FK | Finanssialan Keskusliitto
FC | Finansbranschens Centralförbund
FFI | Federation of Finnish Financial Services

13.8.2015

Elina Kirvelä

The Federation of Finnish Financial Services (FFI) represents the interests of banks, insurers, finance houses, securities dealers, fund management companies and financial employers. Its members also include providers of statutory insurance lines, which account for much of Finnish social security.

European Commission
DG FISMA
Financial Markets Infrastructure

PUBLIC CONSULTATION ON REGULATION (EU) NO 648/2012 ON OTC DERIVATIVES, CENTRAL COUNTERPARTIES AND TRADE REPOSITORIES

EUROPEAN COMPANIES WOULD BENEFIT FROM MORE TARGETED DERIVATIVES RULES

The Federation of Finnish Financial Services (FFI) welcomes the opportunity to respond to the consultation paper on the review of Regulation (EU) No 648/2012 (the EMIR Review).

Key points

- **It is time for a review.** The FFI welcomes the review of the EMIR regulation which entered into force in August 2012. Even though some of the obligations have not yet been finalized it is worthwhile to consider how the European derivatives framework could be improved. We believe that it is crucial for the Commission to be aware of the possible challenges with respect to the EMIR framework as a whole to be able to evaluate the combined consequences to European entities. Therefore some feedback is also related to the aspects that have not yet been implemented.
- **Scope of the regulation should be amended.** The current scope that covers all entities using derivatives regardless of the size, scale or complexity of the entity or the position is too broad. Many affected contracts cannot be regarded as systemically important. Yet the compliance costs for many companies have been disproportionate to their risk position.
- **Proportionality principle has to be introduced.** The EMIR review should lead to a fine-tuning of the regulation in which principles of better regulation – especially principle of proportionality – are followed. This would mean additional thresholds or carving out some entities from the scope of the rules.
- **Reporting challenges can be avoided.** FFI supports the reporting obligation in principle. However it should not apply to all entities. Many problems in reporting (matching, creation of right data fields) could be avoided if a contract is to be reported only once by one of the counterparties (single-sided reporting obligation). The amount of fields should be readjusted to absolutely necessary data only. ESMA's recent review of reporting standards risks making the reporting obligation even more complex.
- **Clearing obligations should not enter into force before existing problems are solved.** FFI supports strongly the proposal for a risk management framework for central counterparties. It should ideally enter into force before any clearing obligations. Further, client clearing options have proven to be very challenging to provide. The access to clearing for all obliged counterparties needs to be resolved as soon as possible. This should be done in a manner that does not create additional risks or disincentives to clearing members.
- **Client perspective should be reinforced.** Compliance costs have been very high in proportion to the risk profile especially for small and medium-sized banks, financial buy-side entities and non-financial counterparties. It seems that most rules have been

FK| Finanssialan Keskusliitto
FC| Finansbranschens Centralförbund
FFI| Federation of Finnish Financial Services

Elina Kirvelä

drafted with large international banks in mind. However, derivatives are an important risk-reducing instrument for most European companies. The review should be made with a one size does not fit all –view in mind.

- **Europe should strive for globally competitive rules.** Derivatives markets are extremely global and positions move quickly to more flexible markets. Even though the starting point for EMIR regulation lies in the Pittsburg G20 commitment, our European rules have proven to be stricter than for example in the US. This applies especially to the scope of the regulation and reporting obligation especially, but also to the third-country rules.

1 PART I Questions on elements of EMIR to be reviewed according to Article 85(1)(a)-(e)

Question 1.1 CCP Liquidity

i. Is there a need for measures to facilitate the access of CCPs to central bank liquidity facilities?

Yes.

ii. If your answer to i. is yes, what are the measures that should be considered and why?

Central counterparty's access to central bank liquidity should be solved in a manner that provides a level playing field for the CCPs (and for other credit institutions) in Europe. Currently there seems to be different requirements on whether a CCP can have access to central bank liquidity and whether it has to apply for a banking license to gain access.

Access to central bank liquidity is in our opinion a key element of recovery procedures and could therefore be regulated in the upcoming recovery and resolution legislation for central counterparties. In principle, this access would strengthen the CCPs ability to manage liquidity risks and be useful especially in temporary stress situations.

Question 1.2 Non-Financial Firms

(a)

i. Are the clearing thresholds for non-hedging transactions (Article 11, Regulation (EU) No 149/2013) and the corresponding definition of contracts objectively measurable as reducing risks directly relating the commercial activity or treasury financing activity (Article 10, Regulation (EU) No 149/2013) adequately defined to capture those non- financial counterparties that should be deemed as systemically important?

Yes.

ii. If your answer to question i. is no, what alternative methodology or thresholds could be considered to ensure that only systemically important non-financial counterparties are captured by higher requirements under EMIR?

FFI supports the current clearing thresholds in principle. However there is still little experience of the practical implementation as the clearing obligations have not yet entered

into force. Therefore this issue has to be looked at in a later review, too.

Even if the thresholds, as such, seem adequate at least for the time being, there is room for practical improvements. It would be useful if counterparties could have access to a register of non-financial counterparties that have notified that they have exceeded the threshold. Currently the access to the information from NFC regarding their threshold status has proved to be a difficult exercise involving massive collecting efforts. Therefore a register which collects the notifications of NFC+ should be created from the already existing data and disclosed to all reporting counterparties using derivatives. This could be done for example by means of a global database. Efforts made by for example ISDA could be used when creating such register. This would allow parties to identify NFC+ and to conclude that all other NFCs are NFC- in a simple manner and would improve transparency, legal certainty and consistency of data for all parties.

