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EUROPEAN COMMISSION – PUBLIC CONSULTATION DERIVATIVES AND MARKET INFRASTRUCTURES

FBF'S RESPONSE

GENERAL REMARKS

1. **The French Banking Federation (FBF)** represents the interests of the banking industry in France. Its membership is composed of all credit institutions authorized as banks and doing business in France, i.e. more than 500 commercial, cooperative and mutual banks. FBF member banks have more than 25,500 permanent branches in France. They employ 500,000 people in France and around the world, and service 48 million customers.

The Association française des marchés financiers (AMAFI) has more than 120 members representing over 10,000 professionals who operate in the cash and derivatives markets for equities, fixed-income products and commodities. Nearly one-third of members are subsidiaries or branches of non-French institutions.

Both associations welcome the opportunity to comment EC consultation on derivatives and market infrastructures, since their members are highly involved on the OTC derivative markets.

As general remarks, we would like to underline our agreement on most of the proposals made by the Commission. In that way, FBF and AMAFI also share the aim of limiting the systemic risk through the implementation of OTC derivative CCPs since the financial crisis shows the paramount importance of this kind of infrastructures to prevent such risk.

For years, FBF and AMAFI have jointly been asking a European harmonised legal framework regarding the infrastructures as it is implemented in the United States and giving the American financial system a crucial advantage.

2. The following points are considered essential by the French industry to ensure the efficiency of the future regulation:

- Firstly, **the agenda must be consistent regarding the incentives of CRD IV and the progressive implementation of the clearing process**; indeed, the legislative tool shall ensure a full harmonisation but must be realistic in terms of agenda of implementation. Thus the AMAFI and the FBF support a regulation rather than a directive but underline the need of transitional period to implement, for each asset concerned class, the reporting and the clearing rules. European regulators may also be able to define targets for the financial industry as level 2 rules.

- Secondly, the efficiency of the **systemic risk mitigation** call for a series of mandatory requirements for CCPs:
 - First of all, **CCPs shall have very robust prudential and organisational rules in order to ensure that they are at least as safe as the existing network of regulated dealers.**
 - As a consequence of the first requirement, **the CCP shall have access to central bank facilities, in order to avoid any contagion in case of failure of a clearing member; thus, they shall have a banking status or an ad hoc banking-like status**, since the central banks do not accept any access to the intraday liquidity for non banking entities; this does not only involve a banking status or *ad hoc* banking-like status for the CCP, but also that it would not be possible for any stakeholder which does not have such status to become a CCP; especially, the banking industry would oppose any possibility given to an investment services provider to become a CCP under its investment services license; the banking or banking-like status also means that the CCP has to be supervised and monitored by a banking supervisor, including on-site audit inspections.

As FBF and AMAFI have always stressed, we strongly believe that a CCP should always be in a position to rapidly and securely obtain the necessary liquidity for it to limit systemic risk, as provided by the monetary policy. In the event of a major financial crisis, central banks have a major role to play in order to solve the crisis. In case of default of one of its participants, the CCP needs to be able to access to the liquidity provided by a central bank as rapidly as possible. In this context, the CCP shall have a direct link with the central bank which seems difficult if it is not under its supervision.
 - An existing CCP which activity is to only clear securities shall not have *per se* the ability to clear OTC derivative instruments since the clearing of OTC derivatives imply technical specificities.
 - **A CCP shall be User-owned and User-governed with a robust governance architecture** which allows the mitigation of possible conflict of interests and which gives a central role to the risk-committee. The French banking industry supports two supplementary ideas in this area: it would be useful to set up a maximum limit to the shareholding (for example 25% for each Shareholder/ User); it would also impose to assess the opportunity to forbid the CCPs to be listed on a stock exchange.
- Thirdly, the scope of the future regulation shall be precised. In some areas, we have the feeling that the regulation would apply only to the clearing of derivative instruments and in some other areas to every kind of financial instruments, including securities. The banking industry considers that the regulation should apply to the clearing of every kind of financial instruments, even if some developments would not be as relevant for derivatives as for securities, especially interoperability.
- Fourthly, and as a consequence of the third point, the regulation should address the regulation of central securities depositories (CDSs), which has never been written since the Clearing & Settlement code of conduct was expected to solve problems in this area but failed, as it was recognised by the Commission.

