

**Ms. Rohini Tendulkar**  
**IOSCO General Secretariat**  
**International Organization of Securities Commissions (IOSCO)**  
**Calle Oquendo 12**  
**28006 Madrid**  
**Spain**

**Re: CCP12 Comment on the Task Force on Cross-Border Regulation**

Dear Ms Tendulkar:

The CCP12 is a global association of 35 major central counterparty organizations in Europe, Asia and the Americas<sup>1</sup> and welcomes the opportunity to respond to the Consultation Report prepared by the IOSCO Task Force on Cross-Border Regulation ("Report")<sup>2</sup> as international regulatory coordination is especially for CCP12 an important element.

The G20 Leaders emphasized at the 2009 Pittsburgh Summit the importance of consistent global standards in order to: ensure a level playing field, lower the costs, avoid regulatory arbitrage and avoid fragmentation of markets.<sup>3</sup> Cooperation across jurisdictions could help to reduce the risk of future crisis and enhance the international financial system resilience.

However, regulatory structures, particularly in the United States and Europe, that have emerged since the 2009 Pittsburgh Summit have, understandably, diverged on some key aspects, making the quest for a level playing field and avoidance of regulatory arbitrage more difficult. We continue to believe that global standards should serve as the benchmark for domestic regulators evaluating businesses operating and transactions taking place on a cross-border basis. Therefore we strongly support the development and application of global standards like CPSS-IOSCO Principles for Financial Market Infrastructures<sup>4</sup>.

On equivalence determinations by the European Commission and the recognition of third-country central counterparties (CCPs) under the European Market Infrastructure Regulation (EMIR), we also have seen regulatory divergences. The combination of a lack of third-country CCP recognition and the expiry of the transitional provisions related to own funds for exposures to CCPs in the European Capital Requirements Regulation could severely affect European firms acting on a cross-border basis as EU banks and investment firms would not be able to apply qualifying CCP capital treatment to CCPs not recognized by the European Securities Market Authority. Also Non-EU banks have a disadvantage here, as EU CCPs might not be recognized as qualifying CCP in third countries, although equivalence has been set up. Global convergence would call for recognition of non-EU CCPs that may not have applied for EU recognition but are adhering to the CPSS-IOSCO principles for financial market infrastructures while reciprocity needs to be ensured.

Regulators from jurisdictions around the world must also be conscious the importance of CCPs when establishing resolution plans for systemically important firms. Specifically exemptions for CCPs, from automatic stays should be considered in the relevant resolution plans of a resolution authority. Regulators should also consider cross-border impact(s) of automatic stays and make reasonable endeavors to coordinate with other regulators in order to maintain orderly markets.

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<sup>1</sup> CCP12 was formed to share information, develop analyses and develop policy standards for common areas of concern. , and add to global industry and regulatory consultation and debate in order to promote development and adoption of best practices in CCP risk management and operational activities. The member list of the CCP12 is included in Annex 1 to this letter.

<sup>2</sup> IOSCO Task Force on Cross-Border Regulation, 2014, available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD466.pdf>

<sup>3</sup> See G20 Leaders' Statement: The Pittsburgh Summit, available at [http://ec.europa.eu/archives/commission\\_2010-2014/president/pdf/statement\\_20090826\\_en\\_2.pdf](http://ec.europa.eu/archives/commission_2010-2014/president/pdf/statement_20090826_en_2.pdf).

<sup>4</sup> See Principles for Financial Market Infrastructures, available at: <http://www.bis.org/cpmi/publ/d101a.pdf>.

In the past year, several equivalence processes between various jurisdictions have been initiated. However it is quite unsatisfactorily, that equivalence processes sometimes are resulting in a unilateral recognition only and the opportunity to reach mutual recognition is missed. Also the insolvency law needs closer coordination as some regulators have very broad powers with automatic stays. A lack of regulatory cooperation will worsen things in case of a systemic event.

