



December 2010  
AK Position Paper

Proposal for a Regulation of the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories - COM(2010) 484

## About us

**The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

### **Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Herbert Tumpel  
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm  
Director

# Executive Summary

Employees have a huge interest in a robust economic development, a solid public budget and in a fair distribution of wealth.

Employees have a huge interest in a robust economic development, a solid public budget and in a fair distribution of wealth. For all of these, an adequately regulated and stable financial market is an important condition.

Although the banking crisis did not directly originate from the derivatives market, this market (in particular the Credit Default Swap (CDS) market) created the vehicle, by means of which the „subprime crisis“ developed into a global financial market crisis with serious macroeconomic consequences. Apart from that, it is important that the causes of risks are avoided to prevent future crises. The following features of the OTC derivatives market continue to contribute to the **instability of financial markets** and thereby the economy as a whole:

- Extremely high market volume
- Large share of customized contracts
- Use of unrestricted leverage
- Lack of transparency
- High market concentration
- Strong mutual interconnection of major market participants
- And above all a lack of regulation and market organisation.

Of course, the AK is therefore welcoming the intention of the Commission to reduce the risk derived from derivative markets and to increase the transparency of these markets. The proposed steps are basically going in the right direction but unfortunately not far enough to achieve the postulated target.

In many key areas, the **drafting of detailed rules** has been delegated to the European Securities and Market Authority (ESMA), which has been asked to submit proposals to the Commission before mid 2012. However, the provisions in question go clearly beyond technical details. In many cases, the effectiveness of the Regulation will depend on the way these detailed rules are shaped. In particular in view of the problem of a hardly regulated OTC market and the late submission of the Regulation proposal, this is an unacceptable long time period.

## Reduction of the Market volume for more economic stability

Unfortunately, even in the aftermath of the 2008 financial crisis, the OTC derivatives market has not been significantly reduced. Rather the opposite, as the volume has started to rise again (end of 2009 to 615 trillion US-Dollar).

The bloating of the OTC market has many reasons, among them incorrect collateralization of risks.

We therefore regret the absence of addressing the very high **volume of the OTC derivatives market** in the Regulation proposal. The AK is convinced that the problems in this sector - in particular the risk for the economy as a whole deriving from them - can only be overcome if this volume is reduced. A lot of measures mentioned in the Regulation proposal - for example the risk management of the central counterparty, the ability of the trade repositories to record the reported contracts - are far easier to implement in case of a reduced market volume. **The larger and more complex the derivatives markets, the larger are the required resources to supervise and regulate it.** The argument that a higher volume would result in a more efficient pricing is no longer empirically sustainable, given the fact that risks were systematically underestimated before the crisis (priced too low) and at least in some parts overestimated after the crisis (priced too high).

The bloating of the OTC market has many reasons, among them incorrect **collateralization of risks**. This results in an incorrect „cost signal“, which in turn contributes to an excessive bloating of the market. The Impact Assessment, which supplements the Regulation proposal, explains that adequate risk hedging may entail higher costs for market participants (see in particular Clause 6.2.3.). The AK basically recognizes the need of non-financial companies for cost-effective hedging, for example against price and exchange rate fluctuations. However, these hedging transactions only amount to

a fraction of the entire market volume. The AK in particular emphasises the threat to macroeconomic stability. **The microeconomic costs have to be compared to the macroeconomic costs of an over dimensional bloated strongly interconnected derivatives market with insufficient collateralization.**

The circle closes when one looks at the current **impact of the derivatives market on the most important economic indicators**. The prices for food and commodities, exchange rates, share indices etc are subject to strong fluctuations, which often can no longer be explained with conditions in the „real“ market and are largely the result of financial market speculations. It is specifically tragic if in case of abrupt food price increases in particular the poor and poorest sections of the population are the ones that suffer. In respect of enterprises, the high volatility does not only make calculations more difficult, they are once again dependent on the derivatives market to protect themselves against this volatility, which causes additional costs on the one hand and increases the market volume on the other resulting in the misallocation of resources.

### Financial Transaction Tax

From the point of view of the AK, now the time is ripe to create the suitable structure for introducing a European Financial Transaction Tax, which flows into the EU budget. Therefore, for reasons of pragmatism all data about

From the point of view of the AK, now the time is ripe to create the suitable structure for introducing a European Financial Transaction Tax, which flows into the EU budget.

transactions available from the central counterparties and the trade repositories should be used to enable the collection of such a tax. We therefore propose to implement appropriate reporting duties to ESMA, which currently appears to be the suitable institution to collect such a tax.

This requires of course an additional legal authorization and basis for ESMA.

*Having said that, the AK would ask for support to ensure that*

- trading with contracts, which are not eligible for being settled via a central counterparty, is prohibited;
- only contracts, which **also** have the following features, are classified as eligible: no share in structured products, the use of leverages (outside capital) may not exceed the ratio 1:5, a degree of standardisation, which is adequate for settlement via a CCP;
- the bilateral trade with non-standardised, non customized contracts is prohibited;
- no exemptions for non-financial undertakings from the reporting and clearing obligations, as these exemptions would open major loopholes in the regulatory framework. Regulatory arbitrage and the spreading of the shadow financial system have decisively contributed to the depth and duration of the crisis as neither the regulators nor

the market participants had and have been able to recognise the inherent risks.