- Fifthly, **FBF and AMAFI are not in favour of interoperability between CCPs** since for OTC derivative instruments as we consider it as a major element of distribution of systemic risk. Furthermore, the European experience shows the complexity of its implementation which may lead to slow down the constitution process of CCPs.

Sixthly, **FBF and AMAFI consider that the Trade Repositories for OTC products with an underlying financial instrument in a European currency,, shall be located in Europe** and supervised by ESMA.

SPECIFIC REMARKS

1. RESPONSES TO SPECIFIC QUESTIONS

1. CLEARING AND RISK MITIGATION OF OTC DERIVATIVES

What are stakeholders' views on the clearing obligation, the process to determine the eligibility of OTC derivative contracts for mandatory clearing, and its application? Do stakeholders agree that access from trading venues to CCPs clearing eligible contracts should be guaranteed?

- No. In our point of view, a 100% mandatory clearing standard for all eligible contracts is inappropriate and could actually increase systemic risk; in some cases, participants need to clear positions out of a CCP (bilateral netting between counterparties) in order to manage their credit/ counterparty risk
- OK with double approach (bottom-up and top down), with priority given to the demand from a CCP and the role of the Risk-Committee and definition of timeframe for each asset-class (i.e. transitional period and target in terms of percentage of cleared instruments)
- The role of ESMA shall be clearly defined in both top down and bottom-up approach. Moreover, market regulators have to share the analysis with banking regulators, which are more specialist of systemic-risk mitigation

The FBF stresses that the bottom-up and the top-down approach are complementary. ESMA shall define the related derivatives provided that the European CCPs can act as operators.

- Clearing eligibility process:

ESMA can only determine that a clearing obligation exists for any given derivative contract if a request to establish such determination comes from a CCP clearing such a contract. ESMA should not have the authority to establish a clearing obligation on a contract if there is no connected request from a CCP.

Any request from the CCP to ESMA to determine that a clearing obligation exists for any given derivative contract, shall be approved by the CCP's Risk Committee. We think that the Risk Committee to be decision-maker - rather than simply an advisor - of any decision from the CCP to clear new contracts. Any decision by a CCP which would not follow the opinion of the Risk Committee should be exceptional and would need to be duly documented and explained to both the competent authority and the users.

The assessment by ESMA of whether a clearing obligation exists for any given derivative contract should be made on the basis of strict, public, and objective requirements. The set of assessment criteria - which should be subject to public consultation before being approved - should contain - at least - a criterion related to the reduction of systemic risk that mandatory clearing of any given contract would achieve; and another one looking at whether a similar obligation has been imposed in other relevant jurisdictions, so as to ensure global coordination. Also the individual assessment to determine a clearing obligation for a specific contract should itself be subject to public consultation.

It should be avoided that the process to determine an obligation to clear eventually incentives competition among CCPs on risk management grounds. For that reason, when the assessment process described above is negative, ESMA should list the instrument as one where no obligation to clear it centrally exists (i.e. negative list).

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

A distinction must be made between two kinds of participants:

a) Non financial entities using derivatives to hedge risks:

The FBF believes that the use of OTC derivatives notably by end-users corporations shall not be seen as increasing risk in the financial system. Indeed, most derivatives used by such companies serve merely to hedge real transactions so using OTC Derivatives is definitely required to hedge special risks.(financing transactions: foreign currency risk and interest risk; risks attached to the price of commodities and energy prices such as petrol, gas or electricity).

According to European directives and international standards, large Corporates are submitted to a Governance process designed to ensure that their risk mitigation policy is appropriate, approved at the Board level (or by a sub committee of the board) and implemented accordingly; listed companies have to publish in their annual reports key information on their risk management.