(b) Please explain your views on any elements of EMIR that you believe have created unintended consequences for non-financial counterparties? How could these be addressed?

Non-financial counterparties have been the ones who have probably suffered the most from the broad scope of the regulation whereas small financial firms have suffered from the lack of proportionality principle. Inclusion of all derivatives users in the scope has meant increased costs and heavy documentation for all non-financial firms. In many cases, the costs are by no means reasonable to the risk these transactions and entities create. The best way to address these problems is to limit the scope of the regulation to entities that are significant from a systemic risk perspective. This means that at least some thresholds into the scope have to be introduced. Further, the unforeseen combined effects for non-financial firms could be further minimized by the introduction of a single-sided reporting obligation.

The costs derive in principle from three different sources: 1. compliance costs, 2. reporting costs and 3. collateral costs. Compliance with EMIR regulation and the complex framework - with different levels of regulation, additional guidelines and Questions & Answers-documents - requires in-depth legal knowledge both of the content and of the multi-level legal structure, not to forget the business implications. The structure is very specific to financial markets only and this in itself creates a challenge for non-financial companies.

Reporting costs may seem low at first but are often disproportionate to the amount of contracts which even are mostly used for hedging purposes. The cost to obtain and maintain an LEI-code has in some cases proven to be too expensive in proportion to the contract value. In the most disproportionate cases the LEI code has to be maintained and paid for 30 years in order to enter into one hedging derivatives contract. These issues in turn mean that for example currency risks have remained in the small undertaking’s portfolio. Compliance with reporting obligation means also that even in cases where the reporting has been outsourced to another entity, a simple IT-system for reporting and a detailed documentation system must be in place.

Rise in collateral costs is one of the most severe consequences of EMIR regulation. Even though it correctly seems that most non-financial counterparties are not obliged to post collateral for their non-centrally cleared transactions, indirect consequences can already be seen. Stricter rules on the eligibility and amount of collateral targeted for financial counterparties have led to a collateral squeeze which in turn means that to overcome their

own collateral requirements, financial counterparties need to receive more and diverse collateral from their non-financial counterparties than before.
The most detrimental consequence of the EMIR regulation seems to fall on energy companies and therefore indirectly to all companies and citizens. The problems with the use of bank guarantees are explained in our response to Q 2.10.

FFI is of the opinion that at least a threshold for non-financial firms' inclusion into the scope of EMIR has to be introduced. Such a threshold should be in line with the clearing obligation threshold. Only then it would create a simple, targeted framework also for the remaining counterparties. The threshold should therefore be based on the trading volume and on the type of transaction which would mean that transactions made in hedging purposes would not be counted to the threshold.

In addition, similar unintended consequences apply also to small financial counterparties. The costs for regulatory compliance are even higher as for example the clearing obligation will apply to any financial counterparty regardless of their trading activity and trading frequency. These costs have already brought some financial counterparties to a situation where they are forced to discontinue their derivatives offering and/or their hedging activity. This should not be the case as it not only concentrates the market to even larger players but also increases the overall risks in the financial system. Therefore a threshold of application should apply also to financial counterparties when they are using derivatives only for hedging purposes. If principles of better regulation are followed, this could mean one simple threshold for all derivatives users regardless of whether they are financial or non-financial counterparties. From a systemic risk perspective, these entities could be considered as the same based on their trading activity only.

Finally, the definition of undertaking should be reinforced in this review to bring clarity and simplicity into the regulation. The guidance on this issue on the Commission EMIR Q & A is helpful but introduction at regulation level would further clarify the definition and hence the scope of the regulation across members states.

(c) Has EMIR impacted the use of, or access to, OTC derivatives by non- financial firms? Please provide evidence or specific examples of observed changes.

The above mentioned challenges and the costs associated with complying with the EMIR regulation have already impacted the market. Some experiences were already mentioned.

Further, according to our observations a significant move to fixed rate contracts has occurred especially in commodities markets. Compliance costs related to trade reporting are regularly discussed when entering into FX forward contracts where they seem disproportionate and create disincentives for hedging. Smaller companies have also reduced their hedging activity with regard to interest rates which creates a risk of increased interest rate costs in the future as the rates start rising. Most of these moves are due to the fact that unit costs for derivatives contracts have multiplied since the time before EMIR and the possible benefits at hand may not overcome the costs. It can only be hoped for that the risks that are now left unhedged do not materialize in the future.

The changes in the market are also happening due to indirect consequences of the EMIR regulation. Lower liquidity in general accelerates the rise in the prices and this combined with compliance costs both for derivatives users and their counterparties creates a major

Elina Kirvelä

disincentive to use derivatives products. The vicious circle is thus created that ultimately means fewer and more expensive financing for European companies. Non-financial companies become more risky even from a traditional lending perspective as more traditional risks are no longer hedged due to the EMIR requirements and their indirect consequences. The financial counterparties must take this increased counterparty risk into account when considering the availability and costs for finance. This circle should be broken in this review to balance the European companies' access to finance in light of the Capital Markets Union.

