



30th January 2015

Markets Infrastructure Team,
Markets Policy Division,
Central Bank of Ireland,
Block D,
Iveagh Court,
Harcourt Road,
Dublin 2

RE: Consultation on Supervision of Non-Financial Counterparties under EMIR

Dear Sir, Madam,

ESB welcomes the opportunity to respond to this consultation on the supervision of medium NFCs- under EMIR.

In summary, ESB believes that

- (a) A simpler form of ERR is provided which is not third party assessed is appropriate. If the Central Bank of Ireland (CBOI) wants a third party assessed version, they can request it on an ad hoc basis in accordance with the S.I., and
- (b) Sub-categorisations of NFCs – We believe there is a lack of preciseness to the proposal by Central Bank which makes its implementation impractical.

This approach we believe will enable NFCs- to provide the comfort and confirmation to the CBOI that they are complying with EMIR obligations while at the same time minimising resource and cost burdens on NFCs-. The application of the third criterion in the exemption noted in the S.I. is superfluous and of no added value to the monitoring regime.



In light of significant ongoing developments in the energy industry, industry participants have to undertake significant investment from a resource and systems perspective in meeting separate reporting requirements under the Regulation on Energy Market Integrity and Transparency (REMIT) in October 2015 and in the transition to a new market design that comes into force in October 2017. ESB believes that the proposed ERR in its current format will exacerbate resource and cost requirements and urges the CBOI to consider the suggestions outlined below in this response.

Yours sincerely,

A handwritten signature in black ink that reads "Marie Sinnott".

Marie Sinnott
Manager, Group Compliance, Risk and Environment



Question One: Do you think that this is the optimal categorisation which the Central Bank should use to underpin our supervisory framework? If not what other categorisation would you propose?

No, we do not believe the proposal is the optimal categorisation which the CBOI should use to underpin the supervisory framework for EMIR.

There is divergence between the suggested classification and that reflected in EMIR. Consequently, the proposed categorisation creates confusion. ESB and its relevant subsidiaries, which contain all of ESB's derivative instruments, are each categorised as NFC-. We would be concerned that the phrase on page 8 "...or that have portfolios of derivatives that are notionally above the clearing threshold but are exempt because they constitute hedges of commercial or treasury activities" implies that ESB as a Group could potentially be categorised as a Large / Complex NFC, notwithstanding that it is an NFC- under EMIR. We would propose that the classification mirrors EMIR classification. This is fundamental and forms the basis for how we have responded to Consultation Paper 90 (CP90).

It is presumed, but not entirely clear, from the sub-categories proposed that it is intended each affiliate (with a registered office in Ireland) within a Group would be categorised individually in accordance with that affiliate's NFC status and subject to the appropriate supervisory regime for that affiliate. We would support this view. Nowhere does S.I. No. 443 of 2014 ("the S.I.") or the CBOI consultation specifically provide for supervision or EMIR Regulatory Returns (ERR) at a Group level. It is also not clear whether entities with an LEI issued by the Irish Stock Exchange are intended to be captured by the CBOI's supervisory regime notwithstanding that that entity may be registered as a company in a different jurisdiction (and subject to the EMIR reporting regime in that jurisdiction).

If it is intended that supervision is at a Group level and categorisation will be based on aggregate Group positions, then the aggregated gross notional value of ESB's OTC contracts (including commercial and treasury activities) at a Group level may indeed approach the clearing thresholds at times. These positions would be in economic (and usually accounting) hedging relationships and are not speculative. But if the aggregated gross notional value is being considered as part of the CBOI's supervisory regime, entities like ESB will effectively be considered as NFC+. We believe that this would be contrary to the objective and intention of EMIR.

To impose same level of compliance on NFC- companies as Financial Counterparties or NFC+ entities is unnecessary, impractical and not proportionate to potential systemic risks posed to the relevant financial markets by an NFC-.

We also note that the sub-categorisations proposed in the consultation seem to assume that an NFC will simply fall and remain in just one of these sub-categories. However, it is entirely possible that an NFC- could move between categories in an



ERR period or between ERR periods e.g. during 30 day rolling average period. Therefore, under this proposal there would be little certainty as to which supervisory regime an NFC will fall into in any given period and actually could result in an NFC being categorised incorrectly simply by reason of an exceptional period. We would suggest that categorisation be in respect of the status of an entity at the end of the reporting period only.

ESB would welcome clarity on these points. We are of the view that the CBOI's categorisation of NFCs should be consistent with EMIR i.e. that OTC derivative contracts entered into in order to reduce risks relating to the commercial or treasury financing activity of the NFC are excluded from the calculation of the clearing thresholds.

