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ESMA Discussion Paper on MiFID II / MiFIR

Dear Sirs,

We welcome the publication of the *Discussion Paper on MiFID II / MiFIR* (the "***Discussion Paper***" or "***DP***") by ESMA and we appreciate the opportunity to provide you with our comments.

Markit is a provider of financial information services to the global financial markets, offering independent data, valuations, risk analytics for internal capital models, and related services across regions, asset classes and financial instruments. Our products and services are used by numerous market participants to reduce risk, increase transparency, and improve the operational efficiency in their financial markets activities.[1]

Markit has been actively and constructively engaged in the debate about regulatory reform in financial markets, including topics such as the implementation of the G20 commitments for OTC derivatives and the design of a regulatory regime for benchmarks. Over the past years, we have submitted more than 100 comment letters to regulatory authorities around the world and have participated in numerous roundtables. We also regularly provide the relevant authorities with our insights on current market practice, for example, in relation to valuation methodologies, the provision of scenario analysis, or the use of reliable and secure means to provide daily mid-market marks. We have also advised regulatory authorities on appropriate approaches to enabling a timely and cost-effective implementation of newly established regulatory requirements, for example through the use of multi-layered phase-in or by providing market participants with a choice of means for satisfying regulatory requirements.

Comments

We welcome the publication of the DP by ESMA and we appreciate the opportunity to provide you with our comments. Our below comments focus on the following sections of the DP:

- Access to CCPs and trading venues (DP 5.7)
- Non-discriminatory access to and obligation to license benchmarks (DP 5.8)
- Obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (STP) (DP 9.1)
- Obligation to report transactions - required fields in Annex 8.1.1 (DP 8.1)

[1] Please see www.markit.com for further information.

Access requirements (Articles 35, 36, and 37 MiFIR)

Many of Markit's services enhance efficiency and reduce risk in the OTC markets and support a market structure where competition exists on the levels of execution, clearing, and reporting. We are therefore generally supportive of the access requirements introduced in Articles 35, 36 and 37 of MiFIR as means to increase competition in European financial markets.[2]

Specifically, the following of our services seem most relevant in this context:

- Markit's derivatives processing services establish both upstream and downstream connectivity to a large number of trading venues ("***TVs***"), CCPs, trade repositories and the whole range of counterparties, including buyside, sellside and inter-dealer brokers. The existence of such platform-neutral connectors increases the efficiency of a horizontal model, it reduces cost for all participants and fosters competition on the levels of execution, processing, and clearing.

- Markit is an independent index provider with focus on the fixed income and credit markets. Our index business is not related to or part of any vertically integrated silo and it is our practice to license our indices and related information to a large number and variety of competing trading venues and CCPs.

5.7 Access to CCPs and trading venues

We are generally supportive of Article 35 of MiFIR that requires CCPs to accept to clear a financial instrument on a non-discriminatory and transparent basis regardless of the trading venue on which the transaction is executed. However, we believe that it will be important for ESMA to reflect established market practices and workflows in its implementation of Article 35 to ensure that the objective of fostering horizontal competition amongst CCPs and trading venues ("***TVs***") respectively is indeed achieved and to prevent competition-restricting practices from occurring.

Specifically, ESMA should note that, in today's marketplace for OTC derivatives, access to and connectivity with CCPs is typically not established and maintained by TVs themselves, but by specialized third party service providers that establish connectivity with CCPs on their behalf. Such providers, including MarkitSERV and its competitors, are widely recognized by market participants as a cost-effective and risk-reducing means to establish and maintain connectivity. This function is particularly important in a marketplace where a multitude of CCPs and TVs exist, many of which might just be trying to start up their operations. On that basis, some CCPs have interpreted a similar "open access" requirement under the United States' Dodd-Frank Act to encompass third party connectivity providers[3] while others explicitly allow third party connectivity providers open access under their rules.[4]

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[2] Recital 40 of MiFIR asserts that "access to licences is critical to facilitate access between trading venues and CCPs under Articles 35 and 36 of MiFIR as otherwise licensing arrangements could still prevent access between trading venues and CCPs that they have requested access to. The removal of barriers and discriminatory practices is intended to increase competition for clearing and trading of financial instruments in order to lower investment and borrowing costs, eliminate inefficiencies and foster innovation in Union markets".