Same consequences are also following from the mismatches in the leverage ratio rules. Central clearing is correctly exempted from the leverage ratio rules whereas non-centrally cleared contracts fall into the scope. Similarly, clearing via clearing broker (principal-to-principal) is not exempted from the requirements. This means higher capital requirements for all other than directly centrally cleared transactions in a manner disproportionate to the risk and the possibilities to bring these contracts to central clearing. The consequences are very dramatic to counterparties that are not in scope of the clearing obligations and to counterparties that have no other possibility than to use a clearing broker to be able to fulfill their obligations. Therefore the client clearing exposure and the initial margin requirements should not be included in the leverage ratio rules.

Question 1.3 CCP Colleges

(a) What are your views on the functioning of supervisory colleges for CCPs?

Exchange of information between authorities is of essence. From the FFI perspective, CCP colleges seem to be a rather good tool to facilitate the dialogue between home and host authorities.

If the college structure is however amended in the review, it should fulfill the following criteria:

a) Ensures regular exchange of information,
b) Ensures fast access to information in exceptional circumstances
c) Allows for quick decision making procedures in exceptional circumstances
d) Supports efficient use of authorities resources as regards to meeting frequency and procedures.

(b) What issues have you identified with respect to the college system during the authorisation process for EU CCPs, if any? How could these be addressed?

As a general comment, we believe the processes and the timetable should be very similar for all CCPs. This would ensure a level playing field between the CCPs regardless of the size and composition of their colleges.

FK | Finanssialan Keskusliitto
FC | Finansbranschens Centralförbund
FFI | Federation of Finnish Financial Services

Elina Kirvelä

Question 1.4 Procyclicality

(a)

i. Are the requirements under Article 41 EMIR and Article 28 Regulation (EU) No 153/2013 adequate to limit procyclical effects on CCPs' financial resources?

Yes.

ii. If your answer to i. is no, how could they be improved?

-

(b)

i. Is there a need to define additional capacity for authorities to intervene in this area?

Yes.

ii. If your answer to i. is yes, what measures for intervention should be considered and why?

Due to the increased importance of CCPs, a proposal for solid and clear recovery and resolution rules is needed as soon as possible. It should provide for workable solutions in crisis situations.

Key points for a workable recovery and resolution package are in our opinion:

- Recovery and resolution rules for central counterparties need to be proposed as soon as possible.
    - They are a crucial missing piece of the single rulebook.
    - Central counterparties are very important from systemic risk perspective. The dossier will not be easy so all focus must be on ensuring a workable set of tools for CCPs.

- Owners and operators of CCPs shall cover the losses.
    - Liability is the only way to ensure that the CCP is well managed and any business decisions carefully considered.
    - In case a wider liability needs to be introduced, the following should be taken into consideration:
        a. Possible liability of clearing members needs to be clearly limited. Even capital requirement rules require this.
        b. Clients or indirect clients cannot efficiently handle liability for losses above their direct contracts with general clearing members. Widening the scope of liability to clients or indirect clients should be avoided.

- Any liability for clearing members requires their participation in the decision making and more transparency as regards the CCPs actions.
  - From our experience with the current equities-CCPs we have noticed that the GCMs and client have not had improved possibilities to participate in the CCP's decision making. Information has not been significantly transparent either since EMIR implementation.
  - In addition, EMIR-requirements are interpreted differently by the CCPs and their clientele.

- CCPs clearing derivatives may require earlier intervention by the resolution authorities.
  - The role of those CCPs that clear derivatives will grow massively in the future following the entry into force of the clearing obligations.
  - Long maturity, large amounts of money invested and higher risk profiles of derivatives instruments mean that defaults will have severe consequences.
  - Therefore derivatives-CCPs may need to trigger resolution at an earlier stage than equities-CCPs to restore stability in the markets.

Question 1.5 CCP Margins and Collateral

(a)

i. Have CCPs' policies on collateral and margin developed in a balanced and effective way?

No.

ii. If your answer to i. is no, for what reasons? How could they be improved?

Unfortunately there have been hardly any developments in the field. We have felt for long that the scope of eligible collateral should be as wide as reasonable from a liquidity perspective. This would ease the collateral squeeze and be useful especially for smaller and non-financial counterparties that have fewer possibilities for collateral transformation.

Currently only cash is, in practice, accepted as collateral whereas clients have other liquid assets available and ready to be posted as collateral if they were accepted by the CCP. A broader collateral scope across all CCPs in Europe would decrease the collateral costs as described above and would also improve counterparties possibility to become clearing members or otherwise improve their access to clearing arrangements. In addition, access to central bank liquidity could further remedy the situation as CCPs would be able to transform financial instruments to cash if needed.

(b)

i. Is the spectrum of eligible collateral appropriate to strike the right balance between the liquidity needs of the CCP and its participants?

No.

Elina Kirvelä

ii. If your answer to i. is no, for what reasons? How could it be improved?

The rules on eligible collateral are mostly balanced whereas the problems lie within the practical implementations at CCP-level (see above 1.5 CCP margin requirements a.ii.). By no means should the collateral rules be tightened from the existing.

However, in terms of banking guarantees a dramatic change was made in the drafting of regulatory technical standards in 2013. Bank guarantees play an important, traditional role for client clearing especially in the energy markets where non-financial counterparties regardless of their size have cleared their trades centrally for over a decade. The cumbersome requirements and the interim phase-in for bank guarantees placed in the RTSs will de facto drive these companies away from their risk-reducing central clearing models. A more detailed explanation of the situation can be found below in our response to Q 2.10.

