Irish Association of Corporate Treasurers

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IACT Response to CP90

Dear Sir/Madam,

The Irish Association of Corporate Treasurers (IACT) welcomes the opportunity to respond to the Central Bank's proposals contained in Consultation Paper 90 on the Supervision of Non-Financial Counterparties under the clearing threshold ("NFC-s") under EMIR and is encouraged by the approach of the Central Bank by pro-actively seeking feedback on its proposed regulatory framework. We would like to express our appreciation for the engagement that the Central Bank has sought by organising information sessions and in particular for allowing the IACT to meet with the Central Bank to express our members' concerns.

The IACT was founded in 1986 with the aim of promoting the practice of corporate treasury management in Ireland. We are a not for profit organisation that provides a forum in which corporate treasurers can meet and exchange information. The IACT currently has in excess of 400 members including practicing treasurers from major Irish public companies, multinationals and commercial state entities, as well as a number of smaller and medium-sized enterprises (SMEs).

The IACT has been active in seeking to educate its membership in relation to their EMIR obligations. We support the Central Bank and other national competent authorities in their steps to implement EMIR in a manner which strikes a balance between increasing market transparency, reducing risks and encouraging the appropriate use of derivatives for managing and mitigating commercial and financial risks.

We have engaged with our members on Consultation Paper 90 and, as practitioners, our members have expressed a number of significant concerns relating to the proposals for NFC-s:

- **Why is Ireland being treated differently?** The Central Bank's proposal that a NFC-s in Ireland should generally be required to (a) submit a EMIR regulatory return ('ERR'), (b) have this ERR third party assessed and (c) be levied or taxed for supervisory costs is unique to Ireland and is more onerous than the approach that other national competent authorities in the EU are taking.

- **Lack of Consistency:** The proposed inconsistent implementation of EMIR at a local level within the EU will give rise to the risk of regulatory arbitrage, rather than effective risk management. We would encourage the Central Bank to work with ESMA to foster a co-ordinated approach by national competent authorities and ensure that there is a level playing field for derivative users across all Member States. As long as such a co-ordinated approach in the EU is not taken, the IACT believes that the Central Bank should not prematurely move

forward with its proposals as we believe they will disadvantage Irish businesses as well as international groups with a presence in Ireland compared to other EU member states. Implementation of these proposals will mean that Irish businesses will face additional costs for hedging activity that their competitors in other EU member states are not facing, thereby reducing competitiveness of Irish businesses. Furthermore, international treasury operations may elect to move derivative activity (and jobs) to other Member States, rather than build new reporting systems and incur the unnecessary cost of complying with a bespoke supervisory regime in Ireland.

- **New Costs for Irish NFC-s**: CP90 does not assess the costs for NFC-s in Ireland of setting up a new local reporting model as an overlay to its existing EMIR reporting requirements, nor does it assess the costs for NFC-s of obtaining a third party assessment, nor does it give any indication what the level of levy or charge the Central Bank will be imposing on NFC-s. The IACT believes that the Irish Statutory Instrument for EMIR requires the Central Bank to have regard to those costs. In the IACT's view these costs are likely to be significant, are disproportionate to the benefit obtained and could discourage economically sensible and appropriate hedging activity.

- **In excess of the agreed position for NFC-s at EU level:** Creating new artificial categories of NFC-s in Ireland adds further complexity to already challenging rules. Applying a unique mandatory annual reporting requirement for NFC-s in Ireland on a universal basis tends to undermine the agreed EU level approach for NFC-s that EMIR should be less onerous for NFC-s and that NFC-s can delegate EMIR reporting to a qualified third party. The IACT considers that the Central Bank's requirement for an ERR from NFC-s that have delegated their reporting, is ignoring the benefit of the delegated reporting facility that EMIR offers.

- **Risk-based approach alternatives:** IACT believes a risk-based approach to supervision is more appropriate and proportionate and in line with the Central Bank's established approach in other areas. There may be a role for a modified form of ERR if it used as a supervisory tool on a selective basis. Third party assessment should be required as an exception only where the Central Bank has reasonable grounds for requiring this additional comfort. However, we would strongly encourage the Central Bank to engage in further consultation about its proposed content of the ERR.

