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04/04/2025

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Could non-EU entities, which are subject to the clearing obligation, be subject to the active account requirement?

ESMA Answer

10-07-2025

Original language

No. Article 7a of EMIR only applies to financial counterparties and non-financial counterparties, which are clearly defined under Article 2, points (8) and (9), of EMIR, respectively.

Disclaimer in relation to the answers provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

ESMA_QA_2518

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04/04/2025

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

How should the calculation mentioned in the second sentence of Article 7a(4), fifth subparagraph, of EMIR, be done, in order for counterparties to establish whether

they can benefit from the derogation regarding the number of trades in each of the most relevant categories to fulfil the representativeness obligation?

ESMA Answer

10-07-2025

Original language

First, the counterparty shall determine the number of trades it should clear on an annual average basis in each of the most relevant subcategories per class of derivative contracts and per reference period defined in accordance with Article 7a(8) of EMIR.

Second, where, all subcategories taken together, the resulting number of trades to be cleared exceeds half of the total number of trades of that counterparty cleared over the preceding 12 months, the representativeness obligation referred to in Article 7a(3), point (d), of EMIR, shall be considered fulfilled where that counterparty clears at least one trade in each of the most relevant subcategories per class of derivative contracts per reference period.

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Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

ESMA_QA_2517

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Should counterparties that clear more than 85% of the relevant derivatives contracts in the EU still comply with the representativeness obligation under Article

7a(3), point d, of EMIR and the related reporting obligation under Article 7b(1) of EMIR?

ESMA Answer

10-07-2025

Original language

Counterparties that already clear 85% of the relevant derivatives contracts in a CCP authorised under Article 14 of EMIR, are not exempted from the representativeness obligation under Article 7a(3), point (d), of EMIR.

In accordance with Article 7a(5) of EMIR, such counterparties are exempted from all of the following:

- the operational requirements referred to in Article 7a(3), points (a), (b) and (c), of EMIR;
- the stress-testing requirement referred to in Article 7a(4), fourth subparagraph, of EMIR;
- the reporting requirements referred to in Article 7b of EMIR.

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clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

ESMA_QA_2516

Submission Date

04/04/2025

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Could counterparties that are subject to the active account requirements (i.e. to hold an active account, clear at least a representative number of trades in this

active account and the subsequent reporting requirements) and that are part of a group subject to consolidated supervision in the Union, outsource these obligations to another entity of the group?

ESMA Answer

10-07-2025

Original language

Yes.

However, where an entity chooses to outsource the tasks related to the requirements to which it is subject to according to Article 7a of EMIR, that entity remains legally responsible for the performance of such tasks.

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ESMA_QA_2515

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Could counterparties that are subject to the active account requirements and that are part of a group, outsource the notification to the relevant competent authority

and ESMA, as mentioned in the second subparagraph of Article 7a(1) of EMIR, to another entity of the group subject to consolidated supervision in the Union that it belongs to ?

ESMA Answer

10-07-2025

Original language

Yes.

However, where an entity chooses to outsource the submission of the notification under Article 7a(1) of EMIR, that entity remains responsible for the timely submission as well as the accuracy of the information transmitted to the relevant competent authority and ESMA in such notification.

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and national courts.

ESMA_QA_2514

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Should the requirement to clear at least a representative number of trades in an active account held at an EU CCP be performed at individual level or group level for

the counterparties belonging to a group?

ESMA Answer

10-07-2025

Original language

As clarified in Recital 12 of Regulation (EU) 2024/2987, the representativeness requirement referred to in Article 7a(3), point (d), of EMIR applies at entity level and should be fulfilled by the entity that has been determined to be subject to the active account requirements in accordance with Article 7a(1) of EMIR.

As such, should the entity have outstanding contracts only for a subset of categories of derivatives referred to in Article 7a(6) of EMIR, that entity would be required to meet the representativeness requirement only for those contracts regardless of the activity of the other entities in the group. Relatedly, should the entity not have any outstanding derivative contracts belonging to the categories referred to in Article 7a(6) of EMIR, that entity would not be required to conclude such contracts or to meet any of the related requirements under Article 7a of EMIR.

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Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

ESMA_QA_2513

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04/04/2025

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Regarding the requirement to clear at least a representative number of trades, should the trades be representative of the activity of the group or of the activity of

the individual entities within the group?

ESMA Answer

10-07-2025

Original language

As clarified in Recital 12 of Regulation (EU) 2024/2987, the representativeness requirement referred to in Article 7a(3), point (d), of EMIR applies at entity level and should be fulfilled by the entity that has been determined to be subject to the active account requirements in accordance with Article 7a(1) of EMIR.