[3] "ICE Clear Credit shall ensure that, consistent with the requirements of [Commodity Exchange Act] Section 2(h)(1)(B) and Securities Exchange Act Section 3C(a)(2), there shall be open access to the clearing system operated by ICE Clear Credit pursuant to these Rules for all execution venues (including, without limitation, designated contract markets, national securities exchanges, swap execution facilities and security-based swap execution facilities) and trade processing platforms…" ICC Rulebook, Rule 314, available at https://www.theice.com/publicdocs/clear_credit/ICE_Clear_Credit_Rules.pdf (last revised Nov. 18, 2013). Commodity Exchange Act section 2(h)(1)(B)(ii)(B)'s (as amended by Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") section 723) open access requirement states that DCOs must "provide for non-discriminatory clearing of a swap (but not a contract of sale of a commodity for future delivery or option on such contract) executed bilaterally or on or through the rules of an unaffiliated designated contract market or swap execution facility."

[4] "See CME Rulebook Rule 8H17, available at http://www.cmegroup.com/rulebook/CME/I/8H/8H.pdf ("CME shall provide open access to its CDS Contract clearing services for any execution venue or trade processing or confirmation service that desires to facilitate the submission of CDS Product transactions to the Clearing House for clearing, subject to the Clearing House's normal operational requirements applied to all such third-party services[.]"). See also LCH Rulebook, available at http://www.lchclearnet.com/Images/Voluntary%20Submission%20of%20Rulebook%20and%20Supporting%20Materials_tcm6-62205.pdf (Definition of "Approved Trade Source System" as "a system or facility, such as an exchange, a clearing house, a swap execution facility, a designated contract market or other similar venue,

However, neither Article 35 of MiFIR nor ESMA's DP seem to acknowledge the important role of third party connectivity providers in this context with the discussion evolving solely around "access of Trading Venues to CCPs". We are concerned that failure to recognize the important role of third party connectivity providers in the context of Article 35 and ESMA's draft regulatory technical standards ("***RTS***") could increase the risk of CCPs abusing their market power by refusing access to third parties that want connect to them on behalf of TVs. This risk will be particularly pronounced where CCPs operate their own processing platforms as they could, by requiring TVs to only use those for establishing connectivity to them, directly foster the development of their own vertical silo.

We believe that such behaviour would stand in direct conflict with the spirit of Article 35 of MiFIR and would risk expanding the market power of CCPs. We therefore urge ESMA to prevent the potential occurrence of such unfair market practices by reflecting the relevance of third party connectivity providers in its draft RTS. Specifically, ESMA should clarify that the requirement for CCPs to provide open, non-discriminatory access to TVs equally applies for the provision of access to *third party providers that act (and establish connectivity) on behalf of TVs*.

5.8 Non- discriminatory access to and obligation to license benchmarks

Article 37 of MiFIR states that "where the value of any financial instrument is calculated by reference to a Benchmark ("***BM***"), a person with proprietary rights to the BM shall ensure that CCPs and trading venues are permitted, for the purposes of trading and clearing, non-discriminatory access to: (a) relevant price and data feeds and information on the composition, methodology and pricing of that BM for the purposes of clearing and trading; and (b) licences".

We welcome the analysis that ESMA has performed in relation to Article 37 of MiFIR and its stated objective to design its draft RTS to ensure that the market for indices and benchmarks continues to function properly. Our overall views on ESMA's analysis and our related general recommendations are as follows:

- We welcome ESMA's recognition that the world of Benchmarks is large and diverse.[5] We therefore urge ESMA to ensure that its draft RTS contain sufficient flexibility to reflect the often significant differences between various categories of BMs.

- We appreciate ESMA's references to the IOSCO Principles for Financial Benchmarks.[6] Given the existence of an international regulatory framework for Benchmarks we encourage ESMA to base its draft RTS for Article 37 of MiFIR on and align them with these IOSCO Principles the extent possible. We believe that such approach would be beneficial by avoiding unnecessary duplication and cost for users as well as for administrators of BMs.