Standardizing all derivatives would be inappropriate, taking into account that financial companies use tailor-made derivatives, adapted to their needs.

One should also consider an adequate regime for SMEs (with, if needed a definition of SMEs that would avoid regulatory evasion).

Therefore FBF supports the exemption contemplated by the CP.

In addition, a similar exemption should also be considered for Central Banks and Debt Management Offices of Sovereigns.

b) Significant participants without full hedging strategies (especially on Commodity derivatives):

No exemption.

Regarding the size of the banks, every bank has to apply the rules.

On intra-group deals: the Consultation is silent on the proposed treatment of OTC derivatives transactions entered into between group entities. Such trades are entered into for legitimate hedging purposes to manage risk within cross-border financial institutions. The inclusion of intra-group derivatives trades within the clearing requirement would be detrimental to the risk management function of such groups and we would, therefore, request the Commission to not subject such trades to the proposed clearing requirement. In addition, should the Commission be minded to exclude such trades from the clearing requirement, we would not expect such intra-group derivatives trades to be penalized from a capital adequacy perspective. We would be grateful if the Commission could clarify its thinking on the subject.

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

The FBF broadly agrees with the European Commission.

As a matter of fact, the widespread use of central clearing needs to be complemented by existing counterparty credit risk reduction tools for contracts that cannot prudently be centrally cleared, specifically: the close-out netting and the collateralization of derivative contracts. However some of the recommendations here will have negative consequences for the end-users, as many of them do not use mark-to-market valuation (if used for hedging purpose) or post collateral. It is not sure whether we really need to force them to post collateral when entering into a derivative deal as the cost may deter them to use derivatives to hedge their risks.

2. REQUIREMENTS FOR CENTRAL COUNTERPARTIES

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?

a) General requirements:

The Commission wishes to impose to CCPs some requirements that are very close to the ones applying to credit institutions (organizational requirements, risk mitigation, conflicts of interest, and prudential requirements) without providing a banking status and without giving any precision regarding the authorization and the supervision.

The French Banks have always supported the creation of the clearing houses for the derivatives traded on the Euro zone. The recent financial crisis showed the importance of market and post-market infrastructures for the financial stability and the essential connection between the CCP and the central bank which issues the reference currency on which the buyer of protection, the counterparty of the derivative, wants to hedge.

FBF and AMAFI consider that it is important to prospect for the implementation of a harmonized legal framework, licensed and supervised by specialized regulators. We stand for the following positions:

- For the CCPs, the banking legal status seems to be appropriate provided that the authorization is limited to the sole activities in connection with the clearing of derivatives and not to authorize the other banking activities (no general of credit institution status to the benefit of a credit institution status with a limited activity, to avoid that a CCP practices activities involving risks and in defining specific equity capital requirements).
- The license for the infrastructures should ideally be granted by ESMA or, at least, by a corpus of rules drawn up by this latter and applied by national supervisors under its control.

- The French banks are not in favor, for reasons of financial stability, of the implementation of single clearing houses for each category of instruments and for each currency.

These elements taken into account, the banking industry considers that the European project shall be precised, especially regarding the status and the supervision of the CCPs.

b) Participation requirements:

The participants of regulated entities in a CCP should have sufficient financial resources and robust operational capacities. This is a major issue for CCP as such infrastructure will always be as weak as the weakest of its –direct– members. In other words, direct eligibility to a CCP should be reserved to the best counterparties. For this reason, other criteria should be added to select CCP members, such as the rating of the counterparty and its capital ratios.

Non regulated entities:

Regarding direct participation of non-regulated entities, their participation in a CCP can present challenges to the risk management of a CCP. From a systemic point of view, as the CCP risk management procedures will be designed to cope with the risk of default of one of its members, instead of requiring such entities to post additional upfront collateral or external certifications, **we would recommend not having any non-regulated entity as direct members of a CCP.**

Instead, the possibility should be left to non-regulated entities to join the CCP through an **indirect access** (i.e. using the access of a member). That would need to specify appropriate rules regarding the segregation and portability of assets.

c) Transparency

FBF and AMAFI agree that a CCP should publicly disclose information on fees and prices associated with its services, so as to ensure greater transparency, better comparability (through price simulation tools e.g.) and genuine choice for users when identifying and evaluating the risks and costs associated with using the services of a CCP.