We attach in Section A to this letter a more detailed response to the specific questions posed in CP90, together with more detailed comments on the overall approach suggested in CP90 and what we believe are constructive suggestions on alternatives. Section B contains our detailed comments on the form of ERR contained in CP90.

We would be happy to discuss our response in more detail.

Yours Sincerely,

Remco de Vries
President
The Irish Association of Corporate Treasurers

Irish Association of Corporate Treasurers

SECTION A: IACT DETAILED RESPONSE TO SPECIFIC QUESTIONS IN CP90

General remarks

IACT understand that the main provisions of EMIR have direct effect in EU Member States in order to ensure a consistency of approach in relation to the regulation of derivative activity throughout the EU. In IACT's view, if each EU Member State introduces bespoke local supervisory requirements there is a risk that the objective of ensuring consistency of approach will be undermined.

As a general matter, we believe that CP90 would be more informative for Irish market participants if it had included comparative information on the regimes adopted by other Member States, and the Central Bank's reasons for proposing a different regime in Ireland as well as a cost-benefit analysis of the proposals.

We understand that Ireland was one of the last Member States to implement legislation to appoint a national competent authority. Accordingly, the Central Bank had the benefit of considering the supervisory regimes adopted in other Member States prior shaping its own proposals. The IACT understands that other Member States have, in broad terms, adopted a risk-based approach to supervision of NFC-s. The IACT is not aware of any Member State which hosts a significant international financial services industry having adopted mandatory local reporting for NFC-s.

For example, the Financial Conduct Authority in the United Kingdom has indicated that its "….*supervisory approach will be risk based, taking into account the position of particular firms and the markets in which they operate….*" http://www.fca.org.uk/firms/markets/international-markets/emir/fca-supervisory-priorities.

Similarly, we believe that the Dutch regulator AFM ('Authority Financial Markets') is adopting a risk based approach. We understand from Dutch market participants that AFM are using the information in the trade repositories to identify who are the large users of derivatives. AFM is also approaching its supervision of NFC-s via its existing supervisory mandate for regulated banks. For example, in relation to compliance by NFC-s with requirements for timely confirmations and portfolio reconciliations they are talking to local banks and a bank is permitted to provide to AFM monthly reporting of which customers are not reconciling their trades within five days. Recognising that there are market-based solutions in place for EMIR, AFM may also look at who has signed an ISDA protocol for portfolio reconciliation and dispute resolution. If a derivative user has not signed the ISDA protocol, but derivatives are being traded, then this could be an indication that EMIR may not be complied with and AFM may use that fact as a trigger to follow up with the NFC. Our understanding is that AFM may have considered following the German regulator's example and introducing an audit requirement for NFC-s, but has not decided to proceed with that approach.

In our response to the Department of Finance's consultation in relation to the powers to be granted to the Central Bank in relation to EMIR, we stated that: *'We believe that it may be acutely damaging for important sectors of the Irish economy if prudent hedging activity was stigmatised or made much more onerous in Ireland than in other member states. The EMIR treatment of the NFC who operates below the clearing thresholds should not be undermined.'* The IACT believes that imposing disproportionate and more onerous supervisory requirements in Ireland as compared to other Member States will create an unlevel playing field across the EU. This will potentially give rise to regulatory arbitrage opportunities for derivative users rather than effective risk mitigation within the EU - the relevant users of derivatives could move from Ireland to another Member State.

Risk Magazine reported that, as of September 2014, there were 187,000 entities registered to report in Europe[1] and that DTCC is seeing in average 12.35 million weekly trade reports. Given this level of

[1] Risk Magazine, 29 September 2014.

derivative activity in Europe, IACT does not believe that that the local implementation of EMIR was intended to require NFC-s to build a new reporting infrastructure to re-report to national competent authorities, or for NFC-s to be required to incur professional fees to third parties to assess compliance.

