

Addressing Legal Barriers to Reporting of, and Access to, OTC Derivatives Transaction Data-CMB's Responses

Recommendations on which jurisdictions are to report planned actions by June 2016

Recommendation

Barriers to reporting information into TRs or TR-like entities

- Where barriers to full reporting of trade information (including counterparty information) exist within a jurisdiction's legal and regulatory framework, such barriers should be removed by June 2018 at the latest, with respect to reporting pursuant to domestic and foreign requirements.

CMB's Response

(The Reporting Communiqué/Communiqué) has been drafted and communicated to major related institutions and market participants for consultation. Trade reporting requirements are regulated through this regulation. The draft Communiqué is planned to be revised based on the proposals received from and finalized before end 2016.

Regarding the Communiqué, one of the most important points that should be noted is that, within the limited scope of the authority that has been given to CMB by Capital Markets Law, trade reporting by foreign participants is not regulated in the Communiqué. Thus related fields are still kept N/A. On the other hand, reporting pursuant to foreign reporting requirements are subject to the provisions of the related third country, there is no extra limitation on these reporting requirements resulting specifically from the Communiqué.

One another point to note is that all domestic participants should only report to MKK (Local TR) pursuant to domestic requirements. Reporting to foreign TRs is not permitted.

Additionally there are no specific provisions in the Communiqué regarding reporting to TR-like entities.

According to the provisions of Draft Reporting Communiqué, some table fields in the FSB's thematic peer review report on OTC derivatives trade reporting, published in November 2015 should be updated as below:

Reporting to a TR or pursuant to domestic reporting requirements:

In the Communiqué, reporting by domestic trade participant to a foreign TR is not permitted

		Trade Data:	
		Domestic counterparties	Foreign counterparties
Reporting by domestic trade participant	<i>To a domestic TR</i>	No limitation	No limitation
	<i>To a foreign TR</i>	Not permitted	Not permitted.
Reporting by foreign trade participant	<i>To a domestic TR</i>	N/A	N/A
	<i>To a foreign TR</i>	N/A	<i>Intentionally left blank</i>

Reporting to a TR-like entity pursuant to domestic reporting requirements:

In the Communiqué, reporting by domestic trade participant to a foreign TR-like entity is not permitted. Reporting by domestic trade participant to a domestic authority is not regulated in the Communiqué.

		Trade Data:	
		Domestic counterparties	Foreign counterparties
Reporting by domestic trade participant	<i>To a domestic entity¹</i>	No limitation ²	No limitation ²
	<i>To a foreign entity¹</i>	Not permitted	Not permitted.
	<i>To a domestic authority³</i>	N/A	N/A
	<i>To a foreign authority³</i>	Not permitted	Not permitted.
Reporting by	<i>To a domestic entity¹</i>	N/A	N/A

¹ Include TR-like entities that are owned/operated by the private sector or public sector. Do not include government authorities (such as a central bank, market regulator or prudential regulator) that collect trade data on a TR-like basis.

² In the in the FSB's thematic peer review report on OTC derivatives trade reporting, Takasbank has been cited as a private sector operated TR-like entity receiving trade data limited with leveraged transactions. Since leveraged transactions were excluded from reporting requirements in the Communiqué, Takasbank may not be taken as a TR-like entity anymore.

³ Include government authorities (such as a central bank, market regulator or prudential regulator) that collect trade data on a TR-like basis.

		Trade Data:	
		Domestic counterparties	Foreign counterparties
foreign trade participant	<i>To a foreign entity¹</i>	N/A	<i>Intentionally left blank</i>
	<i>To a domestic authority³</i>	N/A	N/A
	<i>To a foreign authority³</i>	N/A	<i>Intentionally left blank</i>

After revision and finalization of the draft Communiqué based on the proposals, it will be adopted and related parties will be given time for adaptation to the regulations. In the meantime, CMB, MKK and other related public authorities will work on practical issues and additional working papers to guide market participants on reporting requirements.

First reporting of transactions are expected to take place at the beginning of 2017 and no gradual transition is planned. Within this calendar, CMB will be able consider revision of regulations, including removing the legal barriers to trade reporting, only after collecting some trade data based on actual reporting experiences.

CMB's anticipation is that, it will take at least two years after first operation of reporting requirements pursuant to the Reporting Communiqué to have adequate material facts that will help CMB to evaluate and comment on the necessary steps that has to be taken for an action plan for the removal of the legal barriers.

- Where there is a requirement in a jurisdiction's legal and regulatory framework that a trade participant must obtain a counterparty's consent to report trade data, by June 2018 at the latest all jurisdictions should permit transaction counterparties to provide standing consent to the reporting of such data to any domestic or foreign TR.

