorisation shall similarly be applied for by ESMA. Such authorisation may also be applied for as a precautionary measure."

In Article 63(9) of Regulation (EU) No 648/2012, the third sentence is deleted ("Such a request for detailed explanations may in particular relate to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures").

9.5 Clarification of TRs' obligations

147 EMIR already lists a number of obligations with which TRs shall comply at all times and which are assessed before a TR is registered. ESMA's experience during the registration process of TRs as well as in the supervisory phase is that some obligations should be more explicitly laid down in EMIR because it will give more grounds for ESMA to closely monitor their implementation.

Obligation of TRs to ensure data quality and to reconcile data and related empowerment for ESMA

148 It derives from EMIR and the Commission delegated regulation (EU) No 150/2013 on registration of TRs that TRs have an obligation to reconcile TR data between them and to ensure data quality. These 2 obligations are crucial for the well-functioning of the TR's activities and ESMA's supervisory activities have focused to a large extent on the compliance by TRs with these obligations. In order to strengthen these obligations, it would be useful to mention them explicitly in Article 78 of EMIR.

149 Furthermore, the current Article 56(3) of EMIR includes a general empowerment for ESMA to develop regulatory technical standards specifying the details of the application for registration. In accordance with this mandate, ESMA has developed regulatory technical standards specifying that these details include the procedures and arrangements to ensure the compliance of the reporting entity with the reporting requirements and the correctness of the data reported.

150 However, it remained unclear to what extent such procedures and arrangements must be harmonised across TRs leading to situations where TRs were not verifying the compliance of the reports with the EMIR in a consistent manner. To clarify this, ESMA has developed guidance on the data validations to be commonly applied by TRs to ensure that reporting is performed according to the EMIR regime; the validations are included in the ESMA Q&As on EMIR (Q&A TR 20b).

151 The validations consist in the verification that the mandatory and conditionally mandatory fields are populated and the verification that the values reported in the fields comply with the format and content rules set out in the ESMA technical standards. It is envisaged that upon implementation by the TRs, a failure to comply with such validations will trigger a rejection of the report by the TR.

152 The validations are key for the achievement of high data quality as the rejection of the report indicates which fields are not reported in compliance with EMIR and therefore need to be amended, which allows counterparties to improve their reporting to meet the EMIR standards.

153 Therefore, an explicit empowerment for ESMA to define the harmonised validation to be commonly applied by the TRs to ensure that reporting is performed according to the EMIR regime would be beneficial to the overall quality of the data reported to TRs. ESMA recommends inserting such empowerment in both the provision on the application for registration (Article 56 of EMIR) and in the one on the general requirements for Trade repositories (Article 78 of EMIR).

Proposed amendment:

"Article 56(3), first sentence, of Regulation (EU) No 648/2012 is replaced by the following:

3. In order to ensure consistent application of this article, ESMA shall develop draft regulatory technical standards specifying the details of:

- the application for registration referred to in paragraph 1;
- the procedures to be applied by the trade repository in order to verify the compliance of the reporting counterparty or submitting entity with the reporting requirements; the completeness and correctness of the information reported under Article 9 of this regulation;
- the procedures for the reconciliation of data between trade repositories”.

In Article 78 of Regulation (EU) No 648/2012, the following paragraphs are added:

“(9) A trade repository shall have adequate procedures for the reconciliation of data between trade repositories, and

(10) A trade repository shall have adequate procedures to ensure the quality of the reported data.

(11) In order to ensure consistent application of the reporting requirements and accuracy of the data reported to trade repositories, ESMA shall develop draft regulatory technical standards specifying the details of:

- the procedures to be applied by the trade repository in order to verify the compliance of the reporting counterparty or submitting entity with the reporting requirements; the completeness and correctness of the information reported under Article 9 of this regulation;
- the procedures for the reconciliation of data between trade repositories.”

Obligation for TRs to receive the consent from both relevant counterparties before being allowed to use TR data for commercial purposes

154 The experience of ESMA during the registration process has shown that TRs may in the future use the TR data that were reported to them for commercial purposes. Article 80(2) of EMIR provides that such a commercial use is allowed only if the relevant counterparties have provided their consent to such use. However, it would be useful to clarify in EMIR that both counterparties shall have consented to the commercial use, including in cases where the counterparties have reported to different TRs.

Proposed amendment:

“In paragraph 80(2) of Regulation (EU) No 648/2012, “the relevant counterparties” is replaced by “both relevant counterparties”.