The Statutory Instrument[2] requires the Central Bank to have regard to the cost implications of an ERR to the counterparties concerned. CP90 does not include any information on the likely costs for NFC-s. As an illustration, a recent article in Risk Magazine included some market commentary from Germany which is the only other Member State that has imposed an audit requirement. The relevant article suggested that for a large corporate the costs of compliance with local EMIR audit related requirements will be a "high five-digit" bill for set-up and a "low five digit" bill for annual checks[3]. While it is difficult to accurately cost the Central Bank's proposals for third party assessment without further information on the terms of engagement, the IACT believes that compliance costs for engaging one of the large to medium sized audit firms are likely to be higher than the €5,000 per annum that we understand the Central Bank is assuming, and possibly significantly more, depending on the size and complexity of a corporate's treasury operation.

The IACT does not have independent information of the number of NFC-s which are above the "small NFC" threshold suggested by the Central Bank in CP90. However, assuming a population of NFC-s between 1,000 and 5,000 and annual third party assessment costs of €5,000 to €20,000 per NFC-, the annual costs of compliance with the Central Bank proposals are potentially very significant for Irish market participants. This is excluding the internal costs for an NFC- and any initial set-up costs (unless the ERR data fields are limited to those which can be readily re-produced by existing reporting systems). Given the likely costs of compliance, we believe that the Central Bank can only justify requiring a third party assessment for a limited number of NFC-s in each year.

More generally, companies in Ireland have to comply with many other laws and regulations, including in the area of financial services and regulated markets. For example, certain Irish companies have obligations under other financial services related legislation such as the Prospectus Directive, the Market Abuse Directive and the Transparency Directive. The Central Bank has a role in relation to compliance in these areas but, as far as we are aware, does not systematically require all affected companies to report to it on an annual basis in relation to compliance and it does not require Third Party Assessors to verify compliance to it.

The IACT suggest that the Central Bank consider how primary legislation such as the new Companies Act approaches compliance in relation to financial services related legislation. Section 225 of the Companies Act 2014 requires affected companies to include a statement in their annual return to the effect that the directors of the company have formed the view that the company as adopted appropriate measures designed to secure material compliance with the relevant pieces of legislation, including the Market Abuse Directive and the Prospectus Directive. If applied on a risk-assessed basis, the IACT believes that a similar approach to compliance with EMIR for NFC-s in Ireland would be appropriate and proportionate. For example, the Central Bank could consider issuing guidelines to the effect that an Irish company that has derivative trades outstanding may elect to make a statement in their annual directors' report that their use of derivatives was for risk management purpose and to indicate that the directors are satisfied that the company has adopted appropriate measures to ensure EMIR compliance (e.g. delegation of reporting, adoption/incorporation of ISDA protocol etc.).

We believe that there are alternative, less intrusive and more cost-effective and proportionate measures to supervise compliance by NFC-s with EMIR in Ireland are available to the Central Bank within the framework of the Statutory Instrument. The IACT urges the Central Bank to consider those alternatives and to provide the market with guidelines as to its proposed supervisory approach and priorities each year. The IACT believe that ERRs may have their place in the overall supervisory framework. This is if a risk based approach is adopted and ERRs are required from NFC-s on a

[2] Regulation 14 (2)(b), SI No. 433 of 2014.

[3] "Germany finds enforcement fix" – 13 August 2014, Risk Magazine.

selective sample basis only, with NFC-s being provided with reasonable notice to allow it deliver the requested data. Third party assessment should be requested in a limited number cases and only where the Central Bank has reasonable grounds for imposing these additional costs.

We understand from our discussion and the Central Bank's round table information session on 27 January 2015 that the Central Bank justifies its more onerous regulatory regime compared to other EU member states on the premise that 15% of messages into Trade Repositories in the EU are coming from counterparties with an Irish LEI. As no further analysis was provided, it is unclear to us what that actually means. If they were confirmed as Irish entities, how many of these entities were confirmed as NFC-s? And how was this approach benchmarked with other EU countries that have a similar dynamic in their volume of messages into Trade Repositories in relation to the size of their economy? (e.g. Luxembourg?)

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?

The IACT does not believe that the Central Bank's initial view of the categorisation of NFC-s is optimal.

The EU level EMIR framework does not distinguish between large and small NFC-s, nor does it contemplate that there would be a category of "non-complex" and "complex" NFC-s.

