

Future Regulatory Framework Review: Central Counterparties and Central Securities Depositories

The Bank of England's regulation of CCPs and CSDs
Financial Services Strategy
HM Treasury
1 Horse Guards Road
SW1A 2HQ

FRF_Review.CCPs_CSDs@hmtreasury.gov.uk

28 February 2022

Dear Sirs,

Financial Services Future Regulatory Framework Review: Central Counterparties and Central Securities Depositories

The International Swaps and Derivatives Association (**ISDA**) welcomes the opportunity to respond to HM Treasury's consultation on the Future Regulatory Framework Review: CCPs and CSDs.

1. Executive summary

ISDA members would like to flag the following key points for HM Treasury's attention:

- It will be important to define clearly the territorial scope of the Bank's rule-making powers with respect to the regulation and supervision of CCPs and CSDs. We understand that the intention is to retain the current recognition framework for non-UK CCPs and CSDs, and the scope of the Bank's rule-making power should be consistent with this framework, allowing for deference to the home state regulator.

- With respect to the proposed statutory objectives and regulatory principles for the Bank, we agree that:
 - the Bank should ensure that it does not discriminate on the basis of nationality or location in advancing its primary objective;
 - the Bank should take into account the financial stability impact of UK CCPs and CSDs on other jurisdictions;
 - the majority of the regulatory principles that currently apply to the PRA and FCA would be appropriate for the Bank's regulation of UK CCPs and CSDs;
 - the Bank should be required to have regard to the public policy priorities underpinning retained EU law when remaking those requirements as rules.
- As mentioned in our response to the general consultation on the Future Regulatory Framework, we continue to have concerns regarding the potential power for HM Treasury to direct the Bank. In particular, it is unclear whether this power would in fact impinge on the Bank's independence or not, and if it would, what safeguards would apply around exercise of the power.
- We consider it crucial that the Bank should consider the possible impact of its rules on relevant deference arrangements afforded to the UK by overseas jurisdictions.
- It would be useful to understand how HM Treasury may seek to exercise their proposed power to direct the Bank. In particular, we recommend that there be prior consultation and adequate transparency around exercise of this power.
- While we agree that the Bank already engages effectively with the UK CCPs and CSDs that it regulates, we consider that the Bank should increase its engagement with the members and users of those CCPs and CSDs.

2. Responses

Question 1: Do you agree with the proposed set of statutory objectives and regulatory principles for the Bank, in its capacity as CCP and CSD regulator?

ISDA does not have any particular comments on the proposal for the Bank of England to have a general rulemaking power in relation to the regulation and supervision of CCPs. However, when granting rulemaking powers to the Bank of England it will be important to define clearly the territorial scope of those powers. For example, we note that when HMT launched its consultation into extension of the senior managers and certification regime to CCPs, it was not immediately clear that only UK CCPs would be in scope for this proposed regime, which caused some concern among ISDA's membership with respect to non-UK CCPs.

Impact of Bank of England rules on the current recognition regime for non-UK CCPs

We note that the consultation paper states that the proposed ability of the Bank to make rules in relation to incoming CCPs and CSDs will allow the Bank to maintain an appropriate and consistent recognition framework for overseas CCPs and CSDs. If there is any intention to amend the current recognition framework, we would welcome consultation on this at the earliest possible opportunity and ideally in parallel with the consultation on the Bank's rulemaking powers in relation to overseas CCPs and CSDs.

The recognition regime for non-UK CCPs should continue to operate on the basis of deference to the home state regulator of the relevant non-UK CCP (i.e., if a non-UK CCP has obtained recognition because it is subject to equivalent or appropriate home state regulation, it should not then be subject to duplicative regulation or supervision in the UK). Deference among global regulators promotes the efficiency of financial markets, allows the appropriate tailoring of regulatory standards to local jurisdictions, market structures and participants, and ensures the robustness of the global financial ecosystem. This is in line with the commitments made by G20 leaders at the Pittsburgh Summit in 2008¹.

In order to understand fully the potential impact of HM Treasury's proposed changes in respect of overseas CCPs, we would welcome further clarification on whether or not HM Treasury intends to make further changes to the EMIR equivalence framework which operates alongside the recognition framework for CCPs.

Additional powers and objectives for the Bank

In relation to the proposed additional powers for the Bank (including the power to take enforcement action and investigatory and information gathering powers), while we do not have any particular comments on the need for the Bank to have these powers for UK CCPs and CSDs, again it will be important to distinguish between the Bank's ability to exercise these powers over non-UK CCPs and CSDs.

In relation to the Bank's objectives, again we do not have any particular comments on the proposal that the Bank's sole primary objective should remain protecting and enhancing the stability of the financial system of the UK, or on the proposal for the Bank to have a secondary objective of facilitating innovation. We agree with HM Treasury that it would be appropriate to provide additional clarity through legislation and guidance that the Bank should pursue this

¹ In 2008, the G-20 leaders committed "to take action at the national and international level to raise standards together so that our national authorities implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage." [G-20 Leaders' Statement, The Pittsburgh Summit, Sept. 24-25, 2009 at p. 2, available at http://www.fsb.org/wpcontent/uploads/g20_leaders_declaration_pittsburgh_2009.pdf.] In September 2013, G-20 Leaders again declared that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulatory regimes.

objective in the context of non-UK CCPs and CSDs through adopting an approach of regulatory deference that is supported by appropriate memoranda of understanding between regulators.

