



RESPONSE TO

PUBLIC CONSULTATION ON

DERIVATIVES AND MARKET INFRASTRUCTURES

Introduction

The European Association of Central Counterparty Clearing Houses (EACH) welcomes the opportunity to provide comments on the July 2010 Public Consultation on Derivatives and Market Infrastructures.

EACH is grateful to the Commission for having had the opportunity to provide input during the policy formation process and yet is disappointed that at this late stage the full text is still not yet available for scrutiny. In future, we would urge the Commission to issue proposed legislative texts to stakeholders in full so that the impact of specific provisions can be properly analysed.

Key Messages

EACH is fully supportive of the main thrust of the Commission's proposals which recognised the important role played by Europe's CCPs both during and following the global financial crisis and which are intended to further strengthen Europe's CCPs. We are also fully aware of the need to reconcile differing interests and views of stakeholders in Europe and the need to ensure the greatest possible degree of harmonisation in legislation that is being developed in parallel between G20 members, and of the Commission's considerable efforts in striving to ensure global convergence. In doing so, however, we have the following general comments to make:

- Although the Commission is not seeking comment on supervisory structures that will apply to CCPs, EACH would like to clarify that it supports the creation of ESMA and the other new European Supervisory Authorities ("ESAs"). Each ESA should raise standards and ensure greater consistency across the single market by implementing harmonised rules and assessing national regulators' rule implementation, resourcing and independence.
- The G20, European and national agendas are all fully aligned in wishing to bring the benefits of CCP clearing to a much larger proportion of the OTC derivatives markets. These objectives are fully supported by EACH, however we have specific comments on several points:-
 - regarding the **obligation on firms to clear certain derivatives**, and especially on the "top-down" proposal whereby ESMA may identify instruments that should be subject to the clearing obligation but which no CCP has yet received authorisation: we understand that this approach is intended to contribute to the identification of products/classes where further standardisation leading to eligibility for clearing and for the clearing obligation could be sensibly pursued. However we would welcome clarification that a CCP cannot be forced to clear such products identified by ESMA, and that CCPs would be fully included in the consultation process;
 - We foresee increasing **competitive pressure on CCPs to launch clearing services** for instruments in order to enable firms to fulfil the obligation to clear OTC derivatives where clearing is mandatory, and potentially following the granting of **interoperability rights** (even though at present limited to cash instruments) to CCPs, therefore we welcome the setting of strict requirements

- for CCPs to avoid a possible “race to the bottom” in the face of such competitive pressure;
- As for **the requirement on CCPs to make their services available to all trading venues** offering trading in derivatives subject to the clearing obligation, we recommend that (in line with CPSS-IOSCO guidance) a CCP should be able to decide on the basis of its risk management requirements whether to connect to trading platforms for OTC derivatives;
and
 - The lack of **global harmonisation of binding standards** on CCPs’ risk management standards leads us to encourage further global co-ordination as legislation is being developed in different jurisdictions.
- We fully understand and support the Commission’s goal of ensuring that CCPs are as strong as possible and capable of surviving the next, not just the last, financial crisis. We understand public authorities’ concerns that the new obligation to clear certain OTC derivatives can only be justified if CCPs are unquestionably safer than any other counterparty. We recognise that the zero EAD treatment potentially available to CCPs in certain circumstances must be justified. Nevertheless we have concerns – elaborated in the body of the response – over the practical effects of the approach being taken, and the potential impact on all market participants.
 - In general CCPs do not have legally established relationships with end-clients under their national law, though may (for example for derivatives) be required by national law to calculate margins at end-client level. A requirement by the Commission for such legal relationships to be established could conflict with national law. While recognising the need to respect the interests of clients, particularly those that will be subject to the clearing obligation, EACH members do not wish to find themselves under any “duty of care” towards clients of their clearing members, or to take responsibility for the management of the default of a client, in the case where this is not already their legal or regulatory duty.
 - On a related point, markets cleared by CCPs are in many cases characterised by chains of intermediaries. While we agree that access to CCPs by market participants on a non-discriminatory basis should be provided when access criteria are met, we would not want the impact of these proposals to limit existing intermediated structures or to force participants into becoming clearing members or clients of clearing members against their will.
 - It is important that the regulation of CCPs and the practical enforcement of such regulation will continue to allow CCPs to develop new and innovative solutions to reduce risks and costs for customers. The structure of the future regulation and supervision needs to take into consideration the requirement for a level playing field for CCPs operating within the EU, whilst ensuring their global competitiveness. The regulatory framework should rest on a harmonised rule book homogeneously enforced across the EU.