- We believe that the index and BM sector is competitive, innovative and vibrant today and that the creation of indices fosters liquidity and transparency in financial markets. We welcome ESMA's recognition that the right balance needs to be struck between securing access to BM licences and information that BM IP owners need to provide to CCPs and TVs to foster competition in this area and protecting the relevant intellectual property ("***IP***") rights related to the creation of BMs.[7] We encourage ESMA to enter into further

approved by the Clearing House for executing Transactions and/or presenting such Transactions to the Clearing House."). LCH Rule 2A.3.3 provides that "Currently the Approved Trade Source Systems designated by the Clearing House for SwapClear are MarkitWire, Bloomberg and Tradeweb. Where the Clearing House approves additional Approved Trade Source Systems, it will notify Clearing Members via a member circular."

[5] "ESMA is aware that MiFIR covers a vast array of BMs given the definition above and so it will be important for ESMA to consider how the level 2 measures should take account of different types of BMs."

[6] See http://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf

[7] For example, under other conditions ESMA states that "the use of the licensed intellectual property may not cause any damage to the licensor, nor diminish the

discussions with Benchmark providers to further its understanding of current licencing practices and identify challenges that its draft RTS might create in this respect.

The information through licensing to be made available to trading venues and CCPs (Article 37(4)(a), MiFIR)

Q411-416: Do you agree that trading venues require the relevant information mentioned above? If not, why? Is there any other additional information in respect of price and data feeds that a trading venue would need for the purposes of trading? Do you agree that CCPs require the relevant information mentioned above? If not, why? Is there any other additional information in respect of price and data feeds that a CCP would need for the purposes of clearing? Do you agree that trading venues should have access to benchmark values as soon as they are calculated? If not, why? Do you agree that CCPs should have access to benchmark values as soon as they are calculated? If not, why?

ESMA has been tasked with specifying the information that persons with proprietary rights to a BM should make available to CCPs and TVs in respect of relevant price and data feeds, composition, methodology and pricing for the purposes of clearing and trading. ESMA stated that:

- The relevant information provided to a TV through licensing should enable the TV to make an initial assessment of the characteristics of the BM, market the relevant product and support on-going market surveillance activities.

- The relevant information to be made available to a CCP through licensing should enable it to perform appropriate risk management of relevant open positions, including to perform netting, and to meet relevant obligations, such as to calculate risk intraday in order to assess whether it has an appropriate level of margin in accordance with requirements set out in EMIR.

We largely agree with ESMA's general approach to the definition of "relevant information" for TVs and CCPs respectively. However, when identifying the *specific* elements of information that are relevant for CCPs and TVs on that basis ESMA should note that there are often significant differences between BMs and the information that is relevant to CCPs and TVs for the purposes of clearing and trading respectively. We believe that the list of elements of information that ESMA discusses in the DP would often go beyond the actual needs of TVs and CCPs. We therefore recommend that ESMA determine the elements of information that BM IP owners shall provide based on *current* licencing practices as these have been designed to reflect the actual needs of CCPs and TVs. Further, ESMA should allow for sufficient flexibility for BM IP owners to agree with CCPs and TVs on the range of information that is provided. On that basis one could avoid requiring the provision of information that is not relevant for the purposes of trading and clearing.

Ownership of information to be provided

Article 37(1) of MiFIR states that "the person with proprietary rights to the BM" shall ensure access to relevant price and data feeds and information on the composition, methodology and pricing of that BM and to license it to TVs and CCPs under certain circumstances and against payment of a reasonable commercial price. ESMA states in the DP that such "persons with proprietary rights to a BM" could encompass a wide variety of market participants, ranging from public entities, trade organisations, trading venues, CCPs, price reporting agencies, to other organisations. ESMA also recognizes that such persons may be separate from the organisation or

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commercial value of said intellectual property."

legal person that controls the operation of the BM. ESMA rightly points out that the person with proprietary rights to a BM may not own the relevant pricing and reference data that is used to develop the value of the BM and that this data may be owned and licensed by other third party firms that are unrelated to the person with proprietary rights to the BM. However, ESMA also notes that the person with proprietary rights to a BM is still responsible for ensuring compliance with Article 37 of MiFIR and its implementing measures.[8]