The IACT believes that the existing distinction between an NFC- and NFC+ is sufficient and, at this stage, is well understood by market participants. The IACT's view is that creating new artificial sub-categories of NFC for local supervisory regimes introduces new and unnecessary complexity to an already challenging framework.

The primary purpose of the proposed categorisation seems to be to exempt a sub-category of "small non-complex NFC-s" from the requirement to submit an annual EMIR regulatory return (ERR) which is to be validated by a third party. While the IACT welcomes any measure which reduces the number of NFC-s which are exposed to additional local compliance costs, the IACT's position is that requiring a mandatory ERR from all "Medium-sized NFC-s" is excessively intrusive and disproportionate (see general comments above).

If, as an alternative to requiring ERRs on a universal basis, a risk-based approach to local supervision is adopted by the Central Bank, as is the case (to the knowledge of the IACT) in practically all other Member States, there would be no requirement to create a new artificial sub-category of "small non-complex NFC-s" and "medium-sized NFC-s".

CP90 suggests that the Central Bank has formed the view in relation to all NFC-s that "*… [it] needs to know what this group of NFC's do, or, the rationale for why they do it…*". The IACT reads this statement as meaning that the Central Bank is interested in understanding how larger NFC-s use the hedging exemption. The IACT believes that there are more cost-effective, less intrusive ways for the Central Bank to obtain this understanding.

More generally, we would query what the Central Bank's role in the assessment of an NFC's use of the hedging exemption is in the case of a multinational corporate group. As the hedging thresholds are set on a group basis, we are not certain that the Central Bank would be in a position to make its own detailed assessment of the application of the hedging exemption without co-operation from national competent authorities in other Member States. The IACT believes that this aspect underlines the need for Member States to co-operate and adopt a consistent supervisory approach to EMIR.

Having consulted a cross-section of its membership, the IACT does not foresee circumstances where a large or "complex" NFC- would elect to opt for the so-called "direct engagement model".

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?

CP90 suggest that the Central Bank's initial view of the categorisation of NFC-s is based on the number of potential NFC-s in each category. CP90 does not include data in relation to the number of NFC-s in Ireland or the relative size of their portfolios in order to support this position. If the Central Bank has this data available to it, the IACT would invite it to make it available as part of the overall consultation process. The IACT does not have its own data which would support setting the threshold at a specific level, other than by reference to the EMIR clearing thresholds set out in the relevant EU technical standards. Any suggestion made by the IACT for a level other than the relevant EMIR clearing threshold would be arbitrary. As indicated above, the IACT does not believe any sub-categorisation of NFC-s is required if a risk-based approach is adopted as an alternative to mandatory ERRs.

If, notwithstanding the concerns expressed by the IACT, the Central Bank pursues its proposal to require an ERR from a defined sub-category of NFC-s, then we suggest that further research would be required by the Central Bank. In the IACT's view the Statutory Instrument expressly requires the Central Bank to have regard to cost implications (see general comments on costs in introduction above). From our discussions with and the information sessions held by the Central Bank, we understand that the Central Bank has no view of the cost implications faced by NFC-s. We therefore do not believe that it would be possible for the Central Bank to carry out a cost-benefit analysis of the ERR proposal without firmer information on the number of NFC-s located in Ireland which would fall within the threshold selected for mandatory reporting and the likely costs of obtaining the third party assessment. In addition, the IACT believes that any threshold selected based on that research, should exclude derivative contracts entered into on an intra-group basis in order to avoid a "doubling-up" effect.

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?

Yes.

New artificial sub-categories of NFC- create additional complexity and potential uncertainty for market participants. EMIR monitors clearing thresholds based on notional amount of derivatives entered into by all NFC-s in a corporate group. CP90 suggests that NFC-s will now need to establish new systems to monitor exposures on an individual NFC basis. CP90 does not provide any clarity on how an NFC- who periodically moves above and below the relevant legal entity threshold should be treated in terms of categorisation.

Applying new reporting obligations for NFC-s which exceed what may seem to be arbitrary thresholds at an individual NFC level may have the effect of discouraging appropriate hedging of commercial risks. As the Central Bank's proposals approach the thresholds on an individual legal entity basis, there may be a risk of regulatory arbitrage. For example, in order to avoid the ERR requirement, a corporate group could elect to manage its portfolio of derivatives so that no individual NFC- within its group breaches the specified criteria on a standalone basis.