- A harmonised approach to regulation of CCPs is required. Where this is not possible, and where a CCP is supervised as a bank, the corresponding banking regulation should apply instead of the CCP-specific regulation to avoid double-regulation. This would apply to regulations in respect of liquidity, capital adequacy, outsourcing, governance (i.e. conflicts of interest, risk committee, and large exposure rules for investments) and book-keeping requirements. Specific regulation should only be implemented in cases where risks specific to a CCP's operations have to be addressed, while ensuring a level playing field between CCPs that are banks and those that are not. The legislation must ensure that a CCP must not be subject to differing regulatory requirements depending on whether it is a bank or not; CCPs should be supervised as CCPs (who might be banks) and not as banks (who might be CCPs), which would tend to perpetuate national specificities. CCPs that are banks should not be able to undertake activities that non-bank CCPs cannot, and vice versa, nor should either category be prevented from undertaking activities that the other is permitted. Furthermore, in principle any CCP should, subject to its supervisor's approval, have the potential to clear any asset class.
- Many of the proposed provisions, for example capital requirements or the introduction of a default fund, may have significant impact on CCPs' business models and practices and it will be necessary to draft grandfathering provisions so as to enable adaptation to the new rules.

Our answers to the questions posed are noted below together with, where relevant, comments on the specific proposals. EACH's members look forward to continuing their dialogue with the Commission and other authorities over the coming months as the proposals make their way through the legislative process and in the development of more detailed technical standards by ESMA. At all times EACH's primary focus will be on sound risk management.

I Clearing and risk mitigation of OTC derivatives

Questions:

What are stakeholders' views on the clearing obligation, the process to determine the eligibility of OTC derivative contracts for mandatory clearing, and its application?

The specific criteria on which decisions will be based by ESMA are still unclear, as is how these, particularly the interpretation and enforcement of the clearing obligation, will be developed and remain consistent with global standards agreed in principle by the G20. Unintended consequences of the legislation should be carefully evaluated (for example, the definition of the geographical scope of the mandate in relation to similar measures being taken in third countries). The Commission should ensure that the trading of OTC derivative contracts will not be shifted outside the European Union.

EACH therefore believes that the process for mandating clearing as drafted by the Commission would benefit from more definition around the respective roles of the national regulator on the one hand and ESMA on the other. EACH suggests that it should be made absolutely clear that it would be the responsibility of the relevant national regulator to conduct an assessment based on common EU standards and rules for operating a CCP and to provide regulatory authorisation for a CCP to clear a new product. Once such authorisation is granted, clearing would begin. It would then be for ESMA to conduct an analysis of the systemic significance of the product concerned in order to determine whether it should be mandatory for market participants to clear all OTC products with economic terms which are equivalent to those of the authorised product.

Specific uncertainties remain over such issues as:

- How the obligation will apply when only one of the contracting parties is subject to the obligation, and where an EU financial entity enters into a transaction with a third country entity in a derivative subject to the clearing obligation, how the obligation will be enforced on the third country entity. It would be helpful to prepare a matrix showing all the possible combinations of different types of transacting parties and what the obligations are on each party, including where non-EU entities enter into a contract on an underlying EU entity. The outcome is fundamental to the Commission's implementation of the clearing obligation as a CCP must always clear both sides of a trade in order to end up with a balanced book;
- What "additional conditions" (mentioned at 2 b)) ESMA might be empowered to require before subjecting a certain class of derivatives to the obligation. This must be reconciled with the G20 commitment that all "standardised" OTC derivatives should be CCP cleared, without the test of being systemically relevant;
- How ESMA will "discover" a new product; it should always conduct a public consultation – according to a strict timetable – before identifying contracts that should be included in its public register. We support initiatives that might be taken by ESMA together with market participants in identifying products where further standardisation is possible;
- How granular the identification of specific instruments that are subject to the mandate will be. The process must be flexible enough to allow CCPs to modify their products

as market conditions change and leave no room for uncertainty as to whether changes to product specifications affect the obligation to clear but still be sufficiently detailed to reflect the different characteristics of different markets;

- How the approval process for new products will be harmonised to ensure a level playing field and made consistent with similar provisions in third countries. For example, at the moment, in some member states there is no obligation to apply for new products to the competent authority. This requirement must not be allowed to slow down innovation and distort competition;
- Whether there will be a mechanism for instruments to be removed from the register;
- What sanctions will apply to market participants in cases where ESMA has determined that the clearing obligation should apply to an instrument but no CCP provides clearing services for that instrument; and
- Where it will be defined that a CCP cannot be forced to clear a product.