2 PART II General Questions

Question 2.1 (Definitions and scope)

i. Are there any provisions or definitions contained within Article 1 and 2 of EMIR that have created unintended consequences in terms of the scope of contracts or entities that are covered by the requirements?

Yes.

ii If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Many entities have had to cope with the challenges in the implementation of EMIR regulation. The problems related to small financial companies and non-financial companies were already discussed above. In addition, the unintended consequences following the banking guarantee rules fall almost only on energy firms.

We are of the opinion that provisions and definitions should be amended in a way that better suits for the European derivatives markets. In principle, the rules should respond in an efficient and proportionate manner to the ultimate goal of avoiding systemic risks. Further, as already discussed above, the definition of undertaking should be reinforced at level 1 in this review.

The FFI would also like to point out that to some extent even individuals have been falling into the scope of EMIR requirements. This is due to complying with the reporting obligation. Information of individual persons' contracts has to be reported to the trade repositories if the counterparty is in scope of EMIR. In almost all cases, the counterparty is in the scope. This has meant that the individual has had to approve the disclosure of such information.

In general, a uniform definition of a derivative across all member states is crucial to ensure a consistent and regulatory framework. This has not been the case during the past years as inconsistent application of MiFID in different jurisdictions has resulted in different interpretations as to what is a derivative. Therefore it is advisable to introduce such a definition in this review at Level 1. In this process, the objectives of EMIR regulation and the

reality of existing instruments must be borne in mind.

Finally we have noticed that lack of equivalence decisions is causing daily problems in the derivatives markets. The equivalence decisions are a precondition for well-functioning derivatives market and their absence creates legal uncertainty and causes constant concerns when trading with third country entities.

Question 2.2 (Clearing obligations)

(a)

i. With respect to access to clearing for counterparties that intend to clear directly or indirectly as clients; are there any unforeseen difficulties that have arisen with respect to establishing client clearing relationships in accordance with EMIR?

Yes.

ii If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Clearing services have not evolved during the past years as expected. In our opinion there might be several reasons for this. Firstly, the account structure with the portability and segregation requirements as such may not incentive clearing members to start providing indirect clearing services. Indirect clearing is not seen as an interesting business case. Secondly, the postponement of clearing obligations and the constantly evolving EMIR-framework has meant that other issues have had to be prioritized. At the same time we have seen a constant reduction in the number of clearing members/brokers in general.

The FFI has recognized this issue already before EMIR entered into force. From our previous experiences with similar requirements requiring new services s, we have learnt that medium-sized markets at the edge of the European Union have to be more active in order to get infrastructures interested in our companies. Therefore we have organized various market-wide events with clearing brokers, central counterparties and trade repositories during the past years. To some extent, this has been useful in creating more channels for access to clearing to our smaller companies as there now is a direct contact to the CCPs and to some of their clearing brokers.

A solution is needed to limit a situation where the risks concentrate into few clearing brokers and to allow clearing brokers to choose their clients freely after they have conducted a careful risk analysis. In our opinion, the solution could be for example a. to create another category at a CCP level (e.g. “light CCP membership”) where counterparties falling below certain threshold would be able to have access to CCP services with lower requirements and cost, b. to set an overall threshold for clearing where small counterparties using derivatives for hedging purposes would not be obliged to clear their contracts or c. to focus on creating third party solutions which could be even offered by public entities. Creation of a de minimis –threshold would even level the playing field further vis-à-vis the US regime. In addition, the requirements for portability and segregation should be reviewed keeping in mind the balance between the avoidance of systemic risk and business interest for providing services to less frequent clearers with small positions. Finally, the Basel III leverage ratio rules (already mentioned above) should be looked to remove disincentives

for offering services to smaller clients.

In any case, the issue of access to clearing has to be solved quickly. Regulations should not result in a situation where small players are forced out of the market entirely. There is an imminent risk that this will happen when clearing obligations for all financial counterparties enter into force.

It should also be noted that even many medium-sized European banks are using clearing members to access CCPs. There are many reasons to this, but mainly it is due to the account costs at a CCP level, the strict margin policies especially in terms of eligible collateral and the fact that different CCPs focus on different derivatives instruments. Fragmentation in terms of instruments means that the cost to clear the whole portfolio is significantly higher if counterparty is a direct member at several CCPs or counterparty can clear all instruments with only one or two clearing brokers which in turn have access to all relevant CCPs. Following this fragmentation, the cost to comply with clearing obligations is going to be very high for all European entities. These costs could be lowered if the interoperability arrangements were in place. However this seems very unlikely.

Regarding EMIR Article 39, the individual segregation has proven difficult to implement. There are operational challenges and the differences in insolvency legislation pose legal difficulties and compliance costs that easily lead to too high account costs. Similarly, the proposed frontloading requirements lead to legal uncertainties, operational challenges, massive classification of counterparties and ultimately even to unintended, immeasurable pricing issues. Termination of thousands of contracts is probably especially if the issues with access to clearing have not been solved. Such terminations and market activity during the last days of frontloading period puts the stability of the markets at risk. We strongly suggest that the clearing obligation should only apply to new contracts in the light of this review and the better regulation principles.

With regard to the clearing obligation procedure, a quick fix is needed. ESMA should be granted the ability to terminate or suspend the clearing obligation as soon as possible and at least prior to the clearing obligations entering into force. Such termination procedure should be reinforced in the regulation to ensure quick remedial measures to avoid systemic risks. Termination should especially be considered when liquidity of a class or contract is not any more sufficient for clearing and where the CCP cannot manage the risks of such contracts or when the liquidity declines down to a level where it should no longer constitute to be mandatory cleared. Such a review has also been requested by ESMA itself.