Imposing an obligation on NFC-s to submit a mandatory ERR to the Central Bank undermines the position in EMIR that NFC-s are permitted to delegate their reporting obligations to a third party. The IACT cannot identify any provisions of EMIR which expressly contemplate that national competent authorities would impose an additional direct reporting obligation for all NFC-s at a local level. In the IACT's view, the right for an NFC- to outsource reporting obligation is a fundamental part of the primary legislative framework of EMIR. To require all NFC-s to re-report the same data, in a different format, directly to a national competent authority and at different times, is unnecessarily duplicative. In the IACT's view, it is difficult to see what purpose the requirement serves.

Obliging all NFC-s to have an ERR reviewed by Third Party Assessors will impose an unknown additional cost on all NFC-s and is disproportionate to any benefit which it may provide. The EU level EMIR framework legislative requires NFC-s to carry out portfolio reconciliation at specific times and based on certain specified criteria. Nowhere in the EU level EMIR framework is it contemplated that NFC-s would generally need to incur the further expense of engaging Third Party Assessors to verify and reconcile EMIR compliance.

All of these difficulties can be resolved by adopting an appropriate risk-based approach to supervision and requiring EMIR compliance statements or reports from NFC-s on a selective risk-assessed basis.

If, despite the availability of all detailed derivative data in Trade Repositories, the Central Bank continues to pursue the ERR model on a selective basis, the IACT would be willing to assist the Central Bank in re-designing the form of ERR to the benefit of both the Central Bank and the reporting Corporates.

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?

The IACT's position is that requiring an ERR from all NFC-s or an artificial sub-category of NFC-s is not the appropriate supervisory approach (see responses above).

If a risk-based approach is adopted and NFC-s are required to submit an ERR on a selective basis, we agree that the Central Bank should accommodate tailored submission periods to allow the relevant NFC-s the option to use their financial year-end date as ERR reference date. This would give NFC-s the opportunity to:

- link in with their existing EMIR portfolio reconciliation requirements; and
- use their external auditors to assess the ERR (if the Central Bank's risk assessment was that the relevant NFC- should have the report independently verified)

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

This question is based on the premise that a universal ERR is the appropriate supervisory approach and the only option. The IACT does not agree with that position and believes that the Central Bank should adopt a risk-based approach based on the regimes in effect in most other Member States.

As far as we are aware, there is no charge for supervisory costs to NFC-s below the clearing threshold in other jurisdictions.

Implementation of any charge for executing derivatives in Ireland would discourage economically sensible hedging, would be a serious threat to the treasury sector in Ireland and may prompt international treasury operations to relocate to other EU member states which adopt a more measured approach to EMIR compliance.

Imposing a levy on NFC-s in Ireland in circumstances where there is no agreed EU level position will result in an unlevel playing field across Member States and may distort the market for this type of financial/economic activity. Any levy may be ineffective as a measure to improve transparency or mitigating risk in relation to derivative activity at an EU level. An NFC wishing to avoid the levy in Ireland could simply move its derivative activities to an entity established in any one of the other EU Member States which does not impose such a levy.

As a body we are not sure the Central Bank has explained in CP90 the incremental costs it is proposing to levy. If there are to be incremental costs, the IACT believes that the Central Bank

should justify its cost base per the cost/benefit criteria as contemplated by the Statutory Instrument. The suggestion that a sliding scale should be imposed based on "derivative activity" may be arbitrary (see above the risk of arbitrage in relation to thresholds on an individual legal entity basis). We are not certain what criteria the Central Bank would apply to measure such activity levels.

If a risk-based approach it taken to supervision, and an ERR is required from an NFC- on a selective basis, the IACT would not expect that the Central Bank should incur any additional costs above those which it would incur if a universal ERR requirement is adopted. In those circumstances, the IACT believes that the need to impose a levy would not arise.

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 IACT is not of the view that the ERR proposal should be adopted as outlined. See responses above and our detailed responses in Section B below.

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?