Question Two: Should the minimum threshold be set at a level above the criteria specified in the S.I. and if so, what would be the appropriate level?

We believe the proposed sub-categorisation of NFC-s is insufficiently precise to give any certainty as to what supervisory regime will apply in any particular period and does not add materially to the stated objective of capturing NFC-s that are of systemic risk to the financial system. We would also question the ability of minimum thresholds as currently set out in the S.I. to be useful in this regard.

In particular, we question why an NFC must meet the third criterion in order to be exempt. Whether an NFC uses delegated reporting or not is, generally speaking, for operational or commercial reasons. It also assumes that an NFC will have delegated reporting in place for all of its OTC derivatives, whereas this may not be an option in all cases for the entire period to which the ERR relates.

In relation to the other two criteria, the S.I. limits seem generally appropriate. However, our preference would be for limits to refer to notional monetary values only, regardless of the number of instruments. If an entity has entered into a large number (>100) of OTC contracts, but the total notional value is low (<€100m) then the underlying risk is presumably low.

In addition, the S.I. makes no reference to whether intragroup transactions as described in Article 3 of EMIR are excluded from the threshold limits. We would presume that such intragroup transactions would be excluded.



Question Three: Do you envisage any operational or other difficulties with the Central Bank adopting this approach? If so please provide commentary as to how these difficulties could be resolved?

See response to question one. ESB does not believe that it is appropriate that an NFC- corporate entity, which enters into derivative contracts purely to reduce risk and not for speculative purposes, might have the same supervisory approach as a supervised financial counterparty. In our view the CBOI's supervisory categories should match with EMIR categories and that only NFC+ entities would be treated in the same manner as supervised financial counterparties.

The tenet of the sub-categorisations seems to be based on the assumption that the only way to comply with its supervisory obligations under EMIR is for CBOI to understand the nature of the NFC's derivative transactions and that the only way to achieve that understanding is to obtain information directly from the NFC by way of an ERR and/or by direct supervision.

For NFC- entities we would suggest that the data currently reported by these entities to Trade Repositories (TR) (either directly or through delegated reporting) be utilised by the CBOI to support thematic inspections by the CBOI on a rolling basis linked to the size and risk of entities. Data mining of the existing reporting under EMIR, together with targeted thematic inspections, would be more efficient and less burdensome and costly for entities than the completion of the proposed ERR regime, while still allowing the CBOI to carry out its responsibilities to supervise EMIR compliance.

Given the volume of change, and consistent with a risk-based approach in assessing firms' compliance with the new requirements, we believe that the utilisation of data currently reported by entities is sufficient to meet CBOI's supervisory responsibilities. However, if an ERR is still considered necessary, it should simply be a form confirming:

- counterparties compliance with the requirements for trade reporting, including having established connectivity or appropriate delegated reporting arrangements, internal systems to ensure the accuracy of reports, and having both acquired Legal Entity Identifiers and ensured that they are renewed annually;
- non-financial firms assessing and monitoring their status against the clearing threshold in line with EMIR.

This is the approach being taken by the Financial Conduct Authority in the United Kingdom. Therefore, if the CBOI is minded to introduce an EMIR Regulatory Return at this stage, we suggest it should focus on NFC- providing confirmations that the above obligations are being complied with. Such a methodology would



ensure consistency of approach across the two principal EU jurisdictions in which the majority of Irish corporates operate.

It would also give the CBOI further opportunity to tailor the supervisory framework for NFC- entities with the benefit of improved data on the number and diversity of firms in the category based on returns provided thereby avoiding unnecessary costs for NFCs.

Failure to ensure such consistency of approach, particularly if a more expansive reporting regime in Ireland resulted in higher compliance costs, would lead to an uneven playing field across EU states. This would distort the market for genuine hedging activity, and might even create perverse incentives for Irish corporates not to engage in appropriate hedging to mitigate risk.

In light of significant ongoing developments in the energy industry, industry participants have had to undertake significant investment from a resource and systems perspective in meeting separate reporting requirements under the Regulation on Energy Market Integrity and Transparency (REMIT) in October 2015 and in the transition to a new market design that comes into force in October 2017. ESB believes that the proposed ERR in its current format will exacerbate resource and cost requirements and urges the CBOI to consider the suggestions outlined in this response. We hope that the CBOI is in regular communication with other regulatory bodies in Ireland (such as the CER) regarding the impact of their respective work programmes on each other.

Question Four: Should the Central Bank accommodate tailored submission periods from NFCs, or should it determine a fixed date for the submission of all ERRs?