We appreciate the fact that ESMA has identified this situation as a potential issue and requests comment from market participants.[9] We indeed believe that compliance with this requirement would be very problematic, and often impossible, in cases where the BM IP owner does not actually own one (or several) elements of the relevant information. For example, while Markit is the IP owner for several CDS indices we do not actually determine an "official" index level for those. In practice, the information about the index level that might be relevant for CCPs and TVs for purposes of clearing and trading respectively, be it end-of-day or real-time index pricing data, is offered by a number of competing data vendors. A similar issue will often apply in relation to "other relevant price and data feed information", for example "relevant corporate action information",[10] as ownership of such information will often not lie with an index IP owner.

We believe that, in cases where elements of the information that CCPs or TVs need for the purpose of clearing or trading respectively are either not owned by the BM IP owner or are made available by several providers in a competitive market, there is no basis or reason to require the BM IP owner to provide this information to CCPs or TVs. However, which relevant elements of information this applies to will differ from BM to BM. To appropriately address this issue, we therefore recommend that ESMA determine, for a specific BM and element of relevant information, whether the information a) is not owned by the BM IP owner and/or b) is made available by several providers in a competitive market. In such cases the BM IP owner should *not* be required to provide this information to CCPs or TVs.

Other conditions under which access is granted, including confidentiality of information (Article 37(3)(b), MiFIR)

Q437-440: Do you agree with the principles described above? If not, why? Do users of trading venues need non-publicly disclosed information on benchmarks? Do users of CCPs need non-publicly disclosed information on BMs? Where information is not available publicly should users be provided with the relevant information through agreements with the person with proprietary rights to the BM or with its trading venue / CCP?

Provision of information to users of CCPs and TVs

We agree with ESMA that, although Article 37 of MiFIR only refers to TVs and CCPs as recipients of the relevant BM information,[11] a broader group of parties might need to be considered in this context. This broader group could include the participants and members of the TV and the CCP respectively, collectively referred to as "users" in the DP.

We agree with ESMA that, potentially, not only the CCPs and TVs themselves but also their users might need

[8] "… even if a separate organisation or legal person is carrying out the relevant functions or owns the relevant data that needs to be made available to CCPs and trading venues through licensing."
[9] "A different situation might be that of indices based on instruments traded on venues data of which is commercially available from several sources (trading venues, data vendors, etc…). ESMA would like to get the views of market participants on this." DP p. 364
[10] DP p. 361
[11] "Article 37 of MiFIR is silent on whether the foreseen licence agreement includes the right for licensees (trading venue or CCP) to pass on relevant information to their users. However, as mentioned above ESMA is of the view that trading venue and CCP users should have access to certain information, where necessary, for trading and clearing purposes."

access to the relevant information in order to be able to make use of their BM related services. We believe that most BM IP owners that licence their indices to CCPs or TVs today will already have experience also in providing direct or indirect licences for some relevant information to users of CCPs or TVs. From a technical perspective we would therefore generally not expect the provision of such relevant information to users of TVs and CCPs to be overly problematic.

However, we agree with ESMA that the BM-related information that the users of CCPs or TVs might need is likely to vary depending on the nature of the BMs and the intended use. Specifically, such information may only be a subset of the information that is provided to CCPs or TVs and it may be provided in a less timely manner. We agree with ESMA that it should be up to the person with proprietary rights to the BM to decide how to license the relevant information to users of TVs and CCPs, for example, whether the relevant information would be licensed directly to users or via the TV or CCP. We further believe that it will be of crucial importance for ESMA to provide BM IP owners with sufficient flexibility to design the terms of their licencing agreements with users of CCPs and TVs in a manner that sufficiently protects their IP and can be limited to the relevant use cases.

Q441-445: Do you agree with the conditions set out above? If not, please state why not. Are there any are other conditions persons with proprietary rights to a BM and trading venues should include in their terms for agreeing access? Are there any are other conditions persons with proprietary rights to a BM and CCPs should include in their terms for agreeing access? Which specific terms/conditions currently included in licensing agreements might be discriminatory/give rise to preventing access? Do you have views on how termination should be handled in relation to outstanding/significant cases of breach?