9.6 Tools for ESMA’s supervision

Possibility for ESMA to oppose material changes to the conditions of registration

155 In accordance with Article 55(4) of EMIR, TRs shall notify ESMA of material changes to the conditions of their registration. However, it is not specified how ESMA could react to notifications that raise concerns, except in extreme situations where Article 71 of EMIR provides that ESMA has the power to withdraw the registration of a TR that no longer meets the conditions under which it was registered. For notifications that raise doubts but do not justify a withdrawal of

registration, ESMA cannot formally oppose them, even though in practice it can initiate discussions with the TR and try to find a mutually agreed solution.

Proposed amendment:

“In Article 55(4) of Regulation (EU) No 648/2012, the following sentence is added:

ESMA shall have the right to oppose a material change to the conditions of registration which is notified by the trade repository”.

Obligation for TRs to submit periodic information to ESMA.

156 As indicated before, Article 55(4) of EMIR provides that TRs shall notify ESMA of the changes to the conditions of their registration. However, there is no provision in EMIR imposing an obligation on TRs to notify ESMA with periodic information such as financial accounts, audit, risk and compliance reports. Periodic information is an important supervisory tool for ESMA and therefore a specific obligation to provide such information should be added in EMIR.

Proposed amendment:

“In Article 55(4) of Regulation (EU) No 648/2012, the following sentence is added:

A trade repository shall, without undue delay, notify ESMA of periodic information.”

Sanctions for breaches of the obligation to notify periodic information and material changes to the conditions of registration

157 The above-mentioned obligations to notify periodic information and material changes to conditions of registration should be complemented by an amendment of EMIR regarding the potential sanctions (fines) for breaches of the obligation to notify periodic information and material changes to the conditions of registration. It should be noted that such a sanction for breach of the obligation to notify ESMA of changes to conditions of registration already exists in the CRA Regulation (Annex III, Section II, Point 6).

Proposed amendment:

In Annex 1, Section IV, of Regulation (EU) No 648/2012, the following sentence is added:

“(d) a trade repository does not notify ESMA in due time of material changes to the conditions of its initial registration or of periodic information relating to its financial information and risk and compliance reports”.

Simplifications / clarifications of ESMA’s supervisory procedures

158 The points mentioned below refer to clarifications or simplifications which could be introduced as part of the EMIR review.

159 First, there is an inconsistency in the current drafting of EMIR between the definition of the file accessible by the TR under investigation which is included in Article 67(2) of EMIR and the definition which is included in Article 64(4) of EMIR. There are two different formulations in EMIR

for the description of the content of the same file. The review of EMIR can be used as an opportunity to correct this inconsistency and align the drafting of Article 64(5) with the one of Article 67(2).

Proposed amendment

The last sentence of Article 64(4) of Regulation (EU) No 648/2012 is replaced by the following sentence:

“The right of access to the file shall not extend to confidential information or ESMA’s internal preparatory documents”.

160 Second, in our view, there is an inconsistency in Articles 62(2) and 63(3) of EMIR. It is indicated that periodic penalty payments should be mentioned in the inspection and investigation written authorisations. However it results from the reading of the other paragraphs of Article 62 and 63 of EMIR that periodic penalty payments cannot be imposed on the basis of a written authorisation, but only on the basis of a decision where the TR has an obligation to submit to the investigation/ inspection.

161 It is therefore suggested to delete the obligation to mention periodic penalty payments in the investigation / inspection written authorisations. It should be mentioned that the drafting in Regulation 1/2003 can serve as a reference: periodic penalty payments (Article 24 of Regulation 1/2003) are not mentioned in Article 20(3) of Regulation 1/2003 which relates to written authorisation; they are only mentioned in Article 20(4) which relates to decisions.

Proposed amendment

In the second sentence of Articles 62(2) of Regulation (EU) No 648/2012, the following is deleted:

“indicate the periodic penalty payments provided for in Article 66 where the production of the required records, data, procedures or any other material, or the answers to questions asked to persons referred to in Article 61(1) are not provided or are incomplete, and”

In the first sentence of Article 63(3) of Regulation (EU) No 648/2012, the following is deleted:

“and the periodic penalty payments provided for in Article 66 where the persons concerned do not submit to the inspection”.

162 Third, the current drafting of Article 61(5) of EMIR provides that ESMA shall send a copy of the simple request or of its decision to request information to the competent authority of the Member State where the recipient is domiciled or established.

163 This provision raises practical concerns because this type of correspondence can be quite numerous and they are part of the routine work of ESMA as TR supervisor. We would therefore suggest an amendment so that only copies of decisions requiring information are sent to the NCA, and not copies of simple requests.

Proposed amendment

In Article 61(5) of Regulation (EU) No 648/2012, the following is deleted:

“of the simple request or”.