*However, the AK welcomes the following targets and provisions:*

- The target of the Regulation proposal to increase financial market stability
- To clear transactions of at least part of the OTC derivatives market via central counterparties
- The obligation to report all OTC derivatives contracts to trade repositories
- The increase of requirements in respect of risk assessment and collateralization in case of bilateral contracts, although these are not far-reaching enough.

# The AK position in detail

The AK therefore suggests the following concrete amendments:

## Clearing and reporting obligations, regulations for bilateral transactions – Art 3

**According to the Regulation proposal, the clearing obligation shall not be implemented for all contracts. Only those will be recorded, which are considered eligible.** This raises a signi-

ficant number of criticisms. In particular loopholes will be created, hence the possibility of regulatory arbitrage and the further expansion of the shadow financial system.

### Art 3 - Clearing obligation

#### *European Commission*

1. A financial counterparty shall clear all OTC derivative contracts which are considered eligible pursuant to Article 4 and are concluded with other financial counterparties in the relevant CCPs listed in the register as referred to in Article 4(4). That clearing obligation shall also apply to financial counterparties and to the non-financial counterparties referred to in Article 7(2) which enter into eligible OTC derivative contracts with third country entities.

#### **Reason:**

In order to prevent the avoidance of the clearing obligation, OTC transactions with products, which have been classified not eligible for clearing via CCPs, must be prohibited. It is obvious that the lack of transparency resulting from the continued trading of customized contracts on a bilateral basis significantly puts the target of enhan-

#### *Amendment Application*

... concluded with other financial counterparties in the relevant CCPs listed in the register as referred to in Article 4(4)... **OTC derivative contracts, which are not eligible within the meaning of Art 4, may not be traded.** That clearing obligation shall also apply to financial counterparties...

ced financial market stability at risk. This problem is aggravated, because no quantitative targets for the shares of the contracts managed via CCP are specified in the Regulation proposal, thereby even creating an incentive for bypassing the central clearings via (perhaps newly developed) bilateral contracts.

In order to prevent the avoidance of the clearing obligation, OTC transactions with products, which have been classified not eligible for clearing via CCPs, must be prohibited.

### Art 4 paragraph 3 - Eligibility for the clearing obligation

#### European Commission

3. ESMA shall base its decision on the following criteria:

- a) reduction of systemic risk in the financial system;
- b) the liquidity of contracts;
- c)...

Before taking a decision, ESMA shall conduct a public consultation and, where appropriate, consult with the competent authorities of third countries.

#### Reason:

Trading with structured products, which are difficult or impossible to understand, where in many cases the counterparty risk has been wrongly assessed in the past, must be prohibited both OTC and via central counterparty. The same applies to using unrestricted leverages, where huge volumes are moved on credit. All involved market participants will be affected if the deb-

#### Amendment Application

...

- a) reduction of systemic risk in the financial system; **the involvement of structured products must be prohibited;**
- b) the liquidity of contracts; **the leverage used must not exceed the ratio 1:5;**
- c)...
- f) (new) adequate standardisation of contracts and processes**

Before taking a decision, **ESMA** shall **consult** where appropriate also with the competent authorities of third countries.

tor becomes insolvent as the leveraged transaction has not been backed with equity. At the same time, this measure causes a reduction of financial transactions to a macroeconomically sensible volume.

The consultation of the stakeholders can significantly delay the procedure. Moreover, there is a danger that if doing so, microeconomic interests will be over emphasized.

Trading with structured products, which are difficult or impossible to understand, where in many cases the counterparty risk has been wrongly assessed in the past, must be prohibited both OTC and via central counterparty.

## Art 4 a (new) - Standardisation obligation

*European Commission*

*Amendment Application*

**Contracts must be standardised to such an extent that they are eligible for clearing by a CCP. This concerns a standardisation of legal relationships, of confirmation agreements, documentation as well as the customary handling of events. Otherwise, these contracts are not admitted to trading.**

**Processes must be standardised to such an extent that contracts can be cleared by a central counterparty. This concerns straight through processing (STP), matching, confirmation and settlement. Otherwise, it is not permitted to trade these contracts.**

**ESMA will submit drafts for the standardisation of contracts and processes to the Commission by 30th June 2012 at the latest**

As long as OTC trading with derivatives is permitted, there will be loopholes and a great incentive to use them.