Article 37(1) of MiFIR requires access to the relevant information on a non-discriminatory basis whilst Article 37(4)(b) MiFIR requires *ESMA* to develop draft RTS *"specifying the other conditions under which access is granted, including confidentiality of information provided; [...]"*

As results of its analysis, ESMA voiced the view that, as long as pre-determined and non-discriminatory objective requirements are met, a person with proprietary rights to a BM should offer TVs and CCPs access on the same terms and conditions as it does for existing licensees, only differing where there are material grounds as per the last sentence of Article 37(1) of MiFIR. In this regard, a person with proprietary rights to a BM should make its fee schedules transparent to licensees and potential licensees, and in line with the level 1 text the schedules should be non-discriminatory. ESMA notes that it would however be possible, as per the level 1 text, for a person with proprietary rights to a BM to charge different CCPs, TVs or any related persons different prices only where objectively justified having regard to reasonable commercial grounds such as the quantity, scope or field of use demanded.

We are concerned about ESMA's suggestion that any differences in commercial terms for two CCPs or TVs can only exist if they are "objectively justified" by a difference in the service. We believe that such approach would be problematic as licensing contracts are commercial agreements that are not (and should not be) standardized. Specifically, licensees will often request specific commercial arrangements that reflect their individual circumstances. For example, an already established CCP or TV might prefer paying the relevant licensing/data fee upfront whilst another that is just starting its business might request entering into a revenue sharing agreement (without any upfront payment) for receiving the same information from the BM IP owner. As this example demonstrates, the ability of BM IP owners to provide such flexibility in its licencing terms will be essential to fostering competition between TVs and CCPs respectively.

We therefore believe that ESMA will need to strike a balance between allowing for sufficient flexibility in commercial arrangements and ensuring that their terms are not discriminatory. To achieve this objective, ESMA should allow for commercial terms that are "different" even if not objectively justified by a difference in

the service. At the same time, to ensure non-discriminatory access, ESMA should aim to determine whether the different commercial terms can be regarded as “equivalent”.

Standards guiding how a benchmark may be proven to be new (MiFIR Article 37(3)(c))

Q446-449: Do you agree with the approach ESMA has taken regarding the assessment of a BM’s novelty, i.e., to balance/weight certain factors against one another? If not, how do you think the assessment should be carried out? Do you agree that each newly released series of a BM should not be considered a new BM? Do you agree that the factors mentioned above could be considered when assessing whether a BM is new? If not, why? Are there any factors that would determine that a BM is not new?

Article 37 of MiFIR requires a determination whether the BM is “new” to decide whether the BM IP owner can establish a period of exclusivity when licensing a BM to a TV. Article 37(1) of MiFIR enumerates cumulative criteria to determine how a BM may be proven to be “new”, namely if (i) it is not a mere copy or adaptation of any such existing BM, the methodology, including the underlying data of the new BM is meaningfully different from any such existing BMs; and (ii) the new BM is not a substitute for any such existing BM.

We agree with ESMA that, given the variety of BMs that are covered by Article 37 of MiFIR, it would be appropriate to list a number of factors that could be used to assess whether a BM is “new”. We also agree that it will be important to balance such factors against one another in order to make an appropriate assessment and we believe that the way in which factors are weighed against one another might vary on a case by case basis. We generally agree with ESMA that, for BMs that “release a new/further series on a periodic basis, such that the benchmark is a continuation of the prior BM” each newly released series of such BM should not be considered a new BM. Finally, we agree that the frequency at which a BM is calculated is, in most cases, a less important factor when determining whether the BM is new.

However, we are concerned about ESMA’s view that “any adaptation to an existing benchmark, whether material or not, would not constitute a new benchmark”.[12] We also question ESMA’s views on the relevance of the factor “users” and believe that the factor “format” should feature in the determination process. Specifically, our experience with providing index licences to TVs has shown that it is common for a TV to require a period of exclusivity to be able to structure the BM product, establish commercial agreements, perform marketing activities, and ultimately generate sufficient interest from its clients to drive trading activity. More significant efforts (and time) will typically be required if the TV targets a new user group as potential new users will need time to familiarize themselves with product. This will often be the case even if the composition and/or the methodology of the benchmark are similar to an existing product. An example where, we believe, a BM should be classified as “new” because it addresses a new user group is the launch of a futures contract even if it was based on a BM that is already referenced in OTC traded products. This is because, whilst the underlying BM itself might be the same and the product launch could hence be regarded as “adaptation to an existing benchmark”, the user group for this BM-based product will tend to be very different. For this reason, a significant amount of time will be required for the new users to establish the relevant documentation with the TV, establish connectivity, add the product to their permitted investments, and reflect the product in their trading systems before they can start using it.