According to Reporting Communiqué, transfer of trade data should be displayed according to The Law on Protection of Personal Data, No: 6698 (Data Protection Law) which has been released in Official Gazette on 24th March 2016.

According to the Law, personal data cannot be transferred abroad without data subject giving his consent which is freely given, specific and informed. A transfer of personal data to a third country may take place where the Personal Data Protection Board has decided that the third country in question ensures an adequate level of protection. Such a transfer shall not require any specific authorization. In the absence of such decision, personal data may be transferred to a third country only if the controllers or processors both in Turkey and in the third country provide a written pledge of adequate protection, and on condition that Personal Data Protection Board approves the transfer.

The related provisions in the Law, No: 6698 regarding derogations for specific situations, processing of special categories of personal data and lawfulness of processing are reserved in transfers of personal data to third countries.

In this context, there are no constraints specified in Data Protection Law on counterparties to provide standing consent to the reporting of trade data to any domestic or foreign TR.

- Masking of newly reported transactions should be discontinued by end-2018 once barriers to reporting are removed, since masking prevents comprehensive reporting.

Masking is not permitted in trade reporting requirements regulated in the Reporting Communiqué.

Authorities' access to TR-held data

- By June 2018 at the latest all jurisdictions should have a legal framework in place to permit access to data held in a domestic TR by domestic authorities and by foreign authorities, on the basis of these authorities' mandates and in accordance with the domestic regulatory regime.³

- The legal framework should include eliminating the conditions that, in practice, prevent this access.⁴

2 In some jurisdictions there are restrictions or prohibitions on the use of certain types of counterparty identifying information, particularly in relation to natural persons (for instance, national identity numbers or social security numbers), that may affect what types of information can legally be included in transaction reports. In such cases, jurisdictions should ensure other counterparty identifying information is able to be included in transaction reports made pursuant to domestic or foreign requirements so as to prevent counterparty anonymity.

3 For more details on the level of data access in relation to the authorities' functional mandates, please refer to CPMI–IOSCO (2013), Authorities' access to trade repository data, August; available at: <http://www.bis.org/cpmi/publ/d110.htm> and <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD417.pdf>.

4 Legal frameworks, processes and procedures, and any TR-related cooperative arrangements for authorities' access should be consistent with the recommendations of the CPMI–IOSCO 2013 report on authorities' access to TR-held data, and consistent with Responsibility E of the CPMI–IOSCO Principles for Financial Market Infrastructures which states: "Central banks, market regulators, and other relevant authorities should cooperate with each other, both domestically and internationally, as appropriate, in promoting the safety and efficiency of FMIs." Within this Responsibility, key consideration 8 states: "Relevant authorities should coordinate to ensure timely access to trade data recorded in a TR." See CPMI–IOSCO (2012), Principles for financial market infrastructures, April, pp.133–137; available at: <http://www.bis.org/cpmi/publ/d101a.pdf> and <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf>.

4

- In general, consistent with the recommendations of the CPMI–IOSCO 2013 report on authorities' access to TR-held data, it is preferable that access to relevant data held in TRs be direct rather than indirect access, to enable authorities to have continuous and un-intermediated access to relevant TR-held data.⁵

- All relevant authorities should coordinate in establishing cooperative arrangements that facilitate authorities' access to TR-held data (whether it be through direct or indirect access).⁴
- Authorities and TRs should work together, as appropriate, to facilitate the creation of appropriate operational frameworks that facilitate access to TR-held data, whether direct or indirect.

By June 2016 jurisdictions should report what actions are planned to permit and facilitate authorities' access to data held in a domestic TR.

CMB's Response

Issues on authorities' access to trade data is regulated in the Implementing Regulation on Procedures Concerning TR's Activities (The Implementing Regulation) that has been drafted and communicated to major related institutions and market participants for consultation simultaneously with the Communiqué on Reporting Obligations to TRs.

The draft Regulation is planned to be revised based on the proposals received from and finalized before end 2016.

In the regulation, access to domestic TR data by domestic authorities other than CMB is permitted without any material conditions while foreign authorities are given indirect access.

After revision and finalization of the Reporting Communiqué and the Implementing Regulation based on the proposals, they will be adopted and related parties will be given time for adaptation to the regulations. In the meantime, CMB, MKK and other related public authorities will work on practical issues and additional working papers to guide market participants on reporting requirements.

First reporting of transactions are expected to take place at the beginning of 2017 and no gradual transition is planned. Within this calendar, CMB will be able consider revision of regulations, including facilitating authorities' direct access to data held in MKK, only after collecting some trade data based on actual reporting experiences.