(b)

i. Are there any other significant ongoing impediments or unintended consequences with respect to preparing to meet clearing obligations generally in accordance with Article 4 of EMIR?

Yes.

FK | Finanssialan Keskusliitto
FC | Finansbranschens Centralförbund
FFI | Federation of Finnish Financial Services

Elina Kirvelä

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

The FFI supports the introduction of competition in the field of securities market infrastructures. For this reason and in order to facilitate counterparties access to clearing we are concerned that the regulatory standards for clearing obligation do not support a competitive environment and freedom of choice in clearing. We strongly urge the Commission to endorse regulatory technical standards on clearing obligation only when there are two or more CCPs clearing obliged classes.

In terms of the clearing obligation in general, we are pleased that the proposed phase-in periods support the principle of proportionality and provide more time for smaller financial counterparties too.

We also reiterate the problems regarding frontloading requirements and strongly advise the Commission not to endorse frontloading obligation.

As already discussed, the access to clearing has proved to be very difficult - if not impossible - when a small portfolio of trades subject to clearing obligation is to be cleared. It is not economically viable for clearing members to accept clients with a small portfolio. Compliance with clearing obligation may therefore prove impossible and force these parties out of the market. While an institution may trade and directly clear larger IRS volumes, it may still have a small credit derivatives portfolio mostly for hedging purposes without existing clearing arrangements in place. In such case, it may be difficult and time consuming to find a clearing member willing to accept clearing such a small portfolio. It may also prove too costly and cumbersome to put in place the infrastructure required to establish a new clearing connectivity for a new product class.

The current phase-in has been a concern for some financial institutions to the extent that they would be subject to the clearing obligation with respect to all asset classes in the first phase-in round (i.e. within 6 months after the delegated act enters into force) if they are direct clearing members for one of the mandated asset classes. A grouping approach adopted by ESMA in its latest consultation for clearing of “EEA” currencies is welcome. However, the class by class/currency by currency approach would be more adaptable since the ability to clear one currency does not necessarily presume an existing access to clearing in another currency of the same group. It may therefore require a longer time to access clearing in a specific currency/product even for institutions already used to the clearing framework.

Question 2.3 (Trade reporting)

i. Are there any significant ongoing impediments or unintended consequences with respect to meeting trade reporting obligations in accordance with Article 9 of EMIR?

Yes.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

The reporting obligation has so far been the most challenging EMIR requirement. This is of course due to its broad scope which has already been questioned above. Many of the problems are also inherent to the detailed rules on reporting whereas some are dependent on trade repositories and their different reporting systems and practices. In any case, the FFI recommends an in depth-review of the reporting obligation as a whole.

We question the need to apply the reporting obligation to all counterparties regardless of their business, position size or transaction type. Reporting by all derivatives users is costly in many ways as already explained and does not, in many cases, have anything to do with the prevention of systemic risks. In addition, the reporting of exchange traded derivatives increases the trading costs at European markets and creates a competitive disadvantage. In any case, a counterparty threshold for trade reporting should have been there in the first place and could still be helpful even if many of the costs are already absorbed.

The reporting of intragroup trades has also proven to be expensive, burdensome and is very difficult to understand from a systemic risk perspective. Both financial and non-financial companies of various sizes have intragroup trades. In most cases these are hedging transactions that are executed with a centralized treasury unit which will then aggregate the exposures. This model has been recognized as reducing systemic risks and complexity in the market. These trades do not represent any real external risk and there reporting these contracts does not add any value to reporting. Therefore we strongly advise to delete this obligation.

The amount of data fields and details that need to be reported can be questioned as well. In this case we especially refer to the ESMA Consultation Paper on the Review of the technical standards on reporting under Article 9. In order to improve the quality of the reports, the amount of fields should be lower than currently, not the opposite. The FFI is very concerned especially about the addition of a new data field for corporate sector. Introduction of new reporting requirements for such detailed information as the corporate sector will be expensive and only make the reporting obligation more complex. Even more information has to be provided or collected by one or both of the counterparties. This addition does not bring enough value from a systemic risk perspective, especially when taking into account the broad scope of the reporting obligation and the lack of thresholds. In our opinion the NCAs do know pretty well the companies that exceed the clearing threshold. These companies have most likely been placed under an FSA or similar supervision after the EMIR entered into force. Therefore the Commission should in this review provide guidance for the trade details that are absolutely necessary from a systemic risk perspective and limit the addition of new reporting fields. At the same time, use of existing reporting methods in the field of financial services should be supported.

The cost for application and maintenance for an LEI code has also been discussed above. It does create disproportionate costs for small derivatives users and is especially unreasonable for parties with few transactions that have long maturities. This issue should be looked at more closer and maybe the LEI-requirement should be more targeted than currently. In any case, such cost-creating requirements for companies of all sizes should be set at least in ITS in order to make sure that the regulatory framework is understandable for all types of businesses. In principle however we support the creation of and use of existing

Elina Kirvelä

identifiers instead of requiring different codes in different reports.