We therefore respectfully disagree with ESMA’s view that “any adaptation to an existing BM, whether material or not, would not constitute a new BM.” We further recommend that ESMA classify “user group” and “format” as important factors in its determination whether a BM is “new” under Article 37(2) of MiFIR.

[12] See DP p. 371

DP 9.1. Obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (STP)

Q605: What are your views generally on (1) the systems, procedures, arrangements supporting the flow of information to the CCP, (2) the operational process that should be in place to perform the transfer of margins, (3) the relevant parties involved these processes and the time required for each of the steps?

We welcome the fact that ESMA requests market participants' views on current market practice in relation to the submission of derivative transactions for clearing and the related operational challenges. Indeed, our experience in relation to the implementation of STP requirements in other jurisdictions has shown that carefully reflecting current responsibilities and workflows in a newly established regulatory framework is key to enabling a smooth and timely implementation.

We therefore recommend that ESMA design its draft RTS related to STP in the European derivatives markets to closely reflect the key elements of current market practice, workflows and responsibilities. On that basis, for the avoidance of doubt, ESMA's draft RTS should explicitly allow middleware providers / third parties to submit trades to a CCP on behalf of the parties to the transaction or a trading venue. Such approach would mirror current workflows based on the broad recognition that such third party service providers can ensure a high degree of efficiency, lower the risk of establishing and maintaining connectivity, and, as a consequence, reduce barriers to entry for new trading venues and CCPs alike.

Addressing the issue of counterparty credit risk

Article 29 of MiFIR requires CCPs, TVs, and investment firms to have effective systems, procedures and arrangements in place to ensure that transactions in cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable using automated systems. Article 29(3) tasks ESMA with developing draft minimum requirements for systems, procedures and arrangements, including the acceptance timeframes, taking into account the need to ensure proper management of operational and other risks.

In its DP ESMA discusses the issues of counterparty credit risk, product validation risk, availability of collateral, the assessment of the derivative transaction by the clearing member and by the CCP respectively, as well as the timeframe within which the derivative transaction has to be submitted to the CCP. In relation to the control of credit limits ESMA states that "there are several manners to approach such control", for example "the CM could communicate ex-ante limits to the CCP, or the CM could validate transactions before they are submitted to the CCP".[13]

As ESMA notes, the CFTC has recently introduced STP requirements for the swaps markets. To implement such requirements in the swaps markets, market participants had to arrange a scheme for checking the available credit that is provided by clearing members to their clients for any order that is intended to be cleared, before that order is entered onto a TV or executed. Pre-trade checks should be performed for transactions that are arranged directly between counterparties as well as for those that are executed on TVs. ESMA should note that, to facilitate the performance of such pre-trade credit checks, platforms such as Markit's Credit Centre and competing platforms have been built and are already connected to clearing firms, TVs and many market participants that enter into such transactions.

While several possible approaches can be taken around credit checks, many market participants seem to prefer a "hub" model that supports centralized credit requests. This is because such approach allows each

[13] ESMA DP, p. 527.

clearing member a choice of which risk model to use[14] and relieves TVs from having to perform individual checks or maintain their own risk calculators. Such approach can also support a further credit check of the clearing member by the CCP.[15]

ESMA should note that a centralized facility for credit checking provides significant benefits to the market through creating greater efficiencies and allowing new TVs to compete alongside established execution venues. It also provides end-users with a single view of their credit exposure across the whole range of TVs, CCPs and clearing brokers. The experience of pre-trade credit checking in the US swaps markets has demonstrated that individual firms, including TVs, clients and clearing brokers, select the model that is best suited to them. To allow for this approach, the regulatory framework should expressly permit the use of the model that the parties to the trade prefer, rather than having it mandated by any one participant.