Do stakeholders agree that access from trading venues to CCPs clearing eligible contracts should be guaranteed?

The “legal principle of access” presumably refers to rights of access, subject to objective criteria, as a direct participant. Entities who do not meet those criteria may be able to obtain indirect access but this will be subject to the commercial decisions of direct participants acting as intermediaries.

Obligations on CCPs to accept trades in OTC derivatives that are subject to the clearing obligation from multiple trading platforms, may lead to greater choice and competition between trading venues (although tending to increase operational and legal complexities) and this, in turn, may lead to demands for choice of CCP which could only be fulfilled through interoperability. CCPs clearing OTC derivatives should not be forced into interoperability because of the complexity of risk management issues, which outcome would also conflict with the Commission’s proposal in III 2 that “the right to enter into an interoperability arrangement should at present be limited to cash instruments only”; however the Regulation should not prevent interoperability in other asset classes if voluntarily established and approved by supervisors.

Rules of access by trading platforms should be consistent with the principles of CPSS-IOSCO and ESCB-CESR Recommendations addressing efficiency and operational risk. In particular, CCPs should be allowed to require trading platforms to abide by rules and provisions designed to protect the CCP from the effects of unacceptable risks or unusual trading activity.

Do stakeholders share the general approach set out above on the application of the clearing obligation to non-financial counterparties that meet certain thresholds?

While we do not object to the principle of imposing thresholds, it is not clear how the thresholds will be defined. We assume ESMA will determine them and that national supervisors will report that thresholds are met. Rules must specify, for example, whether all “clearable” derivatives subject to the mandate have to be cleared, including “old” trades, or just those sufficient to remain below the threshold, and to allow removal of positions in cases where a decline in trading activity brings the firm’s positions below a threshold. In setting and monitoring thresholds it will be important to bear in mind that an exposure threshold

assessed by aggregating bilateral exposures will change once part of the position is transferred to one or more CCPs. On one hand multilateral exposures in derivatives may be compressed to single bilateral exposures with the CCP; on the other hand, exposures may increase due to the separation of cleared from uncleared positions. The application of these provisions should not create incentives for unsupervised counterparties to trade between themselves or assume a pivotal role in the relevant markets.

In some cases a clearing obligation may lead to liquidity risk for non-financial counterparties that hedge production or consumption of e.g. energy risk through OTC derivatives. The stability of those non-financial counterparties could be negatively affected by a strict clearing obligation for hedge trades.

Question:

Do stakeholders share the principle and requirements set out above on the risk mitigation techniques for bilateral OTC derivative contracts?

In principle we agree with this approach, however we would point out that bilateral collateralisation typically does not require the exchange of collateral in order to protect against potential future exposures, which a CCP's initial margin is intended to cover. We assume the provisions under "5. Risk mitigation techniques for non-cleared contracts" apply to all derivatives, not only those derivatives which are subject to the clearing obligation but for some reason are not yet cleared (which is the implication of the words "not all OTC derivatives will be eligible for *mandatory* clearing" – we assume this should read simply "not all OTC derivatives will be eligible for clearing"). Nor is it clear how these provisions will be enforced, especially for non-financial firms that are not subject to supervision.

In general it is hard to comment on the proposals without knowledge of what will be the regulatory impact on firms who do not clear contracts where CCP clearing is a) available or b) "mandatory".

II Requirements for Central Counterparties

1. Organisational Requirements

- At the fourth bullet, which refers to the need to separate reporting lines between risk management and other operations, we understand that this is intended as a principle rather than a prescriptive rule but our assumption is that the primary aim is to separate risk management from the business development/marketing operations of the CCP, not its clearing operations. It would be helpful to make this clear.
- At the eighth bullet we assume that the term "independent members" applies to members of the CCP's board of directors and that they should also be independent of the management, i.e. be independent non-executive board members. In the case of a two-tier board structure we assume this means the supervisory board, however the reference to "persons who effectively direct the business" implies a governing board.
- In respect of the ninth bullet, where the operating company is publicly listed – i.e. there is a free float of shares – provision of information on the identity of shareholders will only be achievable through review of the company's share register and is outside the control of the CCP.