### **Reason:**

As long as OTC trading with derivatives is permitted, there will be loopholes and a great incentive to use them. Apart from that, a high volume of contracts, which are customized for individual cases leads to settlement delays and increases the operational risk. The increasing lack of transparency of these contracts goes hand in hand with the difficulties in respect of microeconomic risk management and they are far less liquid - the importance of liquidity has been particularly emphasised in other places, whilst here this criterion does not appear to

play any role. Additionally, customization makes the recording of contracts in trade repositories and above all the market supervision by regulatory authorities more difficult. The competent authority will also have difficulties in recording the contracts, in particular if there are many of them. Apart from that one has to doubt the economic sense of such complex contracts. The Commission also puts the obligation for standardisation up for debate in Impact Assessment under 6.1.4.4. (requirement of the use of standard legal contracts and processes). Although individual companies might incur high-



her costs, the macroeconomic benefits of a more transparent market, where transactions have to be entirely settled via central counterparties, would clearly exceed these costs, given the fact that regulatory arbitrage and a non-transparent shadow financial system

have been one of the main reasons for the seriousness and duration of the crisis. This justifies a general obligation to standardise derivatives, which is adequate, so that they are eligible for clearing via a central counterparty.

### Art 5 - Access to a CCP

#### *European Commission*

A CCP that has been authorised to clear eligible OTC derivative contracts shall accept clearing such contracts on a non-discriminatory basis, regardless of the venue of execution.

#### *Amendment Application*

A CCP that has been authorised to clear eligible OTC derivative contracts shall accept clearing such contracts on a non-discriminatory basis, regardless of the venue of execution, **however under the condition that this will be classified as sufficiently transparent and regulated. It may not clear structured products, leveraged products or products that do not fulfil the criteria specified under Art 4.**

In view of the fragmentation of the market and the planned review of the MiFID, current dark pools should be excluded.

#### **Reason:**

In view of the fragmentation of the market and the planned review of the

MiFID, current dark pools should be excluded. Also see Art 4a (new).

### Art 6 paragraph 1 - Reporting obligation

#### *European Commission*

1. Financial counterparties shall report to a trade repository registered in accordance with Article 51 the details of any OTC derivative contract they have entered into and any modification or termination. ...

#### *Amendment Application*

**(Delete)** The counterparties shall report to a trade repository registered in accordance with Article 51 the details of any OTC derivative contract they have entered into and any modification or termination. ...

The AK advocates for the abolishment of exceptions for financial counterparties.

2. Where a trade repository is not able to record the details of an OTC derivative contract, financial counterparties shall report the details of their positions in those contracts to the competent authority designated in accordance with Article 48 of Directive 2004/39/EC.

**Reason:**

The AK advocates for the abolishment of exceptions for financial counterparties as proposed under Art 7 (compare Amendment Application to Art 7). Where a trade repository is not able to record the details of a contract,

2. Where a trade repository is not able to record the details of an OTC derivative contract, the **trading of this contract must be suspended. The contract has to be standardised to such an extent that it is suitable for recording by a trade repository.**

it will also be difficult for the competent authority. The danger exists that relatively simple contracts are recorded centrally, but that in particular very complex derivatives will be „collected“ by national authorities.

**Art 7 - Non-financial counterparties**

*European Commission*

Where a non-financial counterparty takes positions in OTC derivative contracts,

...

2. Where a non-financial counterparty takes positions in OTC derivative contracts exceeding the clearing threshold to be determined pursuant to paragraph 3(b), it shall be subject ...

3. Powers are delegated to the Commission to adopt regulatory technical standards specifying: ...

*Amendment Application*

**delete**

**delete**

**delete**

4. In calculating the positions referred to in paragraph 2, OTC derivative contracts entered into ...

**delete**

5. The Commission, in consultation with ESMA, ...

**delete**

**Reason:**

The exceptions for non-financial counterparties result in loopholes, which together with the category of „derivatives not eligible for“ clearing by CCPs significantly undermine the objective of the Regulation.

The purpose of the reporting obligations lies in the creation of transparency for the entire volume of the traded derivatives and the associated risks.

Therefore, also non-financial counterparties have to record all of their derivative contracts. The exemption from the clearing obligation does in fact create an incentive for financial companies to bypass the clearing obligation via subsidiaries, even more so when the thresholds are set too high. To avoid loopholes and regulatory arbitrage, the clearing obligation must also apply to all non-financial companies.

The exceptions for non-financial counterparties result in loopholes, which together with the category of „derivatives not eligible for“ clearing by CCPs significantly undermine the objective of the Regulation.

**Art 8 - Risk mitigation techniques for OTC derivative contracts not cleared by a CCP**

*European Commission*

*Amendment Application - provided that such contracts will be admitted for future trading (compare Amendment Applications above)*

1. ...

1. ...

shall ensure that appropriate procedures and arrangements are in place to measure, monitor and mitigate operational and credit risk, including at least:

a) where possible, electronic means ensuring the timely confirmation of the

a) **sufficient** electronic means **guaranteeing** the timely confirmation of

The fact that permanent careful risk assessment of a contract is not possible or too expensive means that the contract is too complicated and needs to be standardised or otherwise excluded from trading.

terms of the OTC derivative contract;

b) robust, resilient and auditable processes in order to reconcile portfolios, to manage the associated risk and to identify disputes between parties ...

3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the arrangements and levels of collateral and capital required for compliance with paragraph 1(b) and the second subparagraph of paragraph 1. Depending on the legal nature of the counterparty...