We agree that the Bank should ensure that it does not discriminate on the basis of nationality or location in advancing its primary objective. We also agree that the Bank should take into account the financial stability impact of UK CCPs and CSDs on other jurisdictions and that while it would be disproportionate for the Bank to have to consider the financial stability impact of its regulation on every jurisdiction at all times, an appropriate way for the Bank to take into account the impact of its regulation on other jurisdictions would be through continued dialogue with regulators in those other jurisdictions and continued participation in fora such as global colleges.

Regulatory principles and activity-specific 'have regards'

We agree that the majority of the regulatory principles that currently apply to the PRA and FCA would be appropriate for the Bank's regulation of UK CCPs and CSDs (subject to amending the wording of the consumer responsibility principle to reflect that it does not relate to retail consumers). We also agree with the proposal to add a new principle for the Bank to have regard to the desirability of facilitating fair, reasonable and equitable provision of services by CCPs and CSDs to their members. We agree that the Bank should avoid access to services being restricted (other than on grounds which are relevant to preserving the resilience of the CCP or CSD), and consider that the Bank should also be required to prevent CCPs or CSDs from imposing unreasonable terms or discriminating unfairly between users.

We also agree that the Bank should be required to have regard to the public policy priorities underpinning retained EU law when remaking those requirements as rules. We understand that any 'have regards' will be set in the legislation granting the Bank its powers, so there will be transparency around what the 'have regards' are and around any changes to those 'have regards'.

HM Treasury power to direct the Bank

We note that paragraph 3.22 of the consultation paper states that the government will confirm that the Bank's regulation of UK CCPs and CSDs is operationally independent by confirming that HM Treasury's power to direct the Bank where necessary in the public interest (under the Bank of England Act 1946) will not apply. However, we also note that HM Treasury proposes that it should have the power to place obligations on the Bank to make rules in relation to CCPs and CSDs. The example given is that HM Treasury could require the Bank to use its rule-making power to make rules relating to risk management processes at UK CCPs. HM Treasury states that it would not be possible to use this power to impinge on the Bank's independence by seeking to influence what those rules should be. However, it is unclear whether this power would in fact impinge on the Bank's independence or not, and if it would, what safeguards would apply around exercise of the power. If the Bank has decided that it is not necessary to make rules with respect to a particular area or type of activity, and HM Treasury has concerns

about this decision, it seems to us that the appropriate course of action would be for HM Treasury to use its power to require the Bank to review its rules, rather than seeking to direct the Bank to make rules that it has already decided are not required.

Given the other objectives and principles that apply to the Bank's rulemaking power, it seems unlikely that it would fail to make rules in relation to an area that international standards indicate should be regulated (e.g., risk management processes for CCPs) or where failure to make rules could negatively impact the availability of recognition or equivalence decisions for UK CCPs. It would be useful to understand further how HM Treasury may seek to exercise this power. It would also be useful to understand what prior consultation or transparency there will be around HM Treasury's exercise of this power, as this will be critical to the ability of other stakeholders to engage with and comment on the proposed exercise of the power.

Question 2: Do you agree with the proposed enhanced accountability mechanisms to HM Treasury and Parliament, as well as the proposed measures to increase transparency to external stakeholders?

ISDA does not have any particular comments on the accountability mechanisms proposed in the consultation paper.

However, we would like to comment on the proposals in relation to overseas deference arrangements and trade agreements. ISDA considers it crucial that the Bank should consider the possible impact on relevant deference arrangements afforded to the UK by overseas jurisdictions when making rules and when setting general approaches on supervision. We agree that the Bank should be required to consult HM Treasury on the general anticipated impact of Bank rules on any deference arrangements and trade agreements, and would also ask that these issues are specifically flagged for comment in any discussion or consultation papers published by the Bank in relation to exercise of its rulemaking powers as well as being addressed in any cost benefit analysis.

We note that paragraph 5.27 states that for trade agreements the Bank would assess whether the exercise of its powers is in compliance with the UK's obligations under relevant trade agreements. We understand that this assessment would take place following consultation with HM Treasury or with appropriate input on the relevant trade agreements from HM Treasury, but would be grateful if this could be clarified.

In relation to HM Treasury's proposed approach to effective stakeholder engagement, although we agree that the Bank does already engage effectively with its direct stakeholders (i.e., the UK CCPs and CSDs it regulates), it will be crucial for the Bank to increase its engagement with the members and users of those CCPs and CSDs, particularly in the case of CCPs where members underwrite the risk of the CCP. For example, we would welcome the establishment of consultative working groups along the lines of those that ESMA runs, giving all stakeholders

the opportunity to have their views heard on a regular basis and giving the Bank a key perspective on the potential impact of its rules.

We thank you for taking the time to consider our views on this issue. If you have questions on any of the issues addressed in this letter, we are happy to discuss them with you at your convenience.

Yours sincerely,

Ulrich Karl

Head of Clearing Services

UKarl@isda.org

International Swaps and Derivatives Association

Annex

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 960 member institutions from 77 countries. These members comprise a broad range of 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, such as exchanges, intermediaries, clearing houses 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 website: www.isda.org. Follow us on Twitter @ISDA.