2. Risk Committee

- Under a) we understand that the statement that the risk committee should be independent from influence by the management is intended to mean that where for example a vote is taken, the management should not be able to vote; not that they would not provide all materials and organise and participate in meetings.
- Under a) and b) we understand that the term "independent administrator" is intended to mean an independent non-executive (supervisory) board member; it would be helpful to provide more organisational clarity.
- Under (the first) c) we understand that the term "parameters for accepting clearing members" means "membership criteria" and suggest the drafting is amended in this way.
- Under (the second) c) there is some confusion between confidentiality and conflicts of interest. We propose as an alternative "The members of the risk committee should be bound by confidentiality, and should declare conflicts of interest to the chairman. The chairman of the risk committee may determine that a conflicted member may not attend discussion of that matter or receive any material relating to it or, if attending, may not participate in any vote of members".

3. Conflicts of interest

- Under b), many CCPs would have difficulty in determining the interests of unknown clients and therefore in managing conflicts of interest affecting them. We understand that the words "with reasonable confidence" are intended to allow some flexibility and we believe the general obligations on a CCP to publicly disclose its governance processes and powers should be sufficient for clearing members and clients to assess the risks of their interests being compromised.
- Under e), where a CCP would be prevented from sharing sensitive information with other group companies this should be qualified as meaning "for business development/marketing use", and the use of information for risk management purposes, and in due IT outsourcing, should be explicitly allowed.

4. Outsourcing

- The performance of outsourced activities should be monitored with the same rigour as similar non-outsourced activities, depending on the risk and importance of the outsourced activity.

5. Participation requirements

- Under b) the requirement to conduct a comprehensive review of all members every year may be impractical although some form of review is acceptable. We suggest "A CCP should conduct an annual programme assessing its members' compliance with these provisions. The programme should focus on the most significant risks to the operation of the CCP".
- For the avoidance of doubt it should be clarified that "Clearing members that clear transactions on behalf of their clients" is a general reference to all members clearing for third parties, whether described as GCMs, DCMs, ICMs or otherwise. The second sentence could read "A CCP should have the power to require from its clearing members information about their risk management of clients", not the overall commercial relationship. We would be concerned if this were to be interpreted as a "duty", leading to the CCP's assumption of liability.
- Under f) the setting of criteria will by definition restrict participation. In addition it is hard to apply proportionality in all cases We suggest that the last sentence could read "These additional obligations should be designed to manage any additional risks brought by the clearing member and be based on objective criteria".

6. Transparency

- Under a) our assumption is that the reference to "services" means e.g. a CCP's clearing services for cash equities or for commodity derivatives rather than to attempt to separate a CCP's transaction processing from its risk management. This should be clarified.

- Under b) the obligation should be expressed as follows, “A CCP should publicly disclose a comprehensive description of its risk management practices and the terms on which its services are provided” or combined with c) (NB one EACH member has the view that this should be limited to disclosure to clearing members). ESMA could provide a template of the form of the required disclosure. We note also that in general, Clearing Members and Clients (particularly as NCMs) are regulated entities which are by definition able to protect themselves from risks which are pertinent to their core activities.
- Under d) there are likely to be confidentiality constraints that prevent a CCP from publicising, for example, individual market participants’ price quotes used to determine end-of-day prices. It is acceptable for CCPs to publicise the process that it follows to determine prices and the output – i.e. the daily settlement price – rather than the “input” prices/quotes themselves.

Questions:

Do stakeholders share the general approach set out above on organisational requirements for CCPs? In particular comments are sought on the role and function of the Risk Committee; whether the governance arrangements and the specific requirements are sufficient to prevent and manage potential conflicts of interest; stringent outsourcing requirements; and participation and transparency requirements?

The overall approach of requiring an advisory risk committee is generally acceptable, however it should be made clearer that it has an advisory role only and conflicts of interest should not be introduced through such a committee. Furthermore, it should be clarified that the advice of the risk committee is not needed for decisions on the issues listed in the first c). However, it is unclear which shortcoming would be addressed by this requirement and if this is necessary in all cases. The description of the risk committee implies an external rather than an internal committee, but the paper states that “each CCP should have in place and [sic] internal risk committee”. CCPs may wish to establish more than one risk committee, for example for different products where different expertise is required.

