Submission to Dept of Finance Public Consultation:

Chambers Ireland Response to EMIR Consultation

March 2014

Chambers Ireland is the largest business organisation in the State. With over 50 member chambers, we represent the interests of those doing business in every region and sector in Ireland.

Due to the way in which the Chamber Network is structured, we have a unique insight into the concerns of business throughout Ireland. Through extensive consultation at local, regional and national level, we understand these concerns and are well placed to voice their opinions.

At the outset, we note that corporate treasury is a core support sustaining both to physical and online commerce in Ireland. It also underpins key sectors that are poised for significant growth here, including Aircraft leasing. Many of these sectors employ large numbers of well paid staff in this country. They also deliver positive impacts in terms of taxes paid and demand created in the domestic economy. We note that treasury functions, and the regulatory environment in which they operate, may well be core to future foreign direct investment decisions to either invest, or to disinvest, in Ireland.

It follows that regulatory changes that are 'gold plated' above and beyond the regimes that currently apply or are set to apply in other EU financial centres could well damage these sectors significantly in the future.

We note the importance of the harmonious implementation of EMIR at member state level. In crafting EMIR, we note that it has been recognised that Non Financial Company (NFC) hedging activity is not an area of significant systemic risk that requires mandatory clearing. We agree 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. EMIR's treatment of the NFC who operates below the clearing thresholds should not be undermined.

Finally given the level of Irish company exposure to the UK market, and their diversity in terms of the size and capacity of firms trading in that market we fear that as currently proposed, EMIR implementation in Ireland risks putting a very significant compliance burden on these firms, that will act as a disincentive for firms to seek new business overseas. This would be a very poor outcome for Ireland given that challenges that domestically-focussed firms face at this time in dealing with weak demand and the manifest need to get more firms trading internationally.

Key concerns:

Note: These points are made following consultation with industry subject matter experts from the Irish Association of Corporate Treasurers.

1. We understand that the European Securities and Markets Authority (ESMA) has publicly signalled that, if it was legally possible, National Competent Authorities should not apply EMIR to certain FX forwards and certain commodity contracts. Given ESMA's clear effort to harmonise the scope of EMIR on a European-wide basis, we believe the Department of Finance and the Central Bank of Ireland (CBI) should provide public assurance that they will follow ESMA's approach and not apply EMIR to these contracts unless ESMA's approach is modified by the European Commission.

2. In this context, the position taken by the Department that all FX forward transactions with a settlement date beyond the spot date, even if entered into for commercial hedging purposes, are to be considered as within the definition of a derivative under EMIR goes against ESMA's recommendation. Informed industry experts recommend to us that these contracts should be taken out of scope for now as any stricter Irish interpretation than ESMA's approach would disadvantage Irish business and discourage international companies from considering Ireland as a location for their European treasury headquarters. This is particularly important given so many Irish companies survive on trade with the UK; making FX forwards a vital part of their business.

3. Industry sources inform us that they are not aware of any other member state where imprisonment sanctions or indeed any form of criminal law proceedings are available to regulators as sanctions for non-compliance with EMIR. Accordingly, the proposal that the sanctions regime would include the ability to take criminal law proceedings, especially proceedings that could result in imprisonment, risks making Ireland an unacceptable location for corporate treasury activity.

4. We note and support the contention that corporate treasurers reduce risk on behalf of their companies in arms length agreements with willing market participants. This is a necessary and simple component of commercial trade and bears no resemblance to nefarious activities such as, money laundering, fraud, inappropriate use of client funds, market manipulation or insider trading, for which financial regulators may utilise imprisonment sanctions. The maximum sentence of three years proposed by the Department of Finance for EMIR is, we understand, equal to the heaviest sentence imposed for insider trading under the Market Abuse Directive in any member state. Accordingly, the proposed criminal sanctions for EMIR are in our view completely and inappropriately excessive and out of line with EMIR implementation in other member states.

5. Providing the Central Bank with the power to "*direct an entity to take or refrain from taking or to prohibit actions, including entering into derivatives contracts"* is an extraordinary proposal and goes far beyond the scope of EMIR. This proposal implies a form of licensing regime not mandated by the G-20 meeting at Pittsburgh, by the Dodd-Frank Act or by EMIR. The power to prohibit transactions, or oblige an entity to enter into derivatives contracts, is of significant

concern to corporate treasurers. Again industry sources tell us that no NFC in any other Member State will be exposed to this risk.

6. We note that no rationale is made for the requirement for a Statement of Compliance (including a third party validation) which is not a feature of EMIR. We note that there is no requirement to confirm compliance with many other laws and regulations. This onerous requirement contrasts with the Companies Bill 2012, which is focussed on certifying that policies and structures are in place in respect of compliance, rather than stating that the company has actually complied with each requirement of an enactment. In this respect we note that;
    a. The range of offences addressed in the Companies Bill could reasonably be considered more serious than EMIR non-compliance for hedging transactions
    b. It is not clear if an assessment has been carried out on the additional burden of compliance costs for the Statement of Compliance.

7. We understand that the “Skilled Persons Report” is used for regulated financial services providers and in that industry the Central Bank may only require a report where it is for the purposes of the proper and effective regulation of those financial service providers. It must have regard to the cost implications of providing the report, the resources available to the reviewee and the benefit to the reviewee of providing the report. It must also consider whether it has other powers which are more appropriate to use. It would be important to understand what condition must be met for the CBI to require a report. For example, must the CBI have reason to suspect that a contravention of EMIR has occurred? In addition, it is not clear why it is necessary that the power to require a report should extend to NFCs, where the Central Bank proposes to have the power to use the “assessor model” for an NFC and where a certification regime is proposed. Given that the Skilled Persons Report model is sourced from the UK financial services regime, it would be useful to understand if the UK National Competent Authority elected to extend this to NFCs when they implemented EMIR. If the UK did not extend it to NFCs, it would be useful to understand why the Department of Finance believe the approach in Ireland should be different.

8. We note that the proposal references Article 22 of EMIR for the authority to grade “investigatory and supervisory powers” however it appears Article 22 applies only in the case of supervising Central Counterparties (CCPs).

9. We understand that intra-group trades pose even less systemic risk than other NFC trades. It follows that these should be explicitly taken out of scope from intrusive surveillance and sanctions.

10. The proposed carve out mechanism for SMEs introduces an additional level of categorisation that does not exist in EMIR and it is not apparent whether many companies will be able to utilise

this exemption. The requirement to delegate reporting is particularly difficult given it is usually not possible to delegate the reporting of inter-company transactions.

Conclusion

We support the harmonious implementation of EMIR in Ireland. However the Department's proposals have very significant potential consequences for treasury practitioners in Ireland as well as for Irish business. Many of these need to be thoroughly reviewed prior to being considered for implementation. Accordingly, the Department should reconsider these proposals urgently.