

## **Memorandum of Understanding**



**European Securities and Markets Authority**



**ASIC**

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Australian Securities & Investments Commission

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## **Memorandum of Understanding on Cooperation Arrangements to access information on derivatives contracts held in European Union trade repositories**

The Australian Securities and Investments Commission ("ASIC") and the European Securities and Markets Authority ("ESMA") have agreed this Memorandum of Understanding ("MoU") regarding cooperation arrangements for the access to information on derivatives contracts held in trade repositories registered in accordance with Article 55 of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (respectively "EU TRs" and "EMIR").

Pursuant to Article 76(1) EMIR, relevant authorities of third countries that do not have any trade repository established in their jurisdiction may contact ESMA with a view to establishing cooperation arrangements to access information on derivatives contracts held in EU TRs.

In this respect, there is no trade repository established in Australia.

Article 76(2) EMIR requires the establishment of cooperation arrangements as a precondition for ASIC to access information on derivatives contracts held in EU TRs.

In addition, Article 81(3) EMIR also requires the establishment of cooperation arrangements as a precondition for ASIC to be provided with the necessary information by a trade repository.

Therefore, the purpose of this MoU is to enable ASIC to have direct access to information on derivatives contracts held in EU TRs that it needs to fulfil its responsibilities and mandates, while ensuring that guarantees of professional secrecy exist, including the protection of business secrets shared by ASIC with third parties.

This MoU is a statement of intent between ASIC and ESMA. It is not legally binding and it does not affect any other MoUs that ASIC has in place with any other national competent authorities of any Member States of the European Union.

### **Article 1**

#### **Definitions**

For the purpose of this MoU:

- a) "ASIC" means the Australian Securities and Investments Commission.
- b) "Authority" means a signatory to this MoU or any successor thereto.

- c) “EMIR” means Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories<sup>1</sup>.
- d) “ESMA” means the European Securities and Markets Authority established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010<sup>2</sup>.
- e) “EU TR” means a TR established in the European Union which has been registered by ESMA pursuant to Article 55 EMIR.
- f) “European Union Competent Authorities” means the competent authority as defined in Article 2(13) EMIR.
- g) “Governmental Entity in the jurisdiction of the Requesting Authority” means any minister assigned responsibility for ASIC’s functions, the Australian Department of the Treasury, the Reserve Bank of Australia and the Australian Prudential Regulation Authority.
- h) “Laws and Regulations” means in relation to ESMA applicable European Union legislation within ESMA’s scope of action and in relation to ASIC any applicable national laws and regulations or rules in force in Australia.
- i) “MoU” means this Memorandum of Understanding.
- j) “Person” includes a natural person, unincorporated association, partnership, trust investment company or corporation and may be an EU TR.
- k) “Requesting Authority” means ASIC making a request for access to information under this MoU.
- l) “RTS on access” means the Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data<sup>3</sup>.
- m) “Trade repository” or “TR” means a legal person that centrally collects and maintains the records of derivatives.

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<sup>1</sup> OJ, L 201, 27.7.2012, p. 1.

<sup>2</sup> OJ L 331, 15.12.2010, p. 84.

<sup>3</sup> OJ, L 52, 23.2.2013, p.33.

## **Article 2**

### **General provisions**

- 1) This MoU is a statement of intent to give direct access to the Requesting Authority to information on derivative contracts held in EU TRs that centrally collect and maintain the records of derivatives in the European Union, in a manner consistent with, and permitted by, Article 76 EMIR and other applicable Laws and Regulations.
- 2) This MoU does not create any legally binding obligations, confer any rights, or supersede any Laws and Regulations. This MoU does not confer upon any Person the right or ability, directly or indirectly, to obtain, suppress, or exclude any information or to challenge the execution of a request for access to information under this MoU.
- 3) This MoU does not prejudice or affect in any other way the competences of any institutions or authorities in the European Union and in any Member States of the European Union and in Australia.
- 4) This MoU does not limit an Authority to taking solely those measures described herein in fulfilment of its responsibilities and mandates.
- 5) The Authorities should, within the framework of this MoU, provide one another with the fullest cooperation permissible under their Laws and Regulations in relation to the grant of access to information on derivative contracts held in EU TRs.
- 6) The Authorities hereby designate contact persons as set forth in the Appendix to facilitate communication under this MoU.