In our opinion, the double-sided reporting obligation is causing the currently existing major quality problems. Low quality of the reported data is widely recognized by the authorities and the industry. It should be solved in a way that does not require any more work from the derivatives users. It is in practice almost impossible for a trade leg to find the other leg especially if counterparties use different trade repositories. As already proposed above, a switch to a single-sided reporting model would not only improve the quality of the data and simplify the structure but also reduce both the cost and administrative burden caused for smaller counterparties.

In the review, it is also advisable to look at the requirements set for trade repositories and whether new initiatives are needed to partially standardize the reporting methods or systems they use. This would facilitate the change of trade repository and improve the possibilities for successful matching and reconciliation.

Finally, the requirement to backload closed trades should be revoked in this review. This obligation is costly and operationally cumbersome. In many companies, the IT-systems have changed after EMIR has entered into force. Closed trades have not been brought to the new IT-system now used in reporting. Since reporting of these trades adds hardly any value to the effectiveness of EMIR regime, it should be revoked. All efforts should be put on enhancing the quality of the reports for new trades.

Redundant and overlapping reporting provisions create unforeseen combined effects in general

In general, the FFI has been raising its concerns on the costs and burden that partially overlapping reporting obligations create. FFI acknowledges the importance of high-quality reporting that gives supervisors and central banks a better idea of the market situation. However, reporting obligations should be implemented in an efficient and straightforward way, using the “one stop shop” principle. Reporting systems should be designed as comprehensive, large systems, as opposed to the current fragmented approach. The financial sector aims for more efficient reporting without overlapping elements, so as to avoid additional costs from the unnecessary development of data gathering and reporting systems.

Recent EU regulations that apply to the entire sector, the Single Supervisory Mechanism, and Solvency II will all significantly increase the reporting obligations of financial companies. Furthermore in the past few years the European authorities EBA, EIOPA and ESMA have given dozens of reporting standards that target the financial sector as a whole. Reporting obligations for different companies are thus moving in partially overlapping but differently defined directions. The same trades need to be reported to multiple destinations with varying deadlines. The SSM, for example, also requires information from SI banks faster than EU regulations do.

The ECB is also planning to implement completely new data collection measures. For example, from late 2017 onward, the ECB expects to collect loan-specific information of bank customers, and later on information on insurance companies in more detail than Solvency II. Currently the ECB is planning to extend the collection of statistical data to meet the needs of SSM and money market statistics. If implemented, these plans require double

reporting of the same data. In many cases the data is already being reported for example to national authorities or trade repositories according to EMIR. The ECB could therefore take advantage of the repositories' data instead of requiring it to be reported twice. Similarly, Solvency II derivatives reporting should utilise data already reported to trade repositories instead of requiring separate tables being sent to national supervisory authorities.

EBA's data collection is also affected by the recommendations of the European Systemic Risk Board, which often increase the reporting burden. Moreover, the Financial Stability Board and the Bank for International Settlements add their own reporting requirements to the list. Their requirements are mostly overlapping, but slightly differently defined than the EU requirements.

Reporting obligations should be designed co-operatively with the Commission, EU supervisors, national supervisory authorities and the ECB so that a single reporting obligation fulfils everyone's needs in terms of schedule, market coverage, information content, and data quality. The reporting model has to be such that a company reports the information to one recipient, who then delivers the information onward for other required recipients. If the national supervisors, for example, do not need all of the information that ECB does, the repository could automatically compile only the required information fields. Current technology allows this in a reliable and cost-efficient way. Existing identifiers and standards should be utilised in reporting. The Commission should also make sure that the European models are suited to fulfil global reporting requirements.

Question 2.4 (Risk Mitigation Techniques)

i. Are there any significant ongoing impediments or unintended consequences with respect to meeting risk mitigation obligations in accordance with Articles 11(1) and (2) of EMIR?

Yes.

ii. If your answer to (i) is yes, please provide evidence or specific examples. How could these be addressed?

For a rather long period there was uncertainty on the application of risk mitigation techniques. Their entry into force could have been communicated better and more comprehensively to the market. As already mentioned the EMIR regulatory framework is extremely complex and requires an in-depth understanding of the structure, content and products in question. As the rules have evolved and more standards have been proposed, the requirements on timely confirmation and applying these requirements to intragroup trades have proven to be challenging. However the recently published draft RTS on risk mitigation techniques[1] seem rather workable from a European perspective.

With regard to timely confirmation, it has proven to be very challenging to comply with the deadline (T+1) for the trades that are not confirmed via electronic means. Specific problems relate to paper based confirmations and to equity & commodity derivatives. As this risk mitigation tool has proven to be challenging only due to the deadline requirement, we strongly recommend the Commission to lengthen this deadline while otherwise leaving

[1] http://www.eba.europa.eu/documents/10180/1106136/JC-CP-2015-002+JC+CP+on+Risk+Management+Techniques+for+OTC+derivatives+.pdf

the requirement intact. Such an amendment would be a major ease without significant negative consequences.

Intragroup exemptions have a special role in the market. They are not significant from systemic perspective due to the fact that risks are carried by the central entity only. The risks are thus mutualized and therefore any risk mitigation requirements cannot be justified for intragroup transactions. Thus we question the need to apply any risk mitigation techniques (exchange of collateral, trade confirmation, reconciliation, compression and dispute resolution) to intragroup trades at all.

More simple procedure to exempt intragroup trades from these requirements would be beneficial, too. It could be added that if an exemption has been granted to a group or institutional protection scheme based on either Article 10 or Article 113 (6) and (7) in the Regulation 575/2013 ("CRR") these structures should automatically benefit from the relevant intra-group exemptions of EMIR regulation. This would ensure legal certainty and simplify the procedures for competent authorities.