However, regarding the prices and fees associated with the clearing services provided, we think that they should not only be publicly disclosed but also they should not be discriminatory without any exception notably as regard the ownership of the CCP. In other words, all clearing members with comparable characteristics (in terms of volume, contracts cleared...) should be submitted to the same fees.

FBF and AMAFI recognize that risk management models and assumptions are proprietary information that should primarily be disclosed to regulators but also, if requested, to direct participants and participants applying for membership.

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

The FBF does not consider that possible conflicts of interests between end-users and CCPs would justify specific rules on the ownership of CCPs. On the contrary, as clearing Members bear the risk and also cover the first layer of risk the fact that there are also shareholders raises no conflicts of interest at all.

Besides, experience has shown that end-user owned CCPs have more reliable risk management processes than the others and have no interest to compete on quality as the users/shareholders would be the first stakeholders to be penalised by such a decision.

The EC should note that exchange-owned clearing houses gives rise to a natural conflict of interest, as their incentive is not necessarily good risk management, but rather maximizing profits. This gives rise to the possibility of competing on risk management, which puts the clearing members at risk, rather than the exchange. Therefore, we suggest that the principles regarding conflicts of interest should explicitly apply to all (not just user-owned) CCPs so as conflicts of interest specific to non-user-owned CCPs could also be considered.

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

FBF and AMAFI agree with segregation regarding Derivatives but does not approve it concerning Cash Equity.

The FBF is of the opinion that the requirements regarding segregation must remain flexible enough. Effective segregation between the assets of a clearing member and the assets of the clients of this clearing member is, of course, essential. However, a CCP should have a certain degree of discretion to what extent it accepts further additional levels of segregation as this may pose – depending on the extent of fragmentation – considerable organisational challenges. Thus, the FBF believes that a CCP should be able to impose certain restrictions and limitations where further segregation is not feasible (the second sentence in lit. b) is somewhat ambiguous in this respect but may be read as to give clients a right to demand further levels of segregation).

As regards the transfer of segregated positions, we believe that the ability of a CCP to execute the transfer of client's positions in the event of a default of the relevant clearing member will be an essential instrument to mitigate risks for clients. Legal certainty over the effectiveness of such transfer is therefore of paramount importance. Specifically, it shall be ensured that such transfer is valid and enforceable and cannot be prevented by applicable insolvency laws. FBF and AMAFI recall that insolvency laws within the EU have not yet been fully harmonised in this respect. Consequently, to ensure the requisite legal certainty, it will be necessary to achieve such full harmonization. Due to the importance of this aspect, we believe that the relevant legal certainty should also be one of the preconditions for the regulatory permission of a CCP.

The FBF fully concurs with the idea that clients should be able to benefit from any reduced counterparty risk exposure of a CCP when they are not exposed to the default risk of the relevant clearing member. Such an assessment cannot of course be made by the individual clients or clearing members but must come from a regulatory authority. In this respect, we believe that it should be necessary to grant the

competent regulatory authorities the power to make such official confirmation following a positive assessment (or a declaration that the assessment was negative, as the case may be).

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? Are exposures of CCPs appropriately measured and managed? 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? 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? Are the provisions above sufficient to ensure access to central bank liquidity without compromising central banks' independence?

