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Re. Consultation on the Supervision of Non-Financial Counterparties under EMIR

Dear Sirs

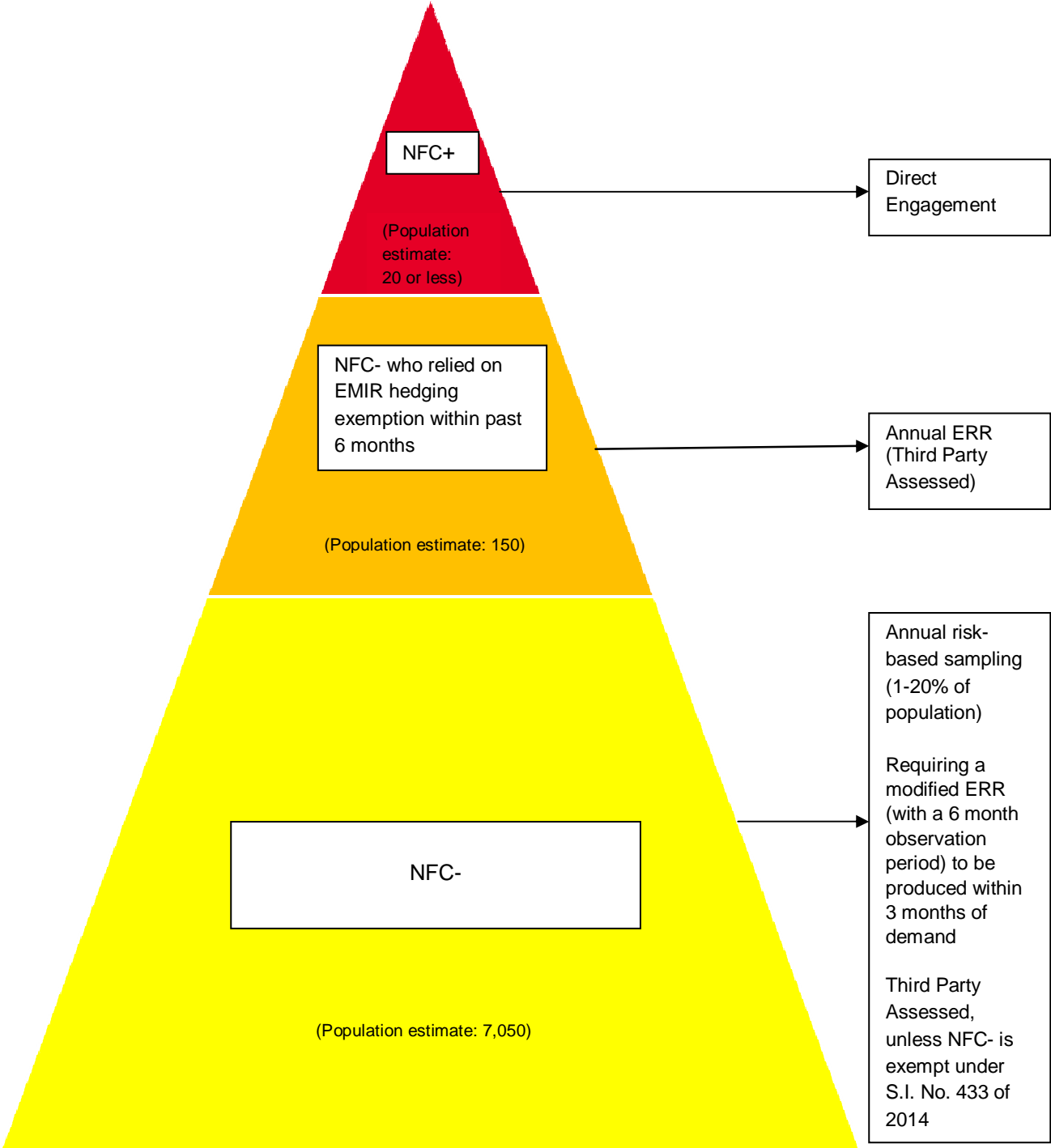
The Irish Debt Securities Association (“**IDSA**”) appreciates the opportunity to respond to the Central Bank’s proposals in Consultation Paper 90 (“**CP 90**”) on the Supervision of Non-Financial Counterparties (“**NFCs**”) under EMIR.