**Reason:**

From the point of view of the AK, the following should basically apply: the fact that permanent careful risk assessment of a contract is not possible or too expensive means that the contract is too complicated and needs to be standardised or otherwise excluded from trading. Even if there is no adequate collateralization, one can assume that the counterparty will charge adequately higher fees. It is also more difficult for the counterparties of bilateral contracts to assess the counterparty risk, as it is for a central counterparty, in particular as the former have no knowledge about the open positions of the counterparty to other market participants. Because of the above mentioned reasons, assessing and collateralizing a risk not in a professional

the terms of the OTC derivative contract;

b) **standardised processes, which are robust, resilient and auditable** in order to **permanently** reconcile portfolios, to manage the associated risk and to identify disputes between parties ...

3. ...

the arrangements and levels of collateral and capital required for compliance with paragraph 1(b) and the second subparagraph of paragraph 1. **The capital must cover 25% of the transactions.** ...

and sufficient way is not an alternative from a macroeconomic point of view. **Against the background of the huge OTC trading volume it is not enough, when derivatives processed via clearinghouses are largely „safe“, whilst bilateral trading continues to pose large risks for the economy as a whole.** As precarious contracts would probably be concluded offside central counterparties, the danger for financial stability would continue. If the argument against a comprehensive clearing obligation is based on higher costs resulting from higher collaterals, the contract is questionable in any case from a macroeconomic point of view. Continuing to admit such contracts in bilateral trades means low collateralization. Hence the following must apply: if bilateral trading should

continue to be permitted (against which the AK - as described - has strong reservations in any case), the

collaterals must at least conform to those, which have been specified for trading via central counterparties.

### Requirements on central counterparties

Although trading via a central counterparty is a step forward compared to unregulated bilateral trade, it is no panacea.

**Although trading via a central counterparty is a step forward compared to unregulated bilateral trade, it is no panacea.** The fact that huge capital volumes are dealt with via one central point creates new risks. If the clearinghouse itself gets into trouble, it endangers economic stability. As outlined above, it is therefore necessary to reduce the high volume of the entire derivatives trade at the same time. Apart from that, the AK is doubtful that the systemic risk, which is derived from the central counterparty (CCP), can be solved by the market alone. The reason for these doubts is above all the competition to be expected among CCP or the competition between the trading platforms belonging to the CCP. This problem is depicted in detail

in Impact Assessment under Clause 7.1.3.3. The BAK fully agrees with the assessment contained therein. Similar to systemic important financial institutes, attention has to be paid to the „too big to fail“ problem and the associated moral hazard. In case of one of the systemic important counterparties getting into difficulties one would be confronted - as in the case of systemic important financial institutes - with the danger that the risk would be shifted to the taxpayer, thus aggravating the debt crisis of the public budgets in the EU. The problem that clearinghouses could also fall under the category „too big to fail“ was recently discussed by the Financial Stability Board and the Basel Committee.

### Art 10 - Authorisation of a CCP

#### *European Commission*

...

3. The authorisation shall specify the services or activities which the CCP is authorised to provide or perform including the classes of financial instruments covered by the authorisation.

#### *Amendment Application*

... covered by the **authorisation in compliance with the provisions of Article 5. The authorisation must be**

4. A CCP shall comply at all times with the conditions necessary for the initial authorisation.

**restricted to the activity as clearing-house and the associated activities; any expansion to other activities, such as investment activities for example, is inadmissible.**

4. ....

**4 a) (new) condition for being authorised as clearinghouse is a legal form under public law.**

...

The systemic risk, which is created by establishing central counterparties, must basically be restricted.

**Reason:**  
The systemic risk, which is created by establishing central counterparties, must basically be restricted. Therefore, it must be ensured that the transactions of a central counterparty are

restricted to its core business, i.e. clearing. For the same reason, a legal form under public law has to be preferred to underline the social responsibility in the financial system and to link it with the relevant legal consequences.

#### Art 14 - Colleges

*European Commission*

The college shall consist of:

a) ESMA; ...

...

f) the authority responsible for the oversight of the CCP and the central banks of issue of the most relevant currencies of the financial instruments cleared.

*Amendment Application*

Apart from supervisory criteria, it is also required to examine the importance of the CCP for the national economy of the Member State.

**Reason:**

Apart from supervisory criteria, it is also required to examine the importance of the CCP for the national economy of the Member State. This includes above all also the issue of the systemic

**g) (new) A representation appointed by the authority responsible of the Member State of establishment, which examines the admission of the CCP on the basis of economic requirements and framework conditions.**

relevance of the CCPs. The problem that clearinghouses could also fall under the category „too big to fail“ was recently discussed by the Financial Stability Board and the Basel Committee.

**Art 20 - Professional secrecy**

*European Commission*

1. The obligation of professional secrecy shall apply to all persons working or who have worked for the competent authorities designated in accordance with Article 18, ESMA, or auditors and experts instructed by the competent authorities or ESMA. No confidential information they may receive in the course of their duties may be divulged to any person or authority whatsoever, except in summary or aggregate form such that an individual CCP, trade repository or any other person cannot be identified, without prejudice to cases covered by criminal law or the other provisions of this Regulation.