## **Article 3**

### **Scope of access to information**

- 1) The Authorities recognise the importance of granting access to information on derivative contracts held in EU TRs.

EU TRs will make the necessary information on derivative contracts available to the Requesting Authority to enable it to fulfil its responsibilities and mandates in accordance with Article 81(3)(i) EMIR and RTS on access.

This MoU covers only the information on derivative contracts which was reported to EU TRs under Article 9 EMIR and does not limit the ability of the Requesting Authority to access and onward share information reported under the Laws and Regulations of the Requesting Authority.

- 2) *Notification*. Each Authority will inform the other relevant Authority as soon as practicable of:
- a) any known material event that could adversely impact the access to information on derivative contracts held in an EU TR;
  - b) changes and pending changes to the relevant obligations and requirements to which EU TRs are subject and to any relevant Laws and Regulations applicable to EU TRs when these changes could have a material effect on the access to information on derivative contracts held in EU TRs;
  - c) changes and pending changes to the relevant Laws and Regulations as well as any known event that could materially impact the fulfilment of the conditions of application of Article 76 or Article 81(3)(i) EMIR (including where a trade repository becomes established in the jurisdiction of the Requesting Authority, or where the guarantees of professional secrecy do not exist any longer);
  - d) changes in the relevant jurisdictions that could materially affect the conditions under which this MoU is entered into; and
  - e) changes in the responsibilities and mandates of the Requesting Authority that could materially affect its right to access information held in EU TRs.

The determination of what constitutes “material event”, “adversely impact” or “material effect” will be left to the reasonable discretion of the notifying Authority.

#### **Article 4**

##### **Permissible uses of information**

- 1) Each Authority will use non-public information that is:
- a. made available to the Requesting Authority by EU TRs in accordance with Article 81(3)(i) EMIR and RTS on access and this MoU; or
  - b. provided by one Authority to the other under Article 3(2);

solely for the purpose of fulfilling its responsibilities and mandates as defined in the Laws and Regulations of the Authority.

- 2) Before using such non-public information for any purposes other than that stated in paragraph 1 of this Article, the Authority receiving the information must first consult with and obtain the written consent of the other Authority for the intended use. If consent is denied by the other Authority, the Authorities will consult to

discuss the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Authority might be allowed.

## **Article 5**

### **Confidentiality and onward sharing of information**

- 1) Except for disclosures under paragraph 4, 5 or 6 of this Article and permissible uses of information under Article 4, each Authority will keep confidential non-public information obtained as contemplated by this MoU and any other non-public information provided by the other Authority under this MoU. The terms of this MoU are not confidential.
- 2) Each Authority will put in place all such procedures as may be necessary to ensure that the confidentiality and professional secrecy required by paragraph 1 of this Article is maintained, including the protection of business secrets shared by the Authority with third parties.
- 3) Except for disclosures under paragraph 4, 5 or 6 of this Article and permissible uses of information under Article 4, each Authority must first consult with and obtain the written consent of the other Authority before disclosing non-public information obtained as contemplated by or under this MoU to any non-signatory to this MoU. If consent is denied by the other Authority, the Authorities will consult to discuss the reasons for withholding approval of such disclosure and the circumstances, if any, under which the intended disclosure by the Authority might be allowed.
- 4) When, according to the Laws and Regulations of an Authority, the Authority must transmit the information obtained as contemplated by or under this MoU to or by the order of other persons that are not signatories of this MoU, the Authority must notify the other Authority of such transmission, including the details of the information transmitted. When complying with a demand for such a transmission of information, the Authority intends to assert all appropriate legal exemptions or privileges with respect to such information as may be available.
- 5) The Requesting Authority may share information obtained as contemplated by or under this MoU with any relevant authority established in its jurisdiction which has entered into cooperation arrangements with ESMA under Article 76 EMIR.
- 6) The Requesting Authority and ESMA may respectively share non-public information obtained as contemplated by or under this MoU with a Governmental Entity in the jurisdiction of the Requesting Authority (other than a relevant authority referred to in paragraph 5 of this Article) and with European Union Competent Authorities under Articles 83 and 84 EMIR. In such circumstances:

- a) The Authority must notify the other Authority of such sharing, including the details of the information transmitted; and
  - b) The Authority must have received adequate assurances concerning the use, the conditions of professional secrecy and confidential treatment of the information by the Governmental Entity in the jurisdiction of the Requesting Authority or the European Union Competent Authorities (as applicable), including, as necessary, assurances that:
    - (i) the information is shared for a purpose within the scope of responsibilities and mandates of the Governmental Entity in the jurisdiction of the Requesting Authority or the European Union Competent Authorities (as applicable); and
    - (ii) there will be no onward-sharing of the information with other parties without getting the prior written consent of the Requesting Authority (in the case of information shared by ESMA with a European Union Competent Authority) or ESMA (in the case of information shared by the Requesting Authority with a Governmental Entity in the jurisdiction of the Requesting Authority).
- 7) The Authorities intend that the sharing or disclosure of non-public information, pursuant to the terms of this MoU, will not constitute a waiver of privilege or confidentiality of such information.

## **Article 6**

### **Personal data**

Each Authority will process any personal data contained in the information obtained as contemplated by or under this MoU solely for the purpose of fulfilling its responsibilities and mandates as defined in the Laws and Regulations of the Authority and complying with the requirements set out in the data protection laws and regulations applicable in the jurisdiction of the Authority.

## **Article 7**

### **Successor authorities**

Where the relevant functions of an Authority are transferred or assigned to another authority or authorities, the terms of this MoU will apply to the successor authority or authorities performing those relevant functions without the need for any further amendment to this MoU and notice will be provided to the other Authorities. This will not affect the right of the successor authority or authorities or any other Authority to give written notice as provided in Article 10(2) that it no longer wishes to be a

signatory to this MoU if it wishes to do so. Notwithstanding the foregoing, such successor authority or authorities will become a signatory or signatories to this MoU.

### **Article 8**

#### **Amendment**

The Authorities intend to periodically review the functioning and effectiveness of the cooperation arrangements between the Authorities with a view, inter alia, to expanding or altering the scope or operation of this MoU should that be judged necessary. This MoU may be amended with the written consent of all signatories.

### **Article 9**

#### **Execution of the MoU**

This MoU will enter into force on the date that it is signed by the Authorities.

### **Article 10**

#### **Termination**

- 1) This MoU will remain operative for an unlimited period of time.
- 2) If an Authority wishes to no longer be a signatory to this MoU, it will provide thirty (30) calendar days prior written notice to the other Authority.
- 3) If an Authority gives such notice, information obtained under this MoU will continue to be treated in a manner prescribed under Articles 4 to 6.
- 4) Where the conditions of application of Article 76 EMIR are no longer met (including where a trade repository becomes established in the jurisdiction of the Requesting Authority, or where the guarantees of professional secrecy do not exist any longer), the MoU will terminate with immediate effect, if and when notice has been provided from one Authority to the other Authority indicating the conditions of application of Article 76 EMIR are no longer met.



**Signatures**

Date:

<p>European Securities and Markets Authority</p>  <p><b>Steven Maijor</b> <b>Chairman</b></p>	<p>The Australian Securities and Investments Commission</p>  <p><b>Greg Medcraft</b> <b>Chairman</b> 26/11/2014</p>
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Appendix

**Contact Persons**

European Securities and Markets Authority	The Australian Securities and Investments Commission
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