An industry organisation established with the aim of promoting and developing the environment and infrastructure in Ireland to support the global structured finance, debt securities and the specialist securities industries, IDSA promotes a responsible, sustainable and effective environment within which debt securities and other specialist securities can be used to facilitate transactions, to create investment products and to raise capital funding. A membership organisation, the members of IDSA include the corporate administrators, trustees, audit firms, legal advisors, listing agents, and other parties involved in the structuring and management of special purpose vehicles in Ireland.

With a specific focus on maintaining the environment and infrastructure in Ireland to support the global structured finance, debt securities and the specialist securities industries, our members and their representatives have a particular interest in this consultation and any subsequent supervisory framework for Non-Financial Counterparties under EMIR. In this regard we have been pleased by the approach of the Central Bank during the various stages of the consultation process, and the positive engagement to determine an appropriate supervisory approach while recognising the many different considerations, however, it is critical that any approach does recognise all of those considerations. In seeking to address both the responsibilities of the Central Bank and the concerns of the industry we wish to propose a somewhat modified supervisory framework, similar to that discussed when we met, but in principle very similar to that contained in CP 90. We believe our proposal would provide the Central Bank with a flexible, proportionate, efficient and effective supervisory framework.

On the following page, we include a diagram summarising the proposed supervisory framework for monitoring EMIR compliance by Irish NFCs.

IDSA's Proposed Supervisory Framework for Irish NFCs under EMIR



The proposed supervisory framework, similar in many ways to that set out in CP 90, offers the following advantages:

1. the proposed supervisory framework gives the Central Bank an ongoing ability to scale the number of ERRs required to be produced by NFC-s to more proportionately reflect the perceived systemic risk and non-compliance risk represented by different types of NFC-s;
2. the proposed supervisory framework adopts a risk-based approach to selecting which NFC-s are required to produce an ERR, creating a powerful incentive for all NFC-s and their service providers to maintain high levels of EMIR compliance;
3. the proposed supervisory framework avoids creating new arbitrary NFC- sub-categories;
4. the proposed supervisory framework gives the Central Bank an ongoing ability to scale the number of ERRs required to be produced by NFC-s to match the resources available to the Central Bank 's ERR review team;
5. while harmonisation of the supervisory approaches among the Member States remains a work in progress, the risk-based supervisory framework is more closely aligned with the supervisory approach currently adopted across the EU in respect of EMIR; and
6. by referencing the existing NFC+ and NFC- categories under EMIR, the proposed supervisory approach is one that could be recommended at ESMA level for adoption by other Member States.

Attached to this letter we also include our response to the specific questions set out in CP 90. Should a further meeting to discuss the above proposed supervisory framework or the responses to the specific questions be helpful, we would welcome such an opportunity.

Yours faithfully

Gary Palmer
For and on behalf of
The Irish Debt Securities Association

Questions for consideration:

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?

Included in our proposed supervisory framework we have assessed and advocated a risk-based supervisory approach referencing the categorisation as included in the EMIR legislation. We are of the strong view that introducing unnecessary distinctions and additional categories would further complicate an already complicated framework. For many reasons we believe that the existing categories of NFC+ and NFC- are sufficient. Any further distinctions, based on arbitrary considerations and not referred to within the EMIR framework, are unnecessary and would simply cause the Irish approach to EMIR supervision to be out of line with the rest of the EU.

During some of the discussions on this it has been explained that the proposed categorisations in CP 90 have been designed to, amongst other things, remove “small non-complex NFC-s” from the requirement to submit an annual EMIR Regulatory Return (“ERR”) approved by a third party assessor. If, as proposed, the risk-based approach to supervision is adopted, such a distinction will not be required and the ERR form could be designed to require the approval of a third party assessor, unless the relevant NFC- qualified for the exemption in S.I. No. 433 of 2014 (the “S.I.”).