The IACT does not agree with the proposed role of a Third Party Assessor in the context of a mandatory ERR. See general comments in introduction above.

CP90 does not include any information of the likely costs of a Third Party Assessor. The Statutory Instrument expressly requires the Central Bank to have regard to the costs implications of an ERR to the counterparties concerned (see comments above). The IACT believes that if the Central Bank requires a third party verified ERR on a universal basis, the costs for NFC-s will be disproportionate to the benefit obtained by the NFC-s and the Central Bank.

The IACT notes that the Statutory Instrument contemplates that an NFC-'s statutory auditors would automatically qualify as a Third Party Assessor, but that other parties could perform this task if pre-approved by the Central Bank. While the IACT believes that an internal audit function might be in a position to fulfil this role, it is not certain that all NFC-s would have an appropriate internal resource available to it or that the internal function would, in all cases, satisfy the Central Bank's requirements for independence. The IACT understand that any Third Party Assessor which is not a statutory auditor would need to be individually pre-cleared by the Central Bank, which may result in an additional administrative burden for the Central Bank. For those reasons, the IACT expect the default position will be that NFC-s would be required to turn to their external auditors to obtain a third party assessment.

SECTION B: DETAILED COMMENTS REGARDING THE CP90-PROPOSED EMIR REGULATORY RETURN (ERR)

The ERR itself is an additional requirement proposed for certain NFC-s that FCs and NFC+s will not apparently be required to fulfil (counteracting the EU's principle of proportionality).

The specific data requests within the ERR should not place even further operational demands on NFC-s (i.e. that FCs and NFC+s are not required to undertake). In this vein:

- The operational effects arising from the proposed ERR data fields should be more closely considered. The following is an initial effort to do so.
- The ERR reporting currency should be the functional currency of the NFC-, and
- The ERR proposals should distinguish between external derivative activity and intercompany derivatives. Without distinguishing between external and internal derivatives (as currently proposed), transactions between Irish entities within the same group would be reported twice under the ERR proposal.

Current, proposed elements of the ERR would thus place undue burdens on NFC-s electing to submit the return.

Moreover, NFC-s electing to submit the ERR should not be required to report instances that could too quickly be interpreted as non-compliance, particularly when the root cause is often and materially attributable to third parties (e.g. TRs, FCs).

ERR Tables

A number of data field requests within the ERR require clarification, are redundant or not required of NFC-s under EMIR, or are operationally challenging to produce. If the Central Bank will indeed utilise an ERR, either on an on-going, industry-wide basis or in a more ad-hoc supervisory manner, further engagement with industry on the specific ERR data requests should occur prior to the actual finalisation of the return.

Section One: General Data

No comments.

Section Two: Reporting Obligations

Table 2.1

- There are three criteria, all of which must be met, in order for an Irish NFC- to be exempted from submitting an ERR. The third criterion is: "*the counterparty has delegated the reporting of the details of their OTC derivative contracts to a third party or parties in accordance with Article 9(1) of Regulation 648/2012 during the entire period to which the EMIR return relates*" (Reg. 14(5) of S.I. No. 443 of 2014). Regarding 2.1(b), is a related undertaking considered a third party for delegated reporting purposes? If so, does the delegation of transaction reporting to a related undertaking meet the Reg. 14(5)(c) criterion for an ERR submission exemption?

Table 2.2

- 'Commodities' and 'Other' should be a single row aligned with the five 149/2013, Art. 11 asset classes
- Reporting counterparties provide two files daily to EU trade repositories:
    1) Either a 'Delta' file of previous-day changes to their portfolio (relative to the prior business day, R-2), or a 'Snapshot' file of their entire reporting population (from the previous day), and

2) A 'PET/Confirmation' file listing those contracts *concluded* (the previous day).

Contracts *modified* and *terminated* are ascertained by comparing 1) above to the previous reporting day's Snapshot.

The second column of Table 2.2 will require Irish NFC-s filing the ERR to introduce systems and processes which, from the commencement of the ERR reference period:

1) Track modifications and terminations daily by comparing one Delta or Snapshot to the previous day's Delta or Snapshot in order to provide an aggregate total of modifications and terminations for the ERR reference period, and
2) Track the number of conclusions appearing in the daily PET/Confirmation file in order to provide an aggregate total of conclusions for the ERR reference period.