We are supportive of CBOI's need to adopt meaningful supervisory processes to discharge its responsibilities under EMIR. In this regard, we appreciate that the adoption of an ERR procedure might be considered an important tool by the CBOI in the development of an appropriate supervisory regime even if we believe that data mining of the existing reporting under EMIR, together with targeted thematic inspections, would be more efficient and less burdensome and costly for entities than the completion of the proposed ERR regime.

However, the proposal to introduce a mandatory annual, third party assessed ERR is disproportionate to the objectives of ensuring the stability and integrity of the financial system. In addition, the level of information which is being requested is unnecessary and in some cases excessive.



If ERR's are to be required, we believe that a simpler ERR, without third party assessment could be submitted in line with an entities statutory financial reporting year.

If necessary, in support of thematic inspections on a rolling basis by the CBOI (see our response to question three above), the CBOI could seek the submission of a third party assessed ERR on an exception basis as required in accordance with its powers under the S.I.

Question Five: If the ERR was not adopted, how should the Central Bank charge supervisory costs to all categories of NFCs? Should we for example have a sliding scale for NFCs, which is dependent on the level of derivative activity?

We would hope that incremental supervisory costs would be low if the information available from existing reporting to TRs under EMIR was utilised. We would not be in favour of any fees linked to derivative activity so that the incremental cost of entering into an OTC contract would be higher for an Irish entity than for an entity from another EU jurisdiction. A flat fee on all supervised entities would be preferable. If an alternative structure is proposed all budgeted associated costs for charging to responding companies would need to be provided a year in advance with an indication of appropriate capping on such costs.

In common with many entities, ESB has already incurred additional costs in relation to EMIR adoption and compliance. Significant enhancements have and are still being made to our systems giving the evolving nature of EMIR, REMIT and MiFID II. Any additional direct supervision costs should be minimal given the costs already incurred meeting our reporting obligations. If the current proposals are adopted we will likely have to incur further system re-design and costs.

Question Six: If you are of the view that the ERR should be adopted, as broadly outlined, are we asking the right questions in the ERR? If there are questions which can be improved upon, please let us have this feedback.

We are of the view that if the ERR is to be adopted it should not be adopted in its current form. As mentioned previously in response to question three and question four, for NFC- entities we would suggest that the data currently reported by these entities to TRs (either directly or through delegated reporting) be utilised by the



CBOI to support thematic inspections by the CBOI on a rolling basis linked to the size and risk of entities. Data mining of the existing reporting under EMIR, together with targeted thematic inspections, would be more efficient and less burdensome and costly for corporates than the completion of ERRs, while still allowing the CBOI to carry out its responsibilities to supervise EMIR compliance.

However, if ERRs are to be required, the approach suggested in Question 3 and 4 above is proposed i.e. a return confirming that:

- counterparties are complying with the requirements for trade reporting, including having established connectivity or appropriate delegated reporting arrangements, internal systems to ensure the accuracy of reports, and having both acquired Legal Entity Identifiers and ensured that they are renewed annually; and
- non-financial firms are assessing and monitoring their status against the clearing threshold in line with EMIR;

We suggest the format in Appendix 2 below for consideration.

In relation to an enduring solution, should the CBOI persist with the draft ERR outlined in the consultation, clarity is required around the wording of some of the questions in the ERR. Detailed comments in respect of these are included in Appendix 1 to this submission. In general many of the questions focus on the movement in the number (as opposed to financial quantum) of OTCs entered into, which is not necessarily aligned to the level of risk therein. It is hard to see an added value for these questions (notably tables 2.2 to 2.4) either for the entities or the CBOI, proportionate to the level of manual intervention and, by implication, cost required, given that entities do not analyse their derivative portfolio in this manner and existing systems do not readily generate this information.

We would also welcome clarity on the effective date. Our understanding is that the first submission of regulatory returns from NFCs to the CBOI as NCA is projected to be in Q3, 2015. Our preference would be that start date of the reporting period for the first submission would be no more than three months before the due date, although for convenience entities could opt for longer initial submission periods in keeping with the principle of question four above. This would reduce the volume of OTCs which had already matured by the date of the first submission being caught in scope.

If ERR should be adopted in its current form we believe it would add considerable administrative burden and cost to provide the ERR for 2015 given that companies continue to embed and improve EMIR and other regulatory related processes. For instance, it was necessary to implement the EMIR requirements manually in our business. Therefore, the provision of ERR for 2014 if the current proposal remains



unchanged would require manual extraction. As an enduring solution additional costs would have to be incurred on system developments to provide the required data directly from our systems.

Question Seven: If there is specific feedback re any professional disclosures, please submit details to the Central Bank.