The overall activity of the group as referred to in Article 7a(2) should only be taken into account to determine whether the entity that is part of that group is subject to the obligations in relation to Article 7a(2) of EMIR. An entity subject to the representativeness requirement should determine the number of transactions it needs to clear – directly or indirectly, in an EU CCP on the basis of all its own activity in derivative contracts belonging to the categories referred to in Article 7a(6) of EMIR.

ESMA_QA_2512

Submission Date

04/04/2025

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Should the requirement to hold at least one active account at an EU CCP be performed at individual level or at group level?

ESMA Answer

10-07-2025

Original language

The requirement under Article 7a(1) of EMIR to establish clearing arrangements, whether directly or indirectly, at a CCP authorised under Article 14 of EMIR, should be performed at individual level, provided that such entity does have outstanding derivative contracts belonging to the categories referred to in Article 7a(6) of EMIR.

Disclaimer in relation to the answers provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

ESMA_QA_2511

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04/04/2025

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Should the group level treatment mentioned in Article 7a(2) of EMIR apply to the calculation of the notional clearing volume outstanding mentioned in fourth

subparagraph of Article 7a(8) of EMIR?

ESMA Answer

10-07-2025

Original language

Yes. For the purpose of setting the duration of the reference period, which is also referred to in Article 7a(3), point (d), of EMIR, the calculation of the notional clearing volume outstanding mentioned in Article 7a(8), fourth subparagraph, of EMIR should apply the calculation method set out in Article 7a(2) of EMIR.

The representativeness obligation referred to in Article 7a(3), point (d), of EMIR nonetheless applies at entity level, as clarified in Recital 12 of Regulation (EU) 2024/2987.

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ESMA_QA_2510

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04/04/2025

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Should the group level treatment mentioned in Article 7a(2) of EMIR apply to the calculation of the notional clearing volume outstanding mentioned in the second

subparagraph of Article 7a(4) of EMIR ?

ESMA Answer

10-07-2025

Original language

Yes. The calculation of the notional clearing volume outstanding mentioned in the second subparagraph of Article 7a(4) of EMIR should apply the calculation method set out in Article 7a(2) of EMIR.

The representativeness obligation to which the second subparagraph of Article 7a(4) of EMIR refers to nonetheless applies at entity level, as clarified in Recital 12 of Regulation (EU) 2024/2987.

ESMA_QA_2509

Submission Date

04/04/2025

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Should the group level treatment mentioned in Article 7a(2) of EMIR apply to the calculation of both conditions mentioned in Article 7a(1)?

ESMA Answer

10-07-2025

Original language

The methodology to determine the fulfilment of the first condition of Article 7a(1) of EMIR, i.e. whether a counterparty is subject to the clearing obligation, is specified under Articles 4a and 10 of EMIR, respectively. There is therefore no need to perform a new calculation under Article 7a(2) of EMIR to establish whether that condition is met.

The group level calculation method set out in Article 7a(2) of EMIR shall apply to the second condition mentioned in Article 7a(1) of EMIR.

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ESMA_QA_2508

Submission Date

04/04/2025

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

Does the group level treatment mentioned in Article 7a(2) of EMIR apply only to groups included in a consolidation in accordance with Directive 2013/36/EU (CRD

IV) or should it also include other groups, e.g. entities included in a consolidation in accordance with Directive 2013/34/EU ?

ESMA Answer

10-07-2025

Original language

The group level treatment referred to in Article 7a(2) of EMIR applies to any EU entity that is part of a group subject to consolidated supervision in the Union. This means that the group level treatment cannot be limited to groups included in a consolidation in accordance with Directive 2013/36/EU.

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The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

ESMA_QA_2507

Submission Date

04/04/2025

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

How should the percentage of derivative contracts belonging to the categories of derivatives subject to the active account requirement be calculated for the purpose

of the exemption mentioned in Article 7a(5) of EMIR?

ESMA Answer

10-07-2025

Original language

A counterparty can benefit from the exemption mentioned in Article 7a(5) of EMIR at any point in time by demonstrating that it clears at least 85 % of its derivative contracts belonging to the categories referred to in Article 7a(6) of EMIR at a CCP authorised under Article 14 of EMIR.

In order to determine whether it is above or below the 85% threshold, the counterparty shall divide the gross outstanding notional of derivative contracts belonging to the categories referred to in Article 7a(6) of EMIR cleared at CCPs authorised under Article 14 of EMIR (numerator) by the total gross outstanding notional of derivative contracts belonging to the categories referred to in Article 7a(6) of EMIR cleared at any CCP, authorised under Article 14 of EMIR, recognised under Article 25 of EMIR or otherwise (denominator).