2. Where a CCP has been declared ...

*Amendment Application*

1.

...

without prejudice to cases covered by criminal law, **tax law** or the other provisions of this Regulation...

Therefore, all fiscal information duties towards the future collection office at EU level must be included in the Regulation.

**Reason:**

In view of the introduction of a Financial Transaction Tax, which in the opinion of the AK should take place at European level and flow into the EU budget, the basic rules must already be deter-

mined in the present Regulation to enable the collection of such a tax. Therefore, all fiscal information duties towards the future collection office at EU level must be included in the Regulation.

**Art 21 - Exchange of information**

*European Commission*

...

4. Competent authorities shall communicate information to the central banks of the ESCB where such information is relevant for the exercise of their duties.

*Amendment Application*

...

4. Competent authorities shall communicate information **in regular reports** to the ESRB and the central banks of the ESCB, where such information is relevant for the exercise of their duties.

**5. (new) The central counterparties transfer all transaction data to the ESMA to enable it to prescribe a European Financial Transaction Tax for all members of the central counterparties.**

**Reason:**

Regular obligatory reports are to be preferred to occasionally reports both to the European Systemic Risk Board (ESRB) and to the central banks. As by establishing a central counter-

party all transactions apart from OTC trade are recorded, it makes sense to use the existing data for prescribing a Financial Transaction Tax and to introduce a respective reporting obligation.



## Organisational Requirements

### Art 24 - General provisions

#### European Commission

...

5. A CCP shall adopt, implement and maintain a remuneration policy which promotes sound and effective risk management and which does not create incentives to relax risk standards.

...

8. The CCP shall be subject to frequent and independent audits. The results of these audits shall be communicated to the board and made available to the competent authority.

#### Reason:

As the central counterparties themselves represent a new systemic risk, for which at worst the taxpayers foot

#### Amendment Application

...

...risk management, which does not **relax** risk standards **and is compatible with the relevant provisions of Annex 2b of the Directive of the European Parliament and the Council on Alternative Investment Fund Managers** and a sound and effective risk management ...

8. ...

The results of these audits shall be communicated to the board and made available to the competent authority **and to the respective national Parliament. ...**

the bill, these newly created trading facilities should be subject to Parliamentary control.

As the central counterparties themselves represent a new systemic risk, for which at worst the taxpayers foot the bill, these newly created trading facilities should be subject to Parliamentary control.

## Art 25 - Senior Management and the Board

### European Commission

1. The senior management shall be of sufficiently good repute and experience so as to ensure the sound and prudent management of the CCP.

2. A CCP shall have a board of which at least one third, but no less than two, of its members are independent. The compensation of the independent and other non-executive members of the board shall not be linked to the business performance of the CCP.

### Reason:

To ensure that the public interest in the general stability of the financial market is represented and that the systemic

### Amendment Application

...

2. A CCP shall have a board of which at least **two** thirds, but no less than two, of its members are independent.

The compensation of the independent and other non-executive members of the board shall not be linked to the business performance of the CCP **and must be compatible with the relevant provisions of Annex 2b of the Directive of the European Parliament and the Council on Alternative Investment Fund Managers.**

risk is also assessed, it is necessary to establish an independent committee, which is not led by self-serving interests.

To ensure that the public interest in the general stability of the financial market is represented and that the systemic risk is also assessed, it is necessary to establish an independent committee, which is not led by self-serving interests.

## Art 26 - Risk committee

### European Commission

1. A CCP shall establish a risk committee, which shall be composed of representatives of its clearing members and independent members of the board. The risk committee may invite employees of the CCP to attend risk committee meetings in a non-voting capacity. The advice of the risk committee shall be independent from any direct influence by the management of the CCP.

...

### Amendment Application

1. ... a risk committee, which shall be composed of representatives of its clearing members and independent members of the board **as well as a representative of the competent authority. The risk committee is appointed in agreement with the competent authority.** The risk committee may invite ...

The fact that the CCPs are competing via cost reductions, which result from a lowering of the safety standards, is considered to be a particular source of danger for the stability of the CCP.

3. The risk committee shall advise the board on any arrangements that may impact the risk management of the CCP, such as, but not limited to, a significant change in its risk model, the default procedures, the criteria for accepting clearing members or the clearing of new classes of instruments. The advice of the risk committee is not required for the daily operations of the CCP or in emergency situations.

...

6. A CCP shall allow the clients of clearing members to be members of the risk committee or, alternatively, it shall establish appropriate consultation mechanisms that ensure that the interests of the clients of clearing members are adequately represented.

**Reason:**

To guarantee the adequate safeguarding of public interest (see also Reason to Art 25), it should be ensured that the decisions of the risk committee are as little as possible influenced by self-serving interests. The fact that the

...new classes of instruments pursuant to Art 5 of the present Directive. ...

6. ...

...The appointment of such members requires the approval of the competent authority.

CCPs resp. the trading venues, which are linked with individual CCPs, are competing via cost reductions, which result from a lowering of the safety standards, is considered to be a particular source of danger for the stability of the CCP.