We would be more than happy to share with ESMA our experiences in establishing a pre-trade credit-checking service as basis for the implementation of the STP requirement in the US and any lessons learned that can help guide the design of the relevant regulatory framework in Europe.

Q606: In particular, who are currently responsible, in the ETD and OTC context, for obtaining the information required for clearing and for submitting the transaction to a CCP for clearing? Do you consider that anything should be changed in this respect? What are the current timeframes, in the ETD and OTC context, between the conclusion of the contract and the exchange of information required for clearing on one hand and on the other hand between the exchange of information and the submission of the transaction to the CPP?

The current market practice in the OTC derivatives markets in relation to which party is responsible for submitting a transaction to a CCP for clearing will vary by asset class and by type of execution. However, third party middleware providers will often be involved in and facilitate this process.

For example, transactions in credit derivatives are typically submitted by the parties to the transaction to a third party platform for the matching of transaction details and submitted by such matching platform to the CCP, regardless of the execution method. For transactions in interest rate derivatives, bilaterally executed transactions tend to follow the same process as credit. In contrast, where such transactions are executed through an inter-dealer broker or on an electronic trading venue these entities will submit the transaction details to a third party middleware platform. Such middleware platform will then facilitate the affirmation of the transaction details by the counterparties and supplement it with additional information to be passed on to the CCP (for example, where applicable, the identity of the clearing member acting on behalf of the counterparty). In addition, the middleware provider can receive allocation information where a “block” execution has taken place at the venue which it then also communicates to the CCP.

Our experience with the implementation of STP requirements for transactions in OTC derivatives in other jurisdictions has shown that, to enable a timely and smooth implementation of such requirements, one should avoid mandating changes to the responsibilities for submitting a transaction to the CCP for clearing.[16] We therefore recommend that ESMA builds the regulatory framework around current responsibilities. This could be achieved by creating the obligation for timely submission for the counterparties, whilst explicitly allowing them to delegate it to trading venues and/or third party middleware providers.

[14] In practice, many clearing members will wish to utilize initial margin as their risk measure to facilitate credit checks. It is therefore important that CCPs provide required open and equal access to their risk calculations and the regulatory framework should explicitly require such equal access.
[15] However, this is currently not the market practice under the CFTC’s regime.
[16] For example in the United States the CFTC assigned the obligation to transmit the swap transaction to the CCP to the trading venue in cases where the transaction has been executed on a US SEF. This led to significant challenges for the industry, including cost of re-designing workflows and elevated operational risk.

Q611: What are your views on the systems, procedures, arrangements and timeframe for (1) the submission of a transaction to the CCP and (2) the acceptance or rejection of a transaction by the CCP in view of the operational process required for a strong product validation in the context of ETD and OTC? How should it compare with the current process and timeframe? Does the current practice envisage a product validation?

As explained in more detail above, it is current market practice for OTC derivatives in many asset classes that third party middleware providers submit a single agreed record of transactions to CCPs on behalf of the parties to the transaction. Importantly, such middleware platforms, through performing their confirmation process, will already apply comprehensive product validation and eligibility checks that also incorporate the standards that have been set by the various CCPs. That said, we encourage ESMA to reflect current market practice for the submission of transactions to CCPs by ensuring that its draft RTS explicitly allow for the use of third parties / middleware providers for submission to CCPs and product validation purposes.

We believe that the clearing of transactions should be required within a sensible timeframe, for example by the end of the business day when the transaction is executed.

Q613: What are your views on the treatment of rejected transactions for transactions subject to the clearing requirement and those cleared on a voluntary basis? Do you agree that the framework should be set in advance?

We believe that ESMA should generally allow participants to resubmit derivatives transactions that have been rejected by the CCP. For example, in case of a rejection for operational reasons, it would be sensible to allow a reasonable time for the problem to be rectified and be resubmitted for clearing.[17] However, if a requirement to pre-screen trades for credit line availability had been established, transactions that are rejected for clearing due to lack of credit-line should not be resubmitted.