Do stakeholders consider that possible conflicts of interests would justify specific rules on the ownership of CCPs? If so, which kind of rules?

While we understand the necessity for rules dealing with conflicts of interest, in our opinion governance and ownership models should not be prescribed too restrictively in regulation. This reduces the scope for differentiation and disincentivises innovative structures and operations.

7. Segregation and portability

Questions:

Do stakeholders share the approach set out above on segregation and portability?

- We assume that the term “segregate” is not intended to be prescriptive: it is one thing to be able to identify and record assets and positions separately in the internal accounts of a CCP, but the term may also be used to mean use of separate external

custodial/bank accounts. We assume the purpose of this section is to enable clients, on request, to have sufficient protection of their positions and assets from the insolvency of a clearing member so that they can be transferred either before or after the insolvency of their clearing member. Furthermore, we assume that “client” (as defined in the Glossary) refers only to the entity that has the direct relationship with the clearing member, e.g. a non-clearing member of an exchange, that may have its own clients.

- Under b) CCPs’ ability to transfer positions and assets must be subject to any injunction or other legal ruling that would prevent them from taking such action, for example in the case of a dispute between a member and its client. The references to “costs and risks” are presumably intended to require disclosure of fees that the CCP would levy on its clearing member and information concerning its legal arrangements, for example an obligation to explain to clients their risk in case of a clearing member’s default taking into account the different levels of segregation. Given that both of these points would be covered under the Transparency requirement, this requirement seems duplicative.
- The provisions of paragraph c) could only work if the CCP itself maintained individual accounts for positions and assets for each client that requested it. The effect, therefore, would be to impose an obligation on the CCP to provide individual client accounts. Given that, the second sentence should read “a CCP should allow its clearing members to allow their clients to have a more detailed segregation...”. This provision may be subject to local legislation in cases where end-client segregation is required.
- Particularly in the case of national insolvency laws, it should be impossible to impose restrictions on the portability of client positions in the event of a clearing member default. We understand this will be the intended effect of the proposed Regulation.
- Greater clarity is needed on the specification of “triggers”, as these apparently conceal a direct legal “duty of care” on the CCP towards the client. Stringent definition of triggers is necessary and this should be based on the circumstances under which a CCP can call a clearing member into default.

8. Prudential requirements

A. Initial Capital

- While we understand that the reference to “separate” capital is intended to mean separate from capital or other resources in place to withstand the failure of a clearing member, greater definition of “available” and “separate” will be needed.

B. Exposure management

- We understand that the words “near to real time basis” should be interpreted to mean that as soon as reliable prices are available, these should be used to measure the CCP’s exposures. Therefore, the rule should be proportionate to the liquidity of the

market and the frequency of price updates. If price updates occur less frequently, the need to update exposures should also be less frequent.

- The requirement that “A CCP should have access in a timely manner and on a non discriminatory basis to the relevant pricing sources to effectively measure its exposures” should result in an obligation on the sources to provide that information.

C. Margin requirements

- We understand that the term “validated” is not intended to mean that supervisors should check the value of each and every parameter (this should be the responsibility of the CCP’s risk management function). “Approves” would be a better word.
- The statement in d) that “A CCP ... should ensure the protection of the margins deposited against the default of ... the institution where they are deposited” appears intended to remove all counterparty credit risk from margin collateral in whatever form, both from clearing members or (where the client has chosen segregation) from clients. Taken to extreme, this could imply that the CCP could not hold cash margin on its balance sheet and cash could only be invested in zero-rated investments such as central bank deposits – implied at H e) – or government debt. We have concerns over the potential effect of this provision on the following bases:-
 - The inability to use cash provided by members as a source of liquidity would force CCPs across Europe to raise very large sums in additional capital in order to source the necessary liquidity, especially where the clearing of securities leads to high values of DvP settlements;
 - Even if such facilities were available in all currencies in which the CCP operates, the low level of remuneration (if any) would act as a disincentive on clearing members to provide cash collateral and therefore significantly impact the CCP’s liquidity. Even if it were possible for CCPs to take margin cash on to their balance sheets (as seems to be implied at H e)), at a minimum, direct access to central banks’ deposit facilities on a remunerated basis and on harmonised terms should be granted to CCPs. It will be particularly important to ensure global consistency on this point;
 - CCPs should also have access to central bank liquidity; however securities provided as collateral may have to be substituted if used to raise liquidity from central banks;
 - Not all central banks are likely to have the operational capability to manage the whole of a CCP’s daily cash movements;
 - in many cases participants currently provide additional “surplus” cash to CCPs over and above margin requirements, which is available to the CCP as collateral in case of the participant’s default. This “windfall” additional protection will be lost; and
 - It could even create the perverse incentive for both clearing members and the CCPs to deposit and accept foreign currencies in order to achieve interest benefits on cash deposited. Alternatively the additional costs will be borne by the entire financial community.