**Art 28 paragraph 1 - Shareholders and members with qualifying holdings**

*European Commission*

1. The competent authority shall not authorise a CCP until it has been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and the amounts of those holdings.

*Amendment Application*

1....

As new systemic risks arise by establishing central counterparties, a relevant influence of the public sector should be assured.

...

**Reason:**

As new systemic risks arise by establishing central counterparties, a relevant influence of the public sector should be assured, which in the worst case has to stand in for the central counterparty. A co-ownership of the public sector contributes to stabilisation. In its capacity as owner it is involved in

**The qualifying holdings may not exceed 25%. At least 20% of the shareholdings must be held by a corporation under public law.**

...

the decision-making processes. We do not completely reject ownership by private market participants because this also results in a private interest in the stability of the CCP. The restriction of the qualifying holding together with the additional provision in Art 31 shall prevent that an (imminent) insolvency of private owner puts the CCP at risk.

**Art 28 paragraph 2**

*European Commission*

...

2.) The competent authority shall refuse authorisation to a CCP where, it is not satisfied as to the suitability of the shareholders or members that have qualifying holdings in the CCP, taking into account the need to ensure the sound and prudent management of a CCP.

...

*Amendment Application*

...

2.

**...It can prohibit the intended purchase or the increase of major holdings if it considers this to be necessary to guarantee the sound and prudent management of a CCP. For the same reason it may prohibit the owner of major holdings or a company controlled by him to exercise his voting rights or to transfer these voting rights to a trustee, which it may also instruct with selling shares of a major holding.**

**Reason:**

Not only the authorisation of the CCP requires approval by an authority; any changes in the holding must also be approved by an authority. This is

necessary to avoid the collision of interests by majority owners that are at the same time counterparties of the CCP themselves.

**Art 29 - Information to competent authorities**

*European Commission*

1. ...

increase, directly or indirectly, such a qualifying holding in a CCP as a result of which the proportion of the voting rights or of the capital held would reach or exceed 10%, 20%, 30% or 50% or

...

6. Where the competent authority does not oppose the proposed acquisition within the assessment period, it shall be deemed to be approved.

8. Member States shall not impose requirements for notification to, and approval by, the competent authority of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Regulation.

*Amendment Application*

1. ...

increase, directly or indirectly, such a qualifying holding in a CCP as a result of which the proportion of the voting rights or of the capital held would reach or exceed **10% (delete)** or...

**6. The acquisition shall be deemed to be approved when an explicit authorisation has been received from the competent authority.**

8. Member States **may impose** requirements for notification to, and approval by, the competent authority of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Regulation.

From the point of view of the AK, any increase in the holding or the voting rights may have a serious impact on the central counterparty.

**Reason:**

From the point of view of the AK, any increase in the holding or the voting rights may have a serious impact on the central counterparty. That is why each change, which does not exceed the limit of 10%, must be registered. The authority must expressly approve

of the **acquisition**, in particular as a simple expiry of the deadline in this sensible issue may not be sufficient for authorisation. Ambitious Member States must be able to impose requirements which go beyond those set out in the Regulation.

### Art 31 - Conflicts of interest and independence

#### European Commission

...

5.) CCP shall take all reasonable steps to prevent any misuse of the information maintained in its systems and shall prevent the use of that information held for other business activities. Sensitive information recorded in one CCP shall not be used for commercial use by any other natural or legal person that has a parent undertaking or a subsidiary relationship with the CCP.

#### Reason:

The fact that a counterparty, which is large in relation to the CCP, has problems, may easily result in difficulties for the CCP itself. This can also ensure

#### Amendment Application

...

5.) CCP shall take all reasonable steps to prevent any misuse of the information maintained in its systems and shall prevent the use of that information held for other business activities. Sensitive information recorded in one CCP shall not be used for commercial use by any other natural or legal person that has a parent undertaking or a subsidiary relationship with the CCP.

**6. (new) The share of exposures of a market participant may not exceed 5 percent of the exposures of the CCP.**

the economic independence of the CCP towards individual counterparties, which contributes to reduction of possible conflicts of interest.

The fact that a counterparty, which is large in relation to the CCP, has problems, may easily result in difficulties for the CCP itself.

### Art 35 - Participation requirements

#### European Commission

1. A CCP shall establish the categories of admissible clearing members and the admission criteria. Such criteria shall be non-discriminatory, transparent and objective so as to ensure fair and open access to the CCP and shall ensure that clearing members have sufficient financial resources and operational capacity to meet the obligati-

#### Amendment Application

1. ...

... shall ensure that clearing members have sufficient financial resources, **at least Euro 50,000, and operational capacities, in particular a commer-**

ons arising from participation in a CCP. Criteria that restrict access shall only be permitted to the extent that their objective is to control the risk for the CCP.

**cially equipped business enterprise, the reliability and the professional aptitude of the owner or managing director to conduct securities or commodity transactions at the stock market and the guarantee of the proper execution of the stock market transactions**, to meet the obligations arising from the participation... **These provisions do not apply to holdings of public corporations within the meaning of Art 28 paragraph 1.**

The members of the CCP must be transparent and have to hold a suitable operational infrastructure including equity.