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Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

ESMA_QA_2506

Submission Date

04/04/2025

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Active Account Requirement

Question

To check whether counterparties are subject to the active account requirement, how should the positions to be compared to the clearing thresholds be calculated?

ESMA Answer

10-07-2025

Original language

In order to determine whether they are subject to the active account requirements in accordance with Article 7a(1) of EMIR, counterparties should check whether they meet the two cumulative conditions:

1. they are subject to the clearing obligation in accordance with Articles 4a and 10 of EMIR; and
2. they exceed the clearing threshold in any of the categories of derivative contracts referred to in Article 7a(6) of EMIR, in an individual category listed in that paragraph or on aggregate across all categories listed in that paragraph.

The methodology to determine the fulfilment of the first condition is specified under Articles 4a and 10 of EMIR, respectively.

For the second condition, counterparties should follow the same methodology as for the first condition, but not with the same frequency (i.e. on a continuous basis rather than every 12 months as mentioned in Articles 4a and 10 of EMIR): once a counterparty is subject to the clearing obligation, it shall determine whether it is above the clearing thresholds in any of the categories of derivative contracts referred to in Article 7a(6) of EMIR, in an individual category or on aggregate across all categories, as the case may be, using the same methodology as described in Articles 4a and 10 of EMIR, on a continuous basis.

Disclaimer in relation to the answers provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation

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competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

ESMA_QA_892

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03/05/2023

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Subject Matter

Access model (old CCP question 23 dated 7/01/2020)

Question

(a) When setting up models to access its clearing services (e.g. sponsored models, direct clearing models), whatever the purpose of such an access (e.g. to facilitate

buy-side or small participant
access to CCPs, to allow for better capital treatment, or for other purposes)

1. can a CCP introduce a new category of entities which would have a direct contractual link with the CCP, mixing some of the clearing member and some of the client features;

2. who bears the responsibility to comply with the financial obligations vis-à-vis the CCP?

(b) Can a CCP set up a clearing model where a client ("the Client") has the possibility to pay to the CCP the financial obligations corresponding to its positions in lieu of the clearing member?

(c) Can a CCP accept an individual as a clearing member?

ESMA Answer

07-01-2020

Original language

(a)(1) CCPs can establish clearing models for different categories of clearing members, clients and indirect clients, based on non-discriminatory, transparent and objective criteria, whatever the purpose of such models (e.g. to facilitate buy-side or small participant access to CCPs, to allow for better capital treatment, or for other purposes).

EMIR envisages clearing through 3 possibilities of access: via being a clearing member, via being a client or via clearing through indirect clearing arrangements. Those categories are distinct and EMIR does not contemplate mixing the status and features of a clearing member and a(n) (indirect) client.

As per Article 2 of EMIR, a clearing member is the undertaking which participates in the CCP, whereas a client does not participate in the CCP and thus is the undertaking which has a contractual relation with a clearing member (and indirect clients with a client) to be able to clear its transactions with a CCP.

(a)(2) EMIR requires that each clearing member bears the full responsibility to discharge with all the financial obligations vis-à-vis the CCP due to its participation, which include margin payment and default fund contributions. This does not mean that a third party cannot fulfil an obligation of a clearing member, but this should not transform the clearing member's liability vis-à-vis the CCP.

(b) In practice, the Client can directly pay to (and receive from) the CCP amounts corresponding to its positions instead of the clearing member. However, the CCP rules should be consistent with the following:

- the rules of the CCP foresee a possibility to refuse that the Client fulfils the payment obligations in lieu of its clearing member and the corresponding conditions for such a refusal;
- the clearing member remains responsible vis-à-vis the CCP for the discharge of the financial obligations stemming from its membership as referred to in Article 2(14) of EMIR, including any new financial obligations (e.g. fee payment, increase in default fund contribution) or an increase of the current obligations (e.g. because of market moves) due to its clearing membership, whether or not related to mutualised resources and including in relation to its clients positions;
- the payment by the Client does not entail that the Client becomes automatically a clearing member (unless it fulfils all participation requirements and has undertaken the corresponding procedure) or substitutes the clearing member;

- the CCP keeps the positions and assets of the Client segregated from the positions and assets of other clients as per Article 39(3) at a CCP and each obligation relating to individual client segregation under Article 39 of EMIR and Article 48 of EMIR remains applicable;
- given that according to Article 39(7) of EMIR, a CCP has to describe the main legal implication of each entity status and the corresponding segregation including the insolvency law applicable, the CCP may also need to perform this obligation in respect of client's insolvency law where a client performs some payments directly to the CCP;
- where the clearing member has defaulted, the CCP may, at any time after the porting window foreseen in Article 48 of