CMB's anticipation is that, it will take at least two years after first operation of reporting requirements pursuant to the Reporting Communiqué to have adequate material facts that will help CMB to evaluate and comment on the necessary steps that has to be taken for an action plan for the giving direct access to foreign authorities.

Turkey's Supplementary Responses

1. In the tables included in your response, what is the difference in substance between boxes marked "N/A" and boxes marked "Intentionally left blank"?

The tables were taken from the original formats of the tables in the "Questionnaire circulated to national authorities for the Thematic Peer Review on OTC Derivatives Trade Reporting" which constitutes the basis of the assessments regarding Turkey in "FSB's thematic peer review report on OTC derivatives trade reporting, published in November 2015. According to the "Questionnaire" the fields were intentionally left blank since the related fields were logically impossible to fill. Thus, the fields which were intentionally left blank were not CMB's choice. Some of the boxes are marked N/A either because it does not apply to the particular case in question or because the answer is not available.

2. Your letter indicates that personal data may be transferred abroad with consent of the data subject. It also indicates that personal data may be transferred abroad upon certain actions by the Personal Data Protection Board. Please clarify whether both consent of the data subject and action of the Personal Data Protection Board are required, or whether either would be sufficient.

According to the Data Protection Law, consent of the data subject is the pre-condition of transferring the data abroad. But in the cases where

- The Personal Data Protection Board decides that a third country in question ensures an adequate level of protection or
- In spite of the absence of an adequacy decision of Data Protection Board on the level of the protection in the third country, if controllers or processors both in Turkey and in the third country provide a written pledge of adequate protection and the Personal Data Protection Board approves the transfer upon this written pledge, data may be transferred abroad without the consent of the data subject provided that if one of the following applies:
 - a) Processing of data is explicitly necessary according to laws.
 - b) Processing of data is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;
 - c) Processing of data is necessary for the conclusion or performance of a contract concluded in the interest of the data subject's part to the contracts
 - d) Processing is necessary for compliance with a legal obligation to which the controller is subject
 - e) Data has been publicized by the data subject himself
 - f) Processing is necessary for the establishment, exercise or defence of legal claims
 - g) Processing is necessary for the purposes of the legitimate interests pursued by the controller, except where such interests are overridden by the fundamental rights and freedoms of the data subject

Additionally, save for the exceptions or derogations provided for in international agreements, personal data may be transferred abroad with the permission of the Personal Data Protection Board after taking the opinion of the related public institution in the cases where it is likely that interests of Turkey or data subject will be harmed seriously upon this transfer.

3. Do the restrictions on transfer of personal data apply only to natural persons, or do they apply to non-natural persons as well?

The restrictions on transfer of data within the framework of the Data Protection Law apply to natural persons. Disclosure of business secrets, banking secrets or information relating to customers with unauthorized persons is prohibited by the provisions of Turkish Penal Code, which apply to both natural and non-natural persons. Turkish Penal Code also has some provisions prohibiting unlawful recording, sharing and obtaining of personal data.

4. Your letter states that there are no constraints in the Data Protection Law on counterparties providing standing consent to trade reporting. Are there constraints on standing consent outside the Data Protection Law, or is standing consent permitted?

“Standing consent” is not specifically regulated in either the Data Protection Law or other laws. Where the processing is based on consent pursuant to the provisions of Data Protection Law, “explicit consent” of data subject which is freely given, specific and informed is sought. Thus, it can be commented that standing consent for “trade reporting requirements” is permitted on the condition that data subject gives explicit and specific consent to the processing of his/her personal data that will apply to all future transactions.

5. Your letter states that foreign authorities would be given indirect access to TR data under the current draft of the Implementing Regulation on Procedures Concerning TR’s Activities. Please describe any conditions to indirect access that are contained in the current draft of the Implementing Regulation or any other laws or regulations.

According to Capital Market Law, sharing of information kept at trade repositories with third persons, including public legal entities, is subject to the approval of the CMB. In the draft Implementing Regulation on Procedures Concerning TR’s Activities,

The requests of the relevant authorities of third countries to access information on derivatives contracts held in Turkish trade repository are subject to approval of CMB. CMB assesses these requests considering

- a) Existence of bilateral or multilateral reciprocity based cooperation agreements between two countries or MoUs between CMB and the relevant authority.
- b) Existence of guarantees of professional secrecy, including the protection of business secrets shared with third parties by the authorities, their equivalency to those set out in the draft Regulation.
- c) The purpose for which shared data will be used.