Without prejudice to the zero EAD treatment, CCPs should be allowed to invest their assets with a range of market counterparties subject to stringent credit, market and liquidity risk criteria as permitted under ESCB-CESR and CPSS-IOSCO Recommendations.

D. Default Fund

- Depending on how a CCP chooses to provide coverage of default scenarios, it can be that the definition and calibration of a default fund will not, in practice, be dependent on the size of other layers of post-default backing and therefore in these cases the words “should take into account the requirements under other risk controls” are redundant. We believe the correct interpretation is that if the default fund on its own was calibrated to cover the exposure of the three largest participants then this would obviate the need for any further layers, while if the CCP’s default fund covers the potential default of (1) the clearing member to which it has the largest exposure or (2) the simultaneous default of the clearing members to which it has the second and third largest exposures, then the other layers would indeed be required.
- Certain of our members that do not have a default fund financed by clearing members at present would want some flexibility in this respect i.e. they are ready to introduce a default fund provided there is adequate flexibility in the interaction between the default fund and “other risk controls”.

E. Other risk controls

- Depending on the size of the market and the granularity of the market shares, the requirement to withstand the default of the three largest clearing members may be excessively conservative. It is possible that for some markets in some circumstances the distance between the two requirements may become excessively large, if a few major institutions holding the largest exposures. Most, though not all, EACH members believe that this requirement should be proportionate to the systemic risk posed by the respective market.
- We assume this requirement is intended to cover “emergency” liquidity needs and not facilities made available intra-day in order to ensure the smooth functioning of a CCP’s cash management through settlement banks and CSDs, where higher proportions are necessary. Even so, the requirement to have no more than 10% of the credit lines needed from a single clearing member is likely to be impractical in many cases. We propose that the formulation is changed such that even if the largest three liquidity providers (i.e. a similar requirement to that for the default fund) default, the needed liquidity should still be available – and the ability to obtain central bank liquidity would be helpful in order to meet this requirement. There should be adequate diversification but ideally hard numbers should not be specified – if this is necessary the figure should be no lower than 25%.
- At d) it is not clear what exactly is meant. We would support a proposal that requires a cap on clearing members’ potential exposures to the default of other clearing

members, the precise level of which could vary between members and be dependent on the member's activity. For example, it should allow for extra (pro rata) contributions to the default fund to be paid by surviving clearing members to cover a default, subject to a cap known in advance. We understand that it would not apply to any extra contributions (after a default) to the Default Fund for future defaults but it needs further clarification.

F. Default Waterfall

- It should be allowed, in particular where a direct (client) holding model applies (by law and regulation) and segregated end clients' margining is required, that this margin is used prior to the clearing member's own margin in the case of a client default.

H. Investment policy

- The requirement to deposit securities only with "operators of securities settlement system[s] that ensure non-discriminatory access to CCPs and the full protection of those instruments" implies that securities must be deposited in direct accounts of issuing CSDs. Such obligations on CCPs must be accompanied by obligations on CSDs and third country settlement systems to provide such access. Use of custodian banks should not be prohibited.
- CCPs should not be obliged to deposit liquidity with central banks, but CCPs should be granted access to Central Bank money for interest bearing capacities in case no collateralised investments with commercial banks are available.
- In regard of deposits (if available) with central banks, we would want to highlight that this is a transfer of credit risk from a CCP to a central bank, and the risk assumed by the central bank could be bigger for the central bank than for the CCP. This is based on the assumption that the central banks would lend that cash against eligible collateral to a broad range of counterparties. The investment policies of CCPs are often more restrictive in regard of acceptable collateral in their investments and typically work with a smaller but highly rated set of counterparties.