**Reason:**

The **members of the CCP** must be transparent and have to hold a suitable operational infrastructure including equity. Therefore, only financial institutions with real business activities may

...

set up accounts with the central counterparty, not however letterbox banks and offshore subsidiaries. Unpublished accounts must be prohibited, in combination with consequent clearing system audits to sanction avoidance.

**Art 37 - Segregation and portability**

*European Commission*

2. A CCP shall require each clearing member to distinguish and segregate in accounts with the CCP the assets and positions of that clearing member from those of its clients. A CCP shall allow clients to have a more detailed segregation of their assets and positions. The CCP shall publicly disclose the risks and costs associated with the different levels of segregation.

3. Depending on the level of segregation chosen by a client, the CCP shall

*Amendment Application*

A CCP shall require each clearing member to distinguish and segregate in accounts with the CCP the assets and positions of that clearing member from those of its clients. A CCP **obliges** its clients to segregate their assets and positions **via nominee accounts**.

3. **The CCP shall ensure that it is able to transfer on request at a pre-defined**

ensure that it is able to transfer on request at a pre-defined trigger event, without the consent of the clearing member and within a pre-defined transfer period its assets and positions to another clearing member. That other clearing member shall only be obliged where it has previously entered into a contractual relationship for that purpose.

trigger event, without the consent of the clearing member **at any time** its assets and positions to another clearing member. **The clearing members shall assume the obligation for acquisition by entering into adequate contractual relationships.**

Such an obligation increases the stability of the financial markets and may not be exclusively left to microeconomic cost-benefit considerations.

**Reason:**

An obligation should be provided for because in particular during the financial crisis a lack of segregation has contributed to further escalation. Such

an obligation increases the stability of the financial markets and may not be exclusively left to microeconomic cost-benefit considerations.

**Art 39 - Margin requirements**

*European Commission*

1. ...

Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant positions. They shall be sufficient to cover losses that result from at least 99 per cent of the exposures movements over an appropriate time horizon and they shall ensure that a CCP fully collateralises its exposures with all its clearing members, and where relevant with CCPs which have interoperable arrangements, at least on a daily basis.

...

*Amendment Application*

1. ...

Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant positions. They shall be sufficient to cover losses that result from at least 99 per cent of the exposures movements over an appropriate time horizon and they shall ensure that a CCP fully collateralises its exposures with all its clearing members, and where relevant with CCPs which have interoperable arrangements, at least on a daily basis. **Where the relevant period does not include any stress periods they have to be integrated in the calculation.**

...



The consideration of stress periods increases financial market stability.

**Reason:**

The consideration of stress periods increases financial market stability. To keep the systemic risk of a central counterparty manageable, the risks

**4 (a) (new) A CCP limits the number of contracts and the tradable volume per clearing member per month. The Commission is authorised to determine the respective parameters for the maximum number and the maximum volume of outstanding contracts. The ESMA submits respective parameters to the Commission by 30th June 2012 at the latest.**

arising from the single members have to be kept manageable. This will also prevent market manipulation, as for example carried out by Amaranth in the American gas sector.

**Art 40 - Default fund**

*European Commission*

2. ...

A CCP shall establish the minimum size of contributions to the default fund and the criteria to calculate the contributions of the single clearing members. The contributions shall be proportional to the exposures of each clearing member, in order to ensure that the contributions to the default fund at least enable the CCP to withstand the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members, if the sum of their exposures is larger.

*Amendment Application*

2. ...

The contributions shall be proportional to the exposures of each clearing member, in order to ensure that the contributions to the default fund at least enable the CCP to withstand the default of the **clearing members with the two largest exposures.**

The AK is in favour of a higher default fund.

**Reason:**

If for example the clearing member with the largest exposure defaults it is likely that other market participants are also in difficulty. After all, the financial

crisis has shown that many institutions are exposed to related (systemic) risks. That is why the AK is in favour of a higher default fund.

**Art 41 - Other risk controls**

*European Commission*

2. ...

A CCP shall develop scenarios of extreme but plausible market conditions, which include the most volatile periods that have been experienced by the markets for which the CCP provides its services. The default fund referred to in Article 40 and the other financial resources referred to in paragraph 1 shall at all times enable the CCP to withstand the default of the two clearing members to which it has the largest exposures and shall enable the CCP to withstand sudden sales of financial resources and rapid reductions in market liquidity.

**Reason:**

The increase to four clearing members with the largest exposures is justified, because the danger exists that even if the amount is calculated via mathematical models - necessarily based on assumptions - s, this could lead to a kind of „false security“. We therefore plead for deleting the term „plausible market

*Amendment Application*

2. ...

A CCP shall develop scenarios of **extreme market conditions**, which include the most volatile periods that have been experienced by the markets for which the CCP provides its services. The default fund referred to in Article 40 and the other financial resources referred to in paragraph 1 shall at all times enable the CCP to withstand the default of the **four** clearing members to which it has the largest exposures, ...

conditions“, as it cannot be excluded that a new extreme crisis situation is not represented by these models. Therefore, also scenarios have to be included in the considerations, which (at least from the current position) are not covered by conventional assumptions („black swan“).

