

OTC derivatives, central counterparties and trade repositories (EMIR, European Market Infrastructure Regulation)

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OPINION OF THE EUROPEAN CENTRAL BANK

On 13 October 2010, the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories.

The ECB supports the proposed regulation's aim to lay down uniform requirements for OTC derivative contracts, and for the performance of activities of central counterparties (CCPs) and trade repositories (TRs).

However, the ECB has concerns with respect to some of the provisions of the proposed regulation.

On a general note, the ECB makes the following observations:

It is necessary to ensure the adequate involvement of the ECB and the national central banks (NCBs) in the ESCB in various aspects of the proposed regulation (in particular concerning decisions to grant or withdraw authorisation, including for the extension of activities; ongoing risk assessments of CCPs; the definition of the technical standards for CCPs and TRs; and decisions to allow third country CCPs and TRs to conduct their activities in the Union) needs to be ensured without regulating, in substance, on central bank competencies;

CCPs should be strictly regulated. In this regard, it should also be considered further whether an amendment of the definition of 'credit institution' in Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (recast) (1) is warranted in order to ensure that CCPs are classified as credit institutions with a limited purpose banking licence.

On a more specific level, the ECB considers that it is critical to ensure effective cooperation between supervisors and overseers in the context of the proposed regulation:

- (1) the determination of eligibility for the clearing obligation should not be carried out by [ESMA](#) in isolation, but in cooperation with the members of the ESCB;
- (2) the setting of regulatory technical standards, guidelines and recommendations for CCPs and TRs should be conducted in close cooperation with the members of the ESCB;
- (3) the relevant members of ESCB should, both from an oversight perspective and as central banks of issue, as the case may be, be involved in all tasks of the college, including in the authorisation and ongoing review of CCPs under Title III of the proposed regulation;
- (4) with regard to relations with third countries, the decision to recognise third country CCPs under Article 23 of the proposed regulation should not be taken by ESMA without close cooperation with the relevant members of the ESCB, both from an oversight perspective and as central banks of issue, in order to ensure that any central bank concerns and policies regarding, for instance, liquidity and risk management are adequately reflected. In addition, the ECB recommends that a requirement for such recognition should be the reciprocal treatment of CCPs from the Union under the relevant laws of such third countries.
- (5) there must be adequate participation and cooperation between all relevant authorities, bodies and central banks. In the case of central banks, this applies with respect to both their participation in the college and with regard to the exchange of necessary information, including for financial stability, oversight and statistical purposes.

The ECB states that the proposed regulation requires that CCPs have 'access to adequate liquidity' as a pre-condition for obtaining authorisation to perform services and activities as a CCP.

The adequate liquidity referred to 'could result from access to central bank liquidity or to creditworthy and reliable commercial bank liquidity'. The ECB considers that commercial bank money does not truly eliminate risks, whilst central bank money does. Therefore, the proposed regulation should not present central bank liquidity and commercial bank money as two equally safe and preferable options.

At the same time, the ECB positively notes that the proposed regulation does not contain any suggestions about regulating access to central bank credit.