Question 2.5 (Exchange of Collateral)

i. Are there any significant ongoing impediments or unintended consequences anticipated with respect to meeting obligations to exchange collateral in accordance with Article 11(3) under EMIR?

Yes.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Generally, we believe it is good to finally have some more information on the details of the margin requirements for non-centrally cleared transactions. The rules have been in the process for long and the implementation is still far ahead in the future. Once they enter into force they will have significant consequences for the market. Market practices and whole collateral management framework will need to be altered following these rules. Therefore, it is advisable to try to keep the detailed documentation and re-negotiation requirements at minimum as these will have to be conducted anyway.

Based on the proposed rules we have made the following observations. FFI welcomes the amended draft rules in general with a couple of exceptions. The alignment with international rules is highly appreciated as well as the existence of proportionality principle in many standards. We especially support the proposed phase-in structure which gives the market participant sufficient flexibility in terms of preparation and in proportion to their significance from a systemic risk perspective.

We further welcome the fact that the revised draft RTS no longer require the entering into formal agreements with all counterparties regardless of their counterparty qualification, in order to be able to rely on existing exemptions from collecting and exchanging variation and initial margin. The elimination of this opt-out rule is crucial in limiting the burden these RTS place on market participants.

One of our key issues during the first consultation in 2014 was the heavy legal and

Elina Kirvelä

operational burden that would arise from the reviews of several contracts and processes. We are pleased to see that the interval for many reviews and tests seems to be mostly once a year which is a significant operational ease. However the requirement for independent legal review in two articles should be further clarified to limit any unintended costs. Additional clarity would be beneficial also in terms of margin models. This would support the principles of better regulation more strongly than providing for the clarity later in updated Frequently Asked Questions -document.

Granting of intragroup exemptions is extremely vital to many Finnish market participants and especially to co-operative and other banks with a large number of intragroup transactions. The current text of the RTS is a significant improvement from the previous version where in principle existence of any insolvency law would have fulfilled the definition of legal impediment. Yet we think that Articles 2-4 IGT might still be too vague to ensure that the criteria for granting exemptions are applied consistently across the member states. In terms of intragroup exemption, it could be added that an exemption has been granted to a group or institutional protection scheme based on either Article 10 or Article 113 (6) and (7) in the Regulation 575/2013 ("CRR") these structures should automatically benefit from the relevant intra-group exemptions of EMIR regulation. This would ensure legal certainty and simplify the procedures for competent authorities.

We also note in this context that similar issues arise under Article 8.1(d) of CRR and in relation to that provision the Commission has issued a report ("Legal Obstacles to the Free Movement of Funds between Institutions within a Single Liquidity Sub-Group") addressing certain more specific potential legal obstacles and their relevance under Article 8 of CRR. We consider that similar guidance will be required in relation to Article 11(5) to (10) of EMIR.

Question 2.6 (Cross-border activity in the OTC derivatives markets)

(a)

i. With respect to activities involving counterparties established in third country jurisdictions; are there any provisions or definitions within EMIR that pose challenges for EU entities when transacting on a cross-border basis?

Yes.

ii. If your answer to (i) is yes, please provide evidence or specific examples. How could these be addressed?

Positive equivalence decision under Article 13 are crucial for the purposes of avoiding duplicative or conflicting requirements for clearing (Article 4), reporting (Article 9), the treatment of non-financial counterparties (Article 10), and risk mitigation techniques for non-cleared trades, including margin requirements (Article 11). In this respect we refer to the responses of other trade organizations such as the European Banking Federation, International Swaps and Derivatives Association and Association for Financial Markets in Europe.

It is extremely important to strive for a framework that is workable from cross-border perspective and creates a level playing field for European entities. This also applies to

many proposals and requirements which may seem small at first but may have unforeseen combined effects and create unintended costs. It is also advisable to look at the definitions of key issues globally and try to find a proper balance and alignment in these in order to facilitate compliance.

(b)

i. Are there any provisions within EMIR that create a disadvantage for EU counterparties over non-EU entities?

Yes.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Provisions on reporting (Article 9) as well as the extensive scope of the regulation create disadvantages for European counterparties. As explained above, the reporting obligation is very costly for the counterparties in a disproportionate manner. These disadvantages could be avoided by three actions. First of all, a single-sided reporting obligation should be in place instead of the current dual-sided reporting system. Secondly, exchange traded derivatives should not be in the scope of EMIR reporting obligations. Finally and most importantly, a volume threshold similar to the clearing obligation must be drafted in this review to avoid the burden on European non-financial firms.

Question 2.7 (Transparency)

i. Have any significant ongoing impediments arisen to ensuring that national competent authorities, international regulators and the public have the envisaged access to data reported to trade repositories?

Yes.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Most problems are related to the low quality of the data, mainly caused by matching problems and the dual-sided reporting obligation as explained above. Data quality could be further improved by careful consideration of the existing data fields and reporting of necessary, consistent and systemically useful data only. This would also mean changing the reporting requirements into a single-sided reporting system where, in principle, the larger counterparty would report on behalf of both parties and where a trade would be complete reported in one single report.

Question 2.8 (Requirements for CCPs)

(a)

i. Are there any significant ongoing impediments or unintended consequences with respect to CCPs' ability to meet requirements in accordance with Titles IV and V of EMIR?