8.1. Obligation to report transactions

Question 550: We invite your comments on the proposed fields and population of fields. Please provide specific references to the fields which you are discussing in your response.

Based on our experience in supporting market participants with their compliance with regulatory requirements to report OTC derivatives transactions to trade repositories in a variety of jurisdictions, we know how demanding the implementation of these requirements can be. We therefore welcome ESMA's stated objective to align the various reporting requirements under EMIR to TRs, the public dissemination of transaction details under MiFID, and the MiFID transaction reporting regime to the extent possible.

In Annex 8.1.1. of its DP ESMA proposed the data fields that should be reported to Competent Authorities under the transaction reporting requirements and requested comments on those. We generally believe that ESMA's expectations might be overly demanding in several areas and are not as joined up with the EMIR reporting requirements as they could be. Our specific comments in relation to the proposed fields, with a focus on the reporting of OTC derivatives, are as follows:

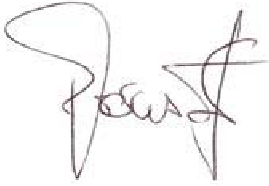
Relevant field	Comment
Field 2 - Submitting entity identification code	We assume that this field would identify the reporting firm or the ARM, rather than a third party service provider that might perform the reporting for the

[17] Such reasonable timeframe could be until the end of the day following the rejection.

	firm on a delegated basis. If that was not the case we wonder whether this field would be restricted to LEI, BIC or national code, as third parties that are used for the reporting do not generally have any of those. We also wonder whether all ARMs will need to have such identification code.
Field 3 - Branch of the reporting firm which received the order from the client(*)	We encourage ESMA to clarify whether this is meant to be the location of the sales person that helped arranging the transaction or the trader location of the branch that the transaction is booked into.
Field 5 - Branch of the reporting firm whose market membership was used for executing the transaction(*)	We assume that this field would only be applicable for exchange-traded derivatives. We encourage ESMA to clarify whether it is not applicable for OTC derivatives.
Fields 21 to 55: various fields related to counterparty and client	We believe that it would be excessive for ESMA to require the reporting of these various data fields in relation to counterparties and clients. ESMA should also be aware of the fact that it is likely to create client confidentiality issues.
Field 59 - Instrument classification	To achieve a smooth and timely implementation of the transaction reporting requirements, we recommend that ESMA endorse the ISDA taxonomy of derivatives product classification well in advance of the reporting start date. Such approach would provide firms with sufficient time to adopt any changes prior to reporting starting.
Fields 69-78 – various fields related to Trader (investment decision & execution)	We believe that it would be excessive for ESMA to require the reporting of these fields in relation to "Trader". We also wonder whether ESMA would require firms to report, for example, passport numbers etc. for all traders. In this context, ESMA should note that passport numbers will change over time. We therefore recommend the use of other ID numbers, e.g. the individual's tax number or national insurance number, which do not change over time.
Field 83 - Waiver flag	We encourage ESMA to confirm whether there should also be an identifier for deferred public reporting as covered by article 11.
Field 84 - OTC post-trade identifier flag	We urge ESMA to clarify when and how these fields will be defined. We also wonder whether these fields would vary from the existing lifecycle event reporting options. We would recommend harmonisation.
Fields 86-88 – Compression / Option exercise / Repo flag	The reporting of these fields seems to imply that new trades should be flagged as such. We recommend for ESMA to confirm whether the close out of original positions should also be flagged as such. If not, ESMA should clarify how it wants firms to identify those.
Field 91 – Report matching number	This field seems to be a package ID ("should be the same among groups of reports which relate to the same execution"). To enable the reporting of such "packages" the parties to the transaction will both need to know the Report matching number, which will be most effectively facilitated by the use of middleware providers. However, the reporting of this field is likely to create challenges in asset classes where the use of middleware is less common.
Field 92 – Transaction reference number	This seems to be the firm's internal ID. We wonder why ESMA would not want to require the reporting of the UTI instead. We believe this should be the preferred approach to more closely align with reporting under EMIR.

We hope that our above comments are helpful to ESMA. We would be more than happy to elaborate or further discuss any of the points addressed above in more detail. In the event you may have any questions, please do not hesitate to contact us.

Yours sincerely,



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