CCP12 fully supports IOSCO to take a leadership role in promoting coordinated and consistent regulatory rules and standards.

Please find some further remarks by CCP12 on Tool 2 Recognition

### **Tool 2 – Recognition**

*“Upon assessment, domestic regulator recognizes that the foreign regulatory regime is sufficiently comparable to the domestic regime to allow for reliance on the other jurisdiction’s regulatory regime. Enables activities of persons and entities and the distribution of products from recognized foreign jurisdictions to take place on specific terms under unilateral recognition, or on agreed terms under mutual recognition. Commonly supported by cooperative mechanisms with foreign regulators.”* *“Mutual Recognition: Requires an arrangement between domestic and foreign regulators to recognize each other’s regimes. Requires mutual cooperation with the regulator and involves reliance on the regulatory regime in the other jurisdiction.”* *“Unilateral Recognition: Recognition of the domestic regulatory regime not required.”*

### **CCP12 Response**

CCP12 supports mutual recognition between jurisdictions using the CPSS-IOSCO Principles for Financial Market Infrastructure (“PFMI”) and an outcomes-based approach to recognizing the regulatory framework in foreign jurisdictions. Such a framework will ensure that market participants have continuous access to CCPs without uncertainty or disruptions and will also help maintain a level playing field for market infrastructure without distortions to cross-border access or competition. As it is clear that CPMI-IOSCO standards are insufficiently precise CCP12 would support more comprehensive international standards that are implemented faithfully in the various jurisdictions. It should also ensure that recognition determinations will be based on an assessment of whether the principles embodied by the PFMI are met by the CCP rather than by a side-by-side comparison of specific rules within each jurisdiction. This principles-based approach should contribute maximum flexibility to recognition determinations in an environment where jurisdictions have chosen different measures to achieve the principles laid out by the PFMI that result in similar outcomes.

However CCP12 believes that the IOSCO report, in dealing with Tool 2, does not adequately account for the range of options in which recognition could be applied. And it is often these differences in the approach to recognition that give rise to disputes, not just the extra-territorial reach of specific regulatory frameworks. From the FStabB paper on deference, they conclude:

- The authority (or types of authority), standards and processes for making determinations vary across jurisdictions and, in some instances, within jurisdictions, depending on the entity requesting deference or the scope of deference being granted.
- Jurisdictions report having a framework for deference in place with respect to infrastructure providers, while fewer report having a framework for deference in place with respect to market participants. With respect to market participants, jurisdictions more commonly report having (or contemplating having) a framework for deference to certain transaction-level requirements than for entity-level requirements (such as the supervision of participants).
- Some jurisdictions look for ‘identical’ rules in their assessments of foreign jurisdictions when considering whether to grant deference while other jurisdictions take an “outcomes approach”. The “outcomes approach” should be the preferred approach. Therefore while we encourage global standard setters to continue to set regulatory standards, we could recommend that global standard setters also provide a more detailed toolkit on how to apply recognition.

Regulatory capacity means that larger jurisdictions are given preference in terms of having their jurisdictions assessed as equivalent before smaller jurisdictions.

It is important for this tool to establish procedures for recognition of CCPs after equivalence of regulatory regimes has been defined. Two options can be suggested:

- a) Recognition of foreign CCPs by the host regulator due to the fact that such CCPs were qualified by the domestic regulator within its jurisdiction. This option is applicable to foreign CCPs which providing clearing services to participants

incorporated in a host jurisdiction and the qualification of the foreign CCP is granted under its national law consistent with PFMI.

b) Recognition by the host regulator on regulator-to-regulator principle, by which a foreign CCP has to follow an easier recognition procedure agreed between regulators, which replaces the recognition procedure applied to CCPs incorporated in the host jurisdiction.