From engaging with the Central Bank through-out the consultation process we understand that the Central Bank is seeking to obtain a better awareness of NFC-s, their business models and the rationale behind their derivative transactions. We believe this is relevant to EMIR compliance only where an NFC- is relying on the EMIR hedging exemption in order to avoid being categorised as an NFC+. Consequently, IDSA proposes that where any NFC-s have relied on the EMIR hedging exemption within the previous six months in order to remain NFC-s, it would not be disproportionate for the Central Bank to require ERRs approved by a third party assessor from all such NFC-s.

With respect to any use of or extension of the “direct engagement model” to NFC-s, from discussions with our members we do not believe that this arrangement would be utilised by any NFC-.

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?

Following our proposed supervisory framework and the adoption of a risk-based approach, no sub-categorisation of NFC-s will be required. During much of the engagement to date, and particularly at the EMIR information session, it was noted that any threshold level other than the relevant EMIR clearing thresholds would be arbitrary.

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

The approach as set out in CP 90 will give rise to a number of significant difficulties. The difficulty, from an administrative perspective, in collating and extracting value from the colossal volume of data received by trade repositories pursuant to EMIR has been widely acknowledged, including most notably at the December presentation by Professor Christian Johnson at the Central Bank. Requiring potentially and additionally thousands of ERRs to be provided on an annual basis will significantly add to that challenge. A more focused risk-based supervisory approach will enable the Central Bank to address its responsibilities in a structured, proportionate and complete way.

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

For the many reasons included, a risk-based supervisory approach is proposed. With the application of a risk-based approach, the selected NFC-s should be allowed use data collected at their financial year-end date as an ERR reference date. This could assist the quality and accuracy of the ERRs submitted and reduce the burden placed upon the selected NFC-s by allowing them the opportunity, should it be appropriate for them to do so, to utilise the external auditors to assess the ERR, and allow the NFC-s to link the ERR with their existing EMIR portfolio reconciliation requirements.

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?

This issue has not been considered in much detail as the industry is strongly of the view that a modified form of ERR (on a risk-based sampling basis) is required for NFC-s not relying on the EMIR hedging exemption (and a full ERR on an annual basis for all NFC-s relying on the EMIR hedging exemption). Nevertheless, our members would be extremely concerned if any formal proposal to implement a levy for executing derivatives in Ireland was included as any such formal proposal would challenge and damage Ireland's reputation and competitiveness as an international financial centre. We are not aware of any charge or levy being considered or imposed elsewhere in connection with the cost of supervising compliance under EMIR by NFC-s. It is vitally important to Ireland's financial services sector that no levy be formally proposed until such time as levies have become effective in all other comparable and complimentary jurisdictions in the EU. The adoption of the risk-based supervisory approach would, amongst other things, enable the Central Bank to manage the cost of supervision in a more proportionate way.

Some of the obvious and immediate consequences of any unilateral application of a charge or a levy would be that large cross-border financing, investment structures and global corporate treasury operations would be designed to exclude Ireland where possible and any Irish party to a derivatives contract would look to novate such contracts over to a new non-Irish derivatives trading entity.

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.

The ERR could be a useful tool to assess NFC- compliance with EMIR if used on a risk-based basis, except where an NFC- is relying on the EMIR hedging exemption, in which case it would be reasonable to require an ERR to be produced annually. However, for an NFC- who has been selected to provide an ERR under the risk-based sampling, the ERR should be modified to the extent appropriate to assess compliance over a six month period rather than a twelve month period.

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

N/A

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

In the proposed and advocated supervisory framework the principle of a Third Party Assessor is included, except for those NFC-s qualifying for the exemption under the S.I.. However; the cost implications of a Third Party Assessor are not yet known but we are of the view that the requirement

for a Third Party Assessor is likely to be disproportionate to the probable systemic risk involved or the probable risk of non-compliance with EMIR.

The consultation process has clarified the data verification role of the Third Party Assessor and that an internal audit function may be eligible to act as the Third Party Assessor, however; a significant number of NFC-s do not have sufficient internal resources to satisfy the requirements for independence and expertise. Consequently, the requirement for a Third Party Assessor is likely to add significant administrative burden and expense for many NFC-s and we note the requirement in the S.I. that the the cost implications of an ERR need to be considered.