Questions:

Do stakeholders share the general approach set out above on prudential requirements for CCPs? In particular: what should be the adequate level of initial capital?

- We recognise that a minimum number for initial capital will be set and it will necessarily be arbitrary, but assessment of the impact of this provision also depends on the interpretation of "available and separate". In this area, it is imperative to ensure there is no conflict with capital requirements for CCPs that are banks and that grandfathering provisions are included.

- Requirements must be objective, harmonised (set by ESMA in conjunction with other pan-European authorities) and ensure a level playing field. They should also not prevent the emergence of new CCPs and the potential for further competition.

Are exposures of CCPs appropriately measured and managed?

- It should be explicitly stated that the appropriateness of margin requirements should take into account the CCP's default management arrangements to ensure that assumptions over, for example, holding periods for margin parameters are based on market conditions and that the CCP's emergency powers will enable it to close out positions within the assumed holding periods.

Should the default fund be mandatory and what risks should it cover? Should the rank of the different lines of defence of a CCP be specified?

- We believe that, while binding standards should be set on the overall level of security that CCPs should provide, CCPs should have flexibility in designing the structures of their lines of defence and that no specific order should be mandated.

Will the collateral requirements and investment policy ensure that CCPs will not be exposed to external risks? Will the provisions ensure the correct management of a default situation?

- We see it the other way round i.e. that the Regulation will apply in all relevant jurisdictions and ensure that a CCP's default procedures are enforceable in all relevant jurisdictions. There will be the need to redraft provisions to avoid legal uncertainty, ambiguity or inconsistency with existing law.

Are the provisions above sufficient to ensure access to central bank liquidity without compromising central banks' independence?

- This is a matter for the central banks. We would support any provision that ensures CCPs' access to central banks' liquidity and deposit (interest-bearing) facilities on a non-discriminatory basis.

Questions:

Do stakeholders share the general approach set out above on the recognition of third country CCPs? Are the suggested criteria sufficient? Do stakeholders consider that additional criteria should be considered?

Do stakeholders agree with the extension of the clearing obligation to contracts cleared by third country CCPs to ensure global consistency?

We agree with the overall approach. However, recognition of third country CCPs to allow provision of any clearing services, as well as in relation to OTC derivatives subject to the mandate, should only be established where equivalent reciprocal arrangements apply.

III Interoperability

Question:

Stakeholders' views are welcomed on the general approach set out above on interoperability and the principles and requirements on managing risks and approval.

We would point out that to have a right of interoperability without a right to obtain trade feed access would render it ineffective. We are unclear as to the meanings in 2. a) to “clearing member concentrations and pooled financial resources”.

We agree that it would be premature for the forthcoming legislation to include provisions in relation to interoperability for derivatives.

IV Reporting obligation and requirements for Trade Repositories

Most members of EACH believes that, where OTC derivatives are being cleared by a CCP, there should be no additional requirement either on counterparties to report contracts to a repository, or for the CCP to report positions to a repository (although a CCP may do so if it chooses). Data collected from multiple repositories and CCPs could be consolidated by supervisors in a second step, based on standards for reporting formats to facilitate such reporting developed jointly between supervisors, CCPs and repositories. We understand this to have been the Commission's position until now and it is not clear if or why this has changed. CCPs that act in this sense as a repository should of course be subject to the same regulatory requirements as apply to repositories. However one EACH member feels strongly that there should be a single global repository per asset class and alternatives would promote fragmentation of data that would severely curtail the supervisory utility of such databases.

Members of EACH

- CC&G (Cassa di Compensazione e Garanzia S.p.A.)
- CCP Austria
- CSD and CH of SERBIA
- ECC (European Commodity Clearing AG)
- EMCF (European Multilateral Clearing Facility)
- Eurex Clearing AG
- EuroCCP (European Central Counterparty Ltd)
- HELEX AS
- ICE Clear Europe
- KDPW SA
- KELER CCP Ltd.
- LCH.Clearnet Ltd
- LCH.Clearnet SA
- LIFFE Administration and Management
- MEFF
- NASDAQOMX
- National Clearing Centre (NCC)
- NOS ASA
- OMIClear
- Oslo Clearing ASA
- SIX x-clear AG