### Art 47 - Settlement

*European Commission*

1. A CCP shall, where available, use central bank money to settle its transactions. Where central bank money is not accessible, steps shall be taken to strictly limit credit and liquidity risks.

...

**Reason:**

Access of the CCP to central bank money raises sensible economic que-

*Amendment Application*

1. A CCP shall, where available, use central bank money to settle its transactions. Where central bank money is not accessible, steps shall be taken to strictly limit credit and liquidity risks.

**Access of the CCP to central bank money requires the approval of the central bank itself and of the Parliament of the respective Member State.**

...

stions and requires a comprehensive review and approval.

### Interoperability provisions

A harmonised regulation of the „post-trade“ market is a basic condition to enable transparency and reliable risk assessment. Only then it can be avoided that the owners of the CCP or in the end the taxpayers are suddenly forced to help out in respect of defaults

of other CCPs which are threatened by insolvency. In the opinion of the AK, the principle of non-discriminating access within the scope of the interoperability agreement considered by the European Commission is the condition for creating transparency in this market.

A harmonised regulation of the „post-trade“ market is a basic condition to enable transparency and reliable risk assessment.

### Art 48 - Interoperability Arrangements

*European Commission*

**Reason:**

This contributes to increasing both

*Amendment Application*

4. (new) **In addition, publication obligations on the website must be established in order to allow the market participants to recognise which and how CCPs cooperate.**

transparency and stability of the financial market..

## Trade repositories

### Art 64 - General requirements

#### *European Commission*

3. A trade repository shall maintain and operate an adequate organisational structure to ensure continuity and orderly functioning of the trade repository in the performance of its services and activities. It shall employ appropriate and proportionate systems, resources and procedures.

4. The senior management and members of the board of a trade repository shall be of sufficiently good repute and experience so as to ensure the sound and prudent management of the trade repository.

...

6. ...  
The prices and fees charged by a trade repository shall be cost-related.

#### **Reason:**

In view of the public interest in the reliable and impartial fulfilment of the supervisory function of such a register,

#### *Amendment Application*

3. ...

... and procedures. **It has to be established as corporation under public law.**

4. ...

... trade repository. **At least one third of the respective members have to be independent. One member has to be delegated from the competent authority. The appointment of the other members requires the approval of the competent authority.**

...

6. ...  
The prices and fees charged by a trade repository shall be **cost-covering**.

the AK supports the option of a public institution, which was subject of debate in the previous consultation. **As the depository has to fulfil public responsi-**

**As the depository has to fulfil public responsibilities, the transfer of these responsibilities to a private legal entity without public control must be rejected.**

**lities, the transfer of these responsibilities to a private legal entity without public control must be rejected.**

To prevent price dumping between trade repositories, which would be

at the expense of the stability of the financial market, it has to be ensured that the prices and fees cover at least the costs.

### Art 64 - General requirements

*European Commission*

*Amendment Application*

**7. (new) A „trading surveillance office“ must be established within the trade repository, which regularly controls whether the notifications received correlate with the market data and which examines whether deviations are in fact illegal actions or whether reporting obligations have been violated. ESMA shall be immediately informed about any violation of the reporting obligations.**

**8. (new) To enable an overall picture of the derivatives market it is necessary for the authorities to have access to data from the trade repositories of third countries.**

In an internationally highly interconnected market, the authorities are only able to get a comprehensive picture by ensuring their global access to trade repositories.

**Reason:**

The examination increases the reliability of the trade repository. In an internationally highly interconnected

market, the authorities are only able to get a comprehensive picture by ensuring their global access to trade repositories.

### Art 67 - Transparency and data availability

*European Commission*

*Amendment Application*

1. A trade repository shall publish aggregate positions by class of derivatives on the contracts reported to it.

1. A trade repository shall **regularly** publish aggregate positions by **detailed** class of derivatives on the contracts reported to it.

**Reason:**

The public has significant interest in a good overview of this sector.

Should you have any further questions  
please do not hesitate to contact

**Mrs Judith Vorbach**

T + 43 (0) 732 6906 2434  
vorbach.j@akooe.at

**Mrs Susanne Wixforth**

T +43 (0) 1 501 65 2368  
susanne.wixforth@akwien.at

as well as

**Mr Amir Ghoreishi**

T +32 (0)2 230 62 54  
e-mail: amir.ghoreishi@akeuropa.eu  
at our AK office in Brussels.

**Austrian Federal Chamber of Labour**

Prinz-Eugen-Straße 8-10  
A-1040 Vienna, Austria  
T +43 (0) 1 501 65-0  
F +43 (0) 1 501 65-0

**AK EUROPA**

Permanent Representation of Austria  
to the EU  
Avenue de Cortenbergh, 30  
B-1040 Brussels, Belgium  
T +32 (0) 2 230 62 54  
F +32 (0) 2 230 29 73