Yes.

ii. If your answer to (i) is yes, please provide evidence or specific examples. How could these be addressed?

The FFI supports competition between CCPs. In the equities market, a project to start interoperability at Nasdaq Nordic markets has been ongoing for a rather long time and finally it seems that the project is moving ahead towards a kick-off. However, as the interoperability in regulated exchanges is currently mostly based on reciprocal access to trade feed the lack of equivalence decisions in the recognition of CCPs has indirect consequences even from a competition perspective. Therefore it is extremely crucial to have equivalence framework with the key third countries in place as quickly as possible.

In addition, the role of users in a CCP has not materialized in a way expected for example according to the Commission Delegated Regulation 153/2013 Article 5. Many material changes are still made without consulting the clearing members as suggested in the regulation. Even if consultations are made, they are open for a very short period and not always to all clearing members. In many CCPs, well-working regional councils with a portion of the members in that particular area have been set up and are working well. These still cannot replace proper member consultations and transparency towards the CCP and its business. Also, the CCP should provide feedback on how the consultation responses have amended the original proposal.

Transparency and real power of influence are extremely vital especially if clearing members are obliged to contribute to CCPs risk management procedures according to the forthcoming CCP recovery and resolution rules.
(b)

i. Are the requirements of Titles IV and V sufficiently robust to ensure appropriate levels of risk management and client asset protection with respect to EU CCPs and their participants?

Yes.

ii. If your answer to i. is no, for what reasons? How could they be improved?

The requirements seem robust but as explained above, the rules on portability and segregation might be too detailed and strict, thus leading to high account costs. These costs cannot be borne by counterparties with smaller portfolios which turn leads to a situation where offering services to these clients is not economically viable from the clearing member's or CCP's business perspective.

(c)

i. Are there any requirements for CCPs which would benefit from further precision in order to achieve a more consistent application by authorities across the Union?

Yes.

ii. If your answer to i. is yes, which requirements and how could they be better defined?

According to our understanding, the approval of new products and instruments could be further improved to ensure a similar procedure and timetable for the process across member states. Currently, there seems to be differences especially in terms of the timeline in which new products can be brought to clearing. Similar procedures are even more important in the future when clearing obligations enter into force and clearing members and client are searching for the CCP which is best for their needs.

Question 2.9 (Requirements for Trade Repositories)

i. Are there any significant ongoing impediments or unintended consequences with respect to requirements for trade repositories that have arisen during implementation of Titles VI and VII of EMIR, including Annex II?

No.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

-.

Question 2.10 (Additional Stakeholder Feedback)

i. Are there any significant ongoing impediments or unintended consequences with respect to any requirements or provisions under EMIR and not referenced in the preceding questions that have arisen during implementation?

Yes.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

We believe it is important to reiterate the difficult situation with bank guarantees. Article 46 of the EMIR provides that non-financial clearing members may use bank guarantees as collateral for CCP clearing (of power and gas derivatives). However, Section 2.1, point h) in Annex 1 of the EMIR Delegated Act (153/2013) provides that commercial bank guarantees are required to be fully backed with collateral that meets the specific conditions.

These additional requirements seem to go far beyond the criteria set in Article 46 of the EMIR and, therefore, appear to lead to a requirement of double collateral. Non-financial clearing members are in Article 62 of the EMIR Delegated Act exempted from the above

mentioned rules in the Annex until 15th March 2016. However, when the exemption expires, they will need to use fully backed bank guarantees as collateral for CCP clearing of power and gas derivatives.

The criteria set in Article 46(1) of the EMIR should, in our view, be sufficient.

Currently, 86 % of the total collateral for commodities at Nasdaq Commodities Electricity Nordic consists of issued bank guarantees. One success factor behind the Nordic electricity market is in particular efficient collateral for clearing. The use of alternative collateral, such as cash, other fully liquid collateral or fully backed bank guarantees, would be more expensive and most likely exclude a large number of participants from the organized energy market. The possibility to use bank guarantees as collateral for clearing is well established and has been essential in developing a liquid financial market for trading energy products, while ensuring market access to all participants at low counterparty risk. It should also be noted that many trades have since years been cleared voluntarily by counterparties below the thresholds. Such voluntarily risk reducing activities should never be placed at risk in EU regulations, even if partially unintentionally.

Thus, there is a growing fear, that when the exemption expires in March 2016, a large share of the financial electricity trade in the Nordic power market will move to less transparent (non-cleared) bilateral trading. This would be contrary to the purpose of the EMIR, i.e. to enhance highly competitive, liquid and transparent markets, particularly related to improving transparency of OTC derivative contracts, and reducing the risk posed by interdependence between market participants. Furthermore, energy market participants would not benefit from the reduced risks associated with counterparty default that the EMIR aims to achieve. Already now, the anticipated expiry of using non-fully backed bank guarantees contributes to regulatory uncertainty. These concerns are particularly related to the rising costs of future collateral, and have begun to negatively impact the commitment to enter into trading and clearing for long-term contracts with duration beyond March 2016. The scenario of a diminished Nordic energy market is worrying.

For these reasons, and in order to reduce the risk of a negative shift in the market for trading in financial electricity products, we propose that
a. The exemption provided for in Article 46 of the EMIR is made permanent or
b. Section 2.1, point h) in Annex 1 of the EMIR Delegated Act is repealed or redrafted.

FEDERATION OF FINNISH FINANCIAL SERVICES

Elina Kirvelä