Column 3 of Table 2.2 is either repetitive (and should be removed) or in conjunction with Column 4 has the intention of requiring Irish NFC-s filing the ERR to reconcile on a daily basis the information they provide in their Delta or Snapshot and PET/Confirmation files with the 'Daily Response File' provided back to them by the TR. Columns 3 and 4 further burden ERR-filing NFC-s with operational requirements not explicitly placed upon Irish FCs and NFC+s.

- 2.2(a) does not define 'late reports' and asks for data that could be misinterpreted as non-compliance as it may have been caused by a TR deficiency.

Table 2.3

Table 2.3 appears to be a complex and operationally burdensome way for NFC-s filing the ERR to assure the Central Bank they are reporting their transactions as of the ERR reference date. The exact contract numbers provide no benefit to the Central Bank in relation to monitoring NFC- compliance with their NFC- EMIR obligations.[4] Why not simply ask NFC-s filing the ERR if they (or a 'third party') are transaction reporting as of the reference date (e.g. a third question in Table 2.1: "Are you or your delegated reporter, reporting transactions to the TR as of the ERR reference date?"). Otherwise, as with Table 2.2:

- 'Commodities' and 'Other' should be a single row aligned with the five 149/2013, Art. 11 asset classes, and
- As described above, further clarity is required around the figures appearing in Column 3 (and hence the Column 4 'Difference').

Table 2.4

- 2.4(a) and 2.4(b). NFC-s are not required to report valuations under EMIR, nor is there an expectation that NFC-s provide valuations for dispute resolution purposes as detailed in ESMA's EMIR Q&As. ESMA's OTC Answer 15(e) states the valuation referred to in 149/2013, Article 15 is the one attributed to each contract in accordance with Article 11(2) of EMIR. The valuations referred to in Article 11(2) of EMIR are the valuations performed by financial counterparties and non-financial counterparties referred to in Article 10 (i.e. 'NFC+s').
  The implementation of 2.4(a) and 2.4(b) will again counteract the principle of proportionality, requiring NFC-s filing the ERR to perform processes and make data submissions similar to the requirements of FCs and NFC+s.
- 2.4(c) is another instance where the CBI is asking NFC-s filing the ERR to report instances that could be misinterpreted as non-compliance, but where the root cause often lies with third parties (e.g. the financial counterparties of the ERR-filing NFC-s).

[4] EMIR places six obligations on NFC-s: 1) Notify ESMA and their NCA if they breach one of five clearing thresholds (i.e. become a 'NFC+'), 2) Transaction reporting, 3) Confirming OTC derivative transactions within T+2, 4) Reconciling their counterparty portfolios either quarterly or annually, 5) Consider compressing portfolios bi-annually if they have >= 500 OTC derivatives with a single counterparty, and 6) Pre-agreed, detailed dispute resolution processes and procedures.

Table 2.5

Table 2.5 is similar to Table 2.3 in that it provides no additional benefit to the Central Bank in relation to monitoring Irish NFC- compliance with their six EMIR obligations. In addition, Column 2 of Table 2.5 appears to either repeat a data request already provided in Table 2.2 or places yet another operational burden on NFC-s electing to submit the ERR: Irish NFC-s would need to track not just conclusions, modifications and terminations on a daily basis, but also both the number of newly entered contracts and (apparently) the gross notional values of the newly entered contracts. The Table 2.5 data requests should be removed altogether or incorporated into a single question without an operational burden being placed on NFC- ERR filers. Otherwise, as with Tables 2.2 and 2.3:

- 'Commodities' and 'Other' should be a single row aligned with the five 149/2013, Art. 11 asset classes, and
- Clarity is required around the meanings of 'gross volumes' and 'gross stock' appearing in Columns 3 and 4. Are they indeed aggregated numbers of daily contracts and contract notionals for the ERR reference period?