There are various recognition and exemption frameworks that regulators currently use to grant access to foreign CCPs. Generally, this cross-border access has been granted through substituted compliance which relieves foreign CCPs of some host-country compliance requirements based on a finding of comparable home-market regulation. These recognition frameworks typically include ongoing information sharing and cooperation requirements. Recognitions and exemptions have helped connect market participants and thereby increase liquidity and efficiency. They have also established trust and cooperation between regulators, often on the basis of bilateral memoranda-of-understanding (MOUs) and information-sharing agreements.

CCPs seeking recognition or exemptions to access customers in foreign jurisdictions often face very divergent initial application and recognition processes and ongoing obligations. The implementation of G20 reforms has also created not only new challenges, but real difficulties for CCPs seeking to access multiple foreign markets or continue to offer services to existing clients, located in different jurisdictions where prudential rules for CCPs have been implemented differently, and which de facto have become extraterritorial requirements. As a result of the extra-territorial approach to regulation, entities that previously were not regarded as “doing business” in a foreign jurisdiction now fall under that jurisdiction’s regulatory regime and have to comply with their standards in addition to whatever home standards may exist. The negative impacts of this extra-territorial approach have been well-articulated by a number of significant financial market stakeholders. This additional compliance implies that CCPs that desire to operate in several jurisdictions now have to be found “equivalent” not just with one global standard but numerous rules from different jurisdictions.

Cross-border recognitions have been tied to other aspects of regulation such as bank capital rules under Basel III or the regulatory status of products under other market regulations, which have become increasingly important in the wake of the G20 reforms. Delays and complexity around cross-border recognition create uncertainty for markets and all market participants including commercial end users that depend on derivatives markets to effectively manage price risk.

CCPs from jurisdictions around the world are also facing pressing challenges relating to recognition and equivalence. Under the new Basel III rules, CCPs need to obtain QCCP status in order to remain viable from a bank capital perspective. Since capital treatment as a QCCP under the EU rules is tied to recognition under the European Market Infrastructure Regulation (EMIR), the delays in the EMIR equivalence and recognition process cast doubt on the continued viability of a global market in derivatives. This includes house and client relationships across every asset class.

It should also be noted that the Basel document ‘Capital requirements for bank exposures to central counterparties’ contains a very clear statement regarding the approach of national regulators to determining a QCCP status i.e. they should do it according to the national rules consistent with the PFMI regulation (See Annex 4, section I,A). In this regard, we believe that EMIR has gone beyond the Basel framework by requiring non-EU CCPs to apply to ESMA to get a QCCP status, instead of taking into account the status granted by its national regulator.

Concerns about the criteria for recognition have been raised in the EU and U.S., as well as in other jurisdictions of Asia Pacific, where in some cases CCPs are encountering opaque application and/or recognition criteria in other regions as well, including the Asia-Pacific. It is proving difficult for many CCPs, including those from both mature and emerging markets, to comply with multiple sets of standards in order to access foreign markets or retain existing clients. Specifically, certain jurisdictions have adopted principles that require CCPs to establish, in certain cases, local subsidiaries to serve domestic participants. This undermines competition and prevents domestic participants from benefiting from the efficiencies available through membership in global CCPs.

## **Conclusion**

Five years on from the Pittsburgh Summit, we believe this report presents an excellent opportunity to move the practice of global regulatory cooperation closer to the vision of G20 leaders. CCP12 believes that effective cross border coordination is an essential component of global financial stability and economic growth. Despite acknowledgement of its importance by policymakers, the practice of coordination has a number of important shortcomings. IOSCO’s Task Force on Cross-Border Regulation Consultation Report is a good opportunity to assess how these might be addressed. CCP12 believes

that mutual recognition in the light of global implementation of the CPSS-IOSCO principles for FMI will become the most powerful tool in the midterm.

The process of strengthening coordination presents a broader role for IOSCO. Promoting more effective and earlier dialogue will be crucial. IOSCO can also help legislators understand and comply with global standards. It can also promote best practice.

**Sincerely,**

Sd/-

**Siddhartha Roy  
Chairman, CCP12**

**Attachment:** Annex 1 – List of CCP12 Member Organizations