6) Do stakeholders share the general approach set out above on prudential requirements for CCPs? In particular:

The key prudential and risk management elements for a CCP are as follows:

- 1) Guarantee fund and waterfall – Both need to be of a reasonable size, and clearly defined with all parties having a well defined worst case loss
- 2) Testing period – A CCP must have available clearly defined test criteria owned and regulated by the CCP which members must satisfy prior to commencing the clearing of any trades.
- 3) Pricing methodology and quality control model – The CCP needs to have an appropriate pricing methodology for valuing open interest for margining cleared trades and an appropriate process of ensuring quality control of the valuation provision process.
- 4) Margin methodology – to achieve effective risk management, CCPs must adopt margining suitable for OTC derivatives (as compared with listed derivatives).
- 5) Default management process – Must be robust and constantly evolved, tailored to the products cleared, and rehearsed for the collapse of its biggest members on a regular basis.

a) What should be the adequate level of initial capital?

Being a bank or having a banking like status, CCP should be submitted to the European capital requirement in term of initial capital and own funds.

Concerning own funds, CCPs should be compliant with the Pillar 1 rules in order to cover credit risks, market risks and operational risks and to Pillar 2 rules by calculating an internal capital ratio.

b) Should the default fund be mandatory and what risk should it cover?

Yes, the default fund should be mandatory.

Mutualisation of the losses among clearing members is necessary for a CCP to operate and one of the central tenets that incentivises appropriate risk management behaviour among members.

We stress the need for the European Commission to define the principles that should be followed regarding the default fund in case of default of a clearing member We are of the view that even if mutualisation of losses among clearing members is necessary for a CCP to operate, clearing members should have limited exposures toward the CCP.

This means that strict rules on default funds should be defined and notably:

- the default fund should be used only if initial and variation margins of the defaulting clearing member are not sufficient enough to cover the losses,
- when the default fund is used, the CCP should use by priority contributions of the defaulting clearing member and, only if a loss should still be covered, the contributions of the non-defaulting clearing members;
- the default fund should be used once in the context of a default. This implies that in the case the default fund is used, the non-defaulting clearing members should only be invited to replenish it in order to cover the potential default of another clearing member.

c) Should the rank of different lines of defence of a CCP be specified?

Yes, see response to Q6.

We agree with the rank of different lines of defence specified by the EC but we would add that – for the clearing members to have limited exposures toward the CCP:

- for the contributions to the default fund (see II, 8, F, c of the CP), as specified above, we think that the default fund should be (1) used once in the context of a default and (2) replenished by the clearing members only once in order to cover the potential default of another clearing member,
- if the default fund is not sufficient enough, the initial capital of the CCP should be used. We would therefore add another rank (II, 8, F, e) to make clear that CCP initial capital is the final line of defence. That is the reason why we think that initial capital should be substantial.

With regard to the section “other risk controls”, the provision “Each clearing member...should not be able to provide more than 10 percent of the credit lines as needed by the CCP” is not realistic - in fact we would want the clearing members to be the main providers of credit lines to the CCP as CCP membership criteria would be calibrated to include entities which would have the capacity to provide credit lines to a CCP.

With regard to default procedures, we strongly support the inclusion of details on a CCP's emergency procedures which are currently lacking in the consultation paper. We would suggest adding a point which states “Preference for procedures which guarantee continued emergency powers of a CCP's operation”. We would suggest using the language from the CPSS-IOSCO on emergency powers for CCPs as a guide.

d) Will the collateral requirements and investment policy ensure that CCPs will not be exposed to external risks?

Yes, provided that the collateral accepted by the CCP should have the same quality as the one used today in bilateral collateral security agreements, ie high quality and highly liquid collateral without wrong-way risk.

Communication and reporting of the invested instruments/strategies and associated risk measures to the clearing members should be encouraged.

In addition, we think that:

- investment policies should be subject to regular audit by supervising authorities;
- assets not invested should preferably be deposited with central securities depositories and national central banks.

e) Will the provisions ensure that correct management of a default situation?

We are supportive of the principles set out in the consultation, but note that you can never guarantee correct management of a default. Therefore, to mitigate risks, default procedures should be regularly audited by supervising authorities and should be available to clearing members.

In addition to the principles set out, CCPs should run regular fire drills (ie default simulations) to ensure all affected parties are entirely familiar with the processes involved with such an event.

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?

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?