9.7 Registration process

Longer timeframe for ESMA’s assessment of TR applications

164 20 working days to assess completeness was in practice too short in 2013 for the registration of TRs under EMIR. It would be useful to extend the timeframe for the assessment of completeness (e.g. 40 working days).

165 Similarly, the timeframe for the assessment of compliance should also be extended. It is currently 40 working days from the date of notification of completeness of the registration file. It should be extended to 60 working days to allow ESMA to have more time to assess the TR applicant’s compliance with EMIR. This will be in line with the duration of the compliance assessment by ESMA of CRA’s applications (Article 16 of the CRA Regulation) when these CRA applicants have outsourced activities, which is the case in principle in TR applications that ESMA has received.

Proposed amendment:

In Article 56(2) first sentence of EMIR, “within 20 working days” is replaced by “within 40 working days”.

In Article 58(1) of EMIR, “within 40 working days” is replaced by “within 60 working days”.

Date of effect of the registration decision

166 Currently, Article 58(2) of EMIR provides that when a registration decision is adopted by ESMA, the registration takes effect on the 5th working day following adoption of the decision.

167 In 2013, all TRs had in practice 3 months to be ready because they were registered in November 2013 and the reporting obligation started in February 2014; this 3-month period will not apply to new TRs which might therefore face difficulties in being ready and on-boarding clients, etc. within only 5 working days.

168 It would be useful to add the possibility for ESMA to indicate in the registration decision that the registration takes effect at a specified date (later than the current 5th working day following adoption of the decision). Indeed, it leaves time for the TR to put in place all systems before starting operations.

169 Another interesting option would be for ESMA to be able to adopt a conditional authorisation, i.e. the registration will be conditional to the fulfilment by the TR applicant of a number of conditions that ESMA will define in its registration decision.

Proposed amendment:

In Article 58(1) of Regulation (EU) No 648/2012, the following is added:

“or at a later date if deemed necessary by ESMA, including where the decision shall take effect only if specific conditions set by ESMA in its decision are met”.

9.8 Relationships with third countries

Suppression of the international agreement requirement for direct access to TR data by third countries

170 Currently Article 75(3) of EMIR provides that an international agreement between the EU and the third country shall be concluded before ESMA is able to sign a cooperation arrangement with third country authorities having TR established in their jurisdiction. The negotiation and conclusion of an international agreement is burdensome. In practice, no international agreement of this kind has yet been concluded and this has prevented ESMA from signing memorandum of understanding with third country authorities having a TR established in their jurisdiction in order to establish reciprocal direct access to TR data.

171 Similarly, the current drafting of Article 77(2) of EMIR lays down that an international agreement between the EU and a third country shall be concluded before ESMA can recognise a TR established in this third country. This has prevented recognition to take place.

172 The requirement of the international agreement should therefore be deleted, and it would make sense to align the process of access to TR data of third countries having a TR established in their jurisdiction with the one currently applicable under Article 76 of EMIR where there is no TR established in the jurisdiction of the third country: i.e. the access to TR data is granted following the conclusion of a Memorandum of Understanding (MoU) between ESMA and the third country authority. This MoU could envisage the possibility for ESMA to exit from it, should discriminatory access to TR data be experienced between European and third country authorities.

Proposed amendment:

Article 77(2), Point (b) of Regulation (EU) No 648/2012 is deleted.

Article 75(2) of Regulation (EU) No 648/2012 is deleted.

In Article 75(3) of Regulation (EU) No 648/2012, the first sentence is replaced by:

“After conclusion of the implementing act referred to in paragraph 1, ESMA shall establish cooperation arrangements with the competent authorities of the relevant third countries to ensure that Union authorities, including ESMA, have immediate and continuous access to all the information needed for the exercise of their duties”.

Fees charged by ESMA for recognition

173 The current drafting of Article 72 of EMIR lists the fees that are charged by ESMA to TRs and provides in particular that these fees shall fully cover ESMA’s expenditures relating to the registration and supervision of TRs. However, ESMA’s expenditures relating to the recognition of TRs are not explicitly mentioned in EMIR, even though the Commission delegated regulation (EU) No 1003/2013 of 12 July 2013 with regard to fees charged by ESMA on TRs already foresees that ESMA can charge fees that cover its recognition expenditures. It is therefore recommended to amend EMIR in this respect. This will be consistent with Article 11 of the SFTR.

Proposed amendment:

In Article 72(1) of Regulation (EU) No 648/2012, the following is added:

“Those fees shall also fully cover ESMA’s necessary expenditure relating to recognition of trade repositories”