Table 2.6

- 2.6(a) and 2.6(b) incompletely target the *objectively measurable as reducing risks* definition of 149/2013, Art. 10(1) by focusing exclusively on Art. 10(1)(c). What does the Central Bank mean by a 'hedging model,' and what relevance do these 'hedging models' have to whether individual contracts qualify as hedging contracts pursuant to IFRS? The two questions posed are but a small portion of what could potentially qualify as *objectively measurable as reducing risk*: the ERR does not request data pertaining to Art. 10(1)(a) or 10(1)(b), and is hence materially incomplete.
- With 2.6(c) the Central Bank is taking the view that every counterparty is required to *maintain a reporting log of modifications to the data registered in trade repositories.* For Irish NFC-s who have delegated their reporting to a third party, how exactly is this possible? Will reporting counterparties facilitate the segregation of modifications by each Irish NFC- they report on behalf of?

Section Three: Risk mitigation techniques for non-centrally cleared OTC derivatives

In proposing this ERR section, is the Central Bank recognizing there is a publicly-available mechanism for providing assurance that some Irish NFC-s are compliant with both their portfolio reconciliation and dispute resolution obligations? Some comfort is provided where Irish NFC-s have adhered to the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol. A list of OTC derivatives counterparties that have done so is found here: http://www2.isda.org/functional-areas/protocol-management/protocol-adherence/15

Hence, given the currently proposed framework, Section Three's first question should be, 'Has the ERR-filer adhered to the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol?' (or similar). If the answer is yes, then the filer should be exempted from completing Section Three.

Table 3.1

- 3.1(c) is an apparently redundant question which again counteracts the principle of proportionality. Under 149/2013, Art. 15(2), FCs provide the Central Bank information related to disputes that have a value > €15m or have been outstanding for >= 15 business days. Why require NFC-s electing to file the ERR to report the number of outstanding disputes <= 5 business days?
- 3.1(d) is redundant if the ERR filer has adhered to the 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol.

Table 3.2

Table 3.2 requires Irish NFC- ERR filers to provide detailed information about every portfolio reconciliation and compression conducted - by counterparty - over the ERR reference period. Nowhere is it apparent that this is required of Irish FCs and NFC+s, once again counteracting the principle of proportionality.

The compilation of Table 3.2 will be particularly onerous for centralised treasury units if intercompany derivatives will be required to be reported within the ERR.

The ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol contractually binds adherent counterparties to reconcile within the EMIR requirements. What justification is there to shoulder Irish NFC-s with even greater operational burdens? On the Table 3.2 columns,

- The 'No. of contracts' column requires further explanation. Over the ERR reference period? If so, this again may generate an additional, on-going tracking requirement by ERR filers.
- Column 5 'Procedure – has a portfolio reconciliation process been agreed?' Again, should be redundant for ISDA Protocol adherents.

If Table 3.2 is deemed a necessity, it should be simplified into 'cause and effect'-type statements, rather than requiring fully-granular information pertaining to each and every of the ERR filer's counterparties (e.g. 'Did you have >= 500 outstanding OTC derivatives with a single counterparty during the ERR reference period?' If no, go to next question. If yes, answer additional questions such as 'How many?' 'Did you compress your portfolios with these counterparties?' Etc.).

Section Four: Voluntary Disclosure

No comments.

Relevance if the ERR is introduced as an ad hoc supervisory tool

Given the currently proposed ERR data fields, it is important to note that the use of the ERR on an ad hoc, rather than an on-going basis would still result in similar operational burdens.

In order to compile a fully-accurate, retrospective aggregation of the Table 2.2 conclusions and terminations, for instance, an NFC- subject to an ad hoc request by the Central Bank to file the currently proposed ERR, would have to reconcile each day's Delta or Snapshot file with the previous day's file for the entire ERR reference period. This would be a resource-intensive request that NFC-s would find either extremely costly or perhaps not possible if they have delegated their reporting to a third party (i.e. dependency on the third party to provide the NFC- the data requested on the ERR).

In either case, extensive further interaction is required with industry on the precise data fields requested on the CP90-proposed ERR prior to a final ERR being implemented. The operational burdens arising from the CP90-proposed ERR are too great for Irish undertakings that use derivatives to reduce risks *directly relating to the commercial activity or treasury financing activity* of their firms, running contrary to the EU's principle of proportionality.