FBF and AMAFI agree with the principle of allowing third-country based CCPs to provide clearing services to entities established in the EU provided that these major conditions are fulfilled :

- The regime of the third country CCP shall be a minima equivalent as the UE CCP and reciprocal arrangements shall apply, under regulatory control.

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

The contracts cleared by third country CCPs shall not be automatically approved. Indeed, they shall comply with Risk committee review, Board approval and regulatory approval, in order to enforce supervision efficiency and user's governance.

3. INTEROPERABILITY

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

The purpose is to develop the clearing houses in the euro zone and yet, this latter is weakened by the fact that the Commission services stress on this interoperability. Indeed, the Commission plans to include in the regulation a right to interoperability, under conditions, for the market infrastructures, with a view to reducing the cost generated by the crossborder activities. It must be underlined that the Commission services have consciously made of this subject a major issue whereas it is not the core of the EMIRL regulation and which might be damaging to the European purpose.

FBF and AMAFI have always been opposed to a mandatory implementation of interoperability between the CCPs for the OTC derivatives: this rule of interoperability between the infrastructures, which could be seen as favoring the development of the competition between the participants and then leading to reduce the cost for the users, faces three major issues:

- As the Commission mentioned and recognized it in one of her “*discussion papers*”, the interoperability of the CCPs could be a vector of spreading the systemic risk in case of the bankruptcy of an interconnected CCP. Yet, the fundamental interest of strengthening the CCPs is precisely to mitigate such a risk, particularly in providing their regulatory and prudential framework and their operational compartmentalization (Chinese wall); in addition, the increase of the number of the links between the CCPs is also a factor of division of information.

- Already set up in 2006 in a Code of conduct drawn up under the presidency of the Commissioner McCreevy, the whole industry has not been able to implement this interoperability due to the many IT issues and to financial costs it involves. In order to lift the requirements, the harmonization of the prudential rules definitely constitutes the best option contrary to the interoperability.

- The further decrease of costs wanted for the users through its implementation seems to be illusory regarding the investment necessary to its implementation.

Therefore, we consider that this right to interoperability must be précised in order to prevent that a claim made by an actor leads to an obligation for the others.

4. REPORTING OBLIGATION AND REQUIREMENTS FOR TRADE REPOSITORIES

What are stakeholders' preferred options on the reporting obligation and on how to ensure regulators' access to information with trade repositories? Please explain.

Do stakeholders share the general approach set out above on the requirements for trade repositories? In particular, are the specific requirements on operational reliability, safeguarding and recording and transparency and data availability sufficient to ensure the adequate function of trade repositories and the adequate protection of the data recorded?

French banks support the creation of one or several European Trade Repositories submitted to the supervision of ESMA for European derivative instruments provided that the initiative of this creation comes from ESMA.

As it was done in the USA with DTCC, appropriate governance shall be implemented taking into account users needs.

Generally speaking, French banks are ready to propose what kind of information shall be reported to the trade repositories, with a distinction between those dedicated only to regulators and those which could be disclosed to the market, due to confidentiality of operations and banking secrecy. One should bear in mind that some work has already been done on this topic (by the “G14” group) and it would be wise, from a cost/benefit point of view, to build on what already exists.

FBF and AMAFI also underline that the reporting process is important. In this perspective, the European Commission's proposal to report to the trade repositories only the information related to non cleared transactions generates undermines the relevance of these infrastructures.

Concerning the status of the trade repositories, the FBF is agnostic but wishes the ESMA to directly supervise these infrastructures. Indeed, trade repositories have a central role to ensure transparency on transactions in order to help systemic risk mitigation. Then, a European license procedure shall be precisely defined under the Aegis of ESMA.

On the sensitive question of investors access to information centralized in Trade repositories, we notice that the Commission envisages two options:

- First, a Trade repository located in a third country must create a European subsidiary;
- or
- Second, a Trade repository located in a third country must replicate in European Union its databases and make it accessible to European regulators.

As long as regulators have an unfettered access to information stored on the trade repository, both options may be contemplated.