ESB is subject to many laws and regulations - including EMIR - and has put processes in place to ensure compliance with these. Most of these laws and regulations do not involve the completion and sign-off of detailed reporting along the lines of the draft ERR, which would not be aligned with our Treasury or Energy Trading systems and would be in addition to the existing reporting requirements in our Financial Statements and to the TRs under EMIR. CP90 is very welcome but does not appear to take account of the existing reporting processes (including delegated reporting) and thresholds under EMIR or related oversight and monitoring by other national authorities – including in ESB’s case the Irish electricity market by the CER. We believe that the CBOI in seeking to ensure compliance with EMIR should align as closely as possible to these existing processes/categories/oversight arrangements and should seek to leverage the available data reported under EMIR in the first instance.

Question Eight: What is your view on the proposed role of a Third Party Assessor?

If a Third Party Assessor is required, our preference would be that this role could be filled by our Internal Audit function for NFC- and should not require approval by the Central Bank. If this was not permitted by the CBOI, we believe that obtaining a different Third Party Assessor (e.g. an External Statutory Auditor) would be expensive for ESB Group relative to the benefit to the CBOI, given the level of assurance which would be provided by the draft report on pages 35-36 of CP90. From initial discussions with our Statutory Auditor, we understand that they would need to develop agreed-upon procedures (AUP) with us, and with the CBOI, in order to provide an appropriate level of assurance in line with auditing standards for such an engagement. Such procedures would be relatively onerous given the level of manual intervention required to prepare an ERR, as noted above.

We note that CP90 does not include any information of the likely costs of a Third Party Assessor in this regard, notwithstanding that the S.I. requires the CBOI to have regard to the costs implications of an ERR.



Appendix 1 Detailed Comments on draft ERR as presented

Section One

Question 1.2 - this question should include LEI in the wording of the question.

Questions 1.7 and 1.8 – Reference start date of the ERR. We would welcome clarity on the effective date as to when ERRs are effective from if ERRs are to be required.

Section Two

Table 2.1 – 2.1 (b) Delegated reporting question is not clear. Has the NFC delegated reporting to Counterparties who report on NFCs behalf to TRs?

Does the NFC use an intermediary (either internal (within Group) or external) to report to TRs?

There is no further mention of delegated reporting in the ERR apart from question 2.1 (b).

Table 2.2 – Suggest that this question should read Total number of contracts executed during the NFC's reference period for the ERR. In the field in relation to number of contracts reported to a TR this should state including delegated reporting as there is no mention of delegated reporting here.

For simplicity, we would prefer if this table was split into the following sub-categories only::

Commodities

Foreign exchange

Interest rate

Other.

Table 2.3 – Number of live contracts as at reference date of the ERR will include contracts which have been reported in a prior period but are still live as at reference date. In the field in relation to number of contracts reported to a TR this should



state including delegated reporting as there is no mention of delegated reporting here.

For simplicity, we would prefer if this table was split into the following sub-categories only:

Commodities

Foreign exchange

Interest rate

Other.

Table 2.4 – Clarity required on Questions 2.4 (a) and 2.4(b). Section Two Notes on Table 2.4 refer to NFCs reconciling valuations however, table 2.4 questions refer to reported valuations which are not a requirement for an NFC- entity.

Table 2.5 – Clarity required on field referring to Gross volume (in Euros). Does this field require Euro nominal values of all derivative contracts executed during the period or only nominal values of live derivative contracts executed during the period?

Clarity required on field referring to Gross stock (in Euros). Does this field require Euro nominal values of derivative contracts which are live as at reference date? Note that this will include contracts which have been reported in a prior period but are still live as at reference date.

For simplicity, we would prefer if this table was split into the following sub-categories only:

Commodities,

Foreign exchange

Interest rate

Other.

Table 2.6 - In relation to 2.6(b) internal and IFRS hedging models are not mutually exclusive: ESB uses internal hedging models which are also IFRS compliant.



Section Four

Whilst we note its voluntary nature, we would question whether Section Four is appropriate for a regulatory return as it appears to require information which is in excess of the requirements of EMIR and of the role of the CBOI with regard to supervision of Non-Financial Counterparties (particularly those in the NFC-category). We would submit that there are more appropriate forums by which CBOI could seek voluntary responses to this type of information.



Appendix 2 Alternative ERR

Daily Trade Reporting	No. of Reportable trades in the period
Backloaded Traded Reporting	Phase 1 & 2 Completed (Y/N)
	Phase 3 Completed Y/N
Risk Mitigation	No of reportable trades not reported on time Reason:
	No. of relevant confirmations not completed on time (#) Reason:
	All EMIR Reconciliations completed (Y/N) If No, Number: Reason
	No. of open disputes
	No. of Counterparties identified for compression exercise
	No. of compression exercises not completed # Reasons:
NFC Status	e.g. NFC -