



Minister for Finance
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2

By email to emir@finance.gov.ie

14 March 2014

**Re: European Markets Infrastructure Regulation (EMIR) No. 648/2012
Consultation on Member State discretions**

Dear Minister

The Irish Debt Securities Association¹ and the International Swaps and Derivatives Association Inc.² (ISDA) welcomes your invitation to contribute to the consultation process on the proposed implementation of certain Member State discretions contained in EMIR.

Structured finance and securitisation is currently being highlighted as “a significantly important financing channel” and is finding growing support from policy makers and regulators. In addition, global regulatory bodies (including, amongst others, the Financial Stability Board, the European Central Bank, the European Commission, the US Federal Reserve and the US Securities and Exchange Commission) highlight the need for a return of structured finance and securitisation when discussing the possible solutions available to deliver the funding required to generate real activity and growth in the economy. All of this supports the huge potential of this industry sector to contribute to economic growth, add to the significant number of high value jobs in the sector and to generate funding for the real economy. Indeed this is specifically recognised in the Irish Government's recently published Medium-Term Economic Strategy paper.

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1. The Irish Debt Securities Association is an industry organisation, the aim of which is to promote and develop Ireland as the premier European location for activities to support the global structured finance, debt securities and the specialist securities industries. Its membership includes the majority of all audit firms, trustees, legal advisors, corporate administrators, listing agents, and other parties involved in the Industry. Further information can be found at www.idsa.ie.
 2. Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

In order for Ireland as a jurisdiction to aspire to partner the global structured finance industry, we require both an infrastructure and an appropriate environment for the business to be encouraged and supported. Ireland already enjoys a significant international reputation for the quality of its specialist service providers and the experience and expertise in its structured finance and debt securities industry. To maintain this reputation and continue to achieve the potential this sector offers, it is important that the business environment is not unnecessarily challenged. This applies not only to the debt securities and securitisation industry, but also to other related sectors of the industry, for example, aircraft leasing. Our concerns as expressed in this response apply equally to those sectors also.

We have set out our responses to the specific implementation proposals in the appendix attached to this letter.

We recognise the importance of designating a National Competent Authority with appropriate powers of supervision and enforcement. We value the clarity and certainty that the conclusion of this consultation will provide. However, it is important to bear in mind that the structured finance industry is one that is highly internationally mobile. It is imperative, in our view, that in implementing EMIR fully and properly, the legislature does not impose obligations that go further than what is required by the Regulation itself, and that are in excess of what is being introduced in other EU jurisdictions. Doing so would contribute to the fragmentation of the European derivatives markets along national lines and would disadvantage the industry in Ireland. Such measures would place onerous obligations not only on entities in this sector, but also on trading companies outside of the financial sector that need to hedge the currency, commodity or interest rate risk in their business activities.

In this regard, we would point particularly to the proposals for:

- a Statement of Compliance and Skilled Person's report, which will place an unequal burden on an Irish NFC- compared to that of equivalent entities in other Member States;
- a power of the Central Bank to give directions, including a direction "to take or refrain from taking or to prohibit actions, including entering into derivatives contracts", which we consider an extraordinary power for the Central Bank to have in respect of entities that are not regulated financial services providers or their related undertakings, and which we believe would have a serious detrimental effect on the ability of Irish counterparties to confirm they have the capacity and power to enter into legally binding derivatives contracts; and
- criminal sanctions for breach of EMIR, which we consider to be disproportionate and out of line with the sanctions regime in other Member States.

Regarding FX forwards, we note the comments of the Department of Finance in the consultation paper, and the position taken by the Department that all FX forward transactions with a settlement date beyond the spot date, even if entered into for commercial hedging purposes, are to be considered as within the definition of a derivative under EMIR.

In its letter of 14 February 2014 ESMA publicly signalled that, if it was legally possible, National Competent Authorities should not apply EMIR to certain FX forwards and certain commodity forwards. We are of the view that an Irish interpretation that runs contrary to ESMA's approach causes uncertainty in derivatives markets (including for companies outside the financial sector that hedge their business activities) and discourages such transactions. We respectfully request that the Department of Finance and the Central Bank of Ireland should provide public assurance that they will follow ESMA's approach and not apply EMIR to such contracts unless ESMA's approach is modified by the European Commission.

We would be happy to discuss further our response as set out in this letter and in the attached appendix.

Yours sincerely

Gary Palmer
CEO IDSA on behalf of the IDSA and ISDA

APPENDIX

1. The designation of the National Competent Authority (NCA)

We agree with the proposal to designate the Central Bank of Ireland as the single NCA for Ireland.

2. Investigative Process and Enforcement

I. Statements of Compliance (“SoC”)

We believe that, as EMIR does not require management or independent third party verification, the SoC proposal contained in the Consultation Paper would make EMIR implementation in Ireland more onerous, and costly, than in other Member States. We are not aware of any other Member State requiring a SoC or any form of verification of compliance with EMIR by management or a third party. It is unclear to us why EMIR would require such verification when other more onerous legislation does not require a similar statement.

We anticipate that completing the SoC would require management to consult specialist technical expertise. Confirming that a party has complied with EMIR will require an in-depth knowledge and understanding of EMIR, which for the vast majority of counterparties will require advice from an external party. This would be an additional cost when complying with EMIR for any Irish counterparties. In addition, the proposal to require a third party to verify the statement will involve yet further costs that would not be incurred in other member states.

If the power to require a SoC is nevertheless given to the Central Bank, it should be made clear that this power is to be used as part of the Central Bank’s investigative and enforcement process only, and a SoC is not to be required otherwise.

We note that EMIR is already a highly technical regulation, with several different levels of compliance required depending on the type of entity. The proposed exceptions to the SoC and Skilled Person’s Report introduce two new NFC- sub-categories, which we strongly believe not only adds further confusion but is also unjustified and not contemplated by either the Regulation or any ESMA guidance to date. EMIR recognises that an NFC- is unlikely to pose systemic risks for financial markets and thus has a limited application to such entities. It is our view that any obligations, such as the SoC and Skilled Person’s Report, not envisaged by EMIR, should not apply to any NFC- for this reason.

To benefit from the exemption to the proposed obligation to make a SoC, it is proposed that an NFC must delegate reporting responsibility to a ‘third party’. Given that the vast majority of counterparties in Ireland will delegate reporting to a bank counterparty (which strictly speaking is not a third party), we feel it is important to clarify that the ‘third party’ to whom reporting responsibility can be delegated includes a bank counterparty.

II. Assessor model

We believe it is appropriate to provide the Central Bank with the power to supervise compliance with EMIR, investigate contraventions of EMIR and to order rectification of data returns as noted in the Assessor model section of the Consultation Paper.

However, we feel that providing the Central Bank with the power to give directions, including a direction “to take or refrain from taking or to prohibit actions, including entering into derivatives contracts”, is extraordinary in respect of entities that are not regulated financial services providers or their related undertakings, and goes far beyond the scope of EMIR.

If the Central Bank is to have such a directive power, we believe that it will have a serious and detrimental effect on the ability of Irish counterparties to confirm they have the capacity and power to enter into legally binding derivatives contracts at all necessary times in the future without fear of interruption to hedging arrangements.

3. Specific Powers of NCA - Skilled Persons Reports

We believe that the Central Bank's power to require a Skilled Person's Report should not apply to any NFC-. In this regard we also believe that it should not be necessary to require an entity to engage an auditor to prove that it is entitled to be treated as an NFC- without recourse to the calculation exemption provided for in Article 10(3) of EMIR. The Consultation Paper refers to the provision for Skilled Persons Reports having been modelled on the regime that has operated in the UK financial system over the past decade. It is noteworthy therefore that there is no proposal in the UK to use such provisions in the context of EMIR enforcement.

4. **Sanctions**

It is our view that providing for criminal sanctions would be out of proportion to the act, and effects, of breaching EMIR. In the limited time available we have been able to survey the EMIR sanctions regimes implemented (or, in some cases, as currently proposed) in 14 other Member States. We are not aware from this survey of any other Member State providing for prison terms for breaches of EMIR. The proposal is not mandated by EMIR and appears to be entirely out of step with the sanctions regime in other Member States.

We note that the Consultation Paper lists a series of factors required to be taken into account when determining the type and level of administrative penalty to be applied. In addition to the factors listed in the Consultation Paper we feel that all of the mitigating factors that apply under the current Administrative Sanctions Procedures should also apply as mitigating factors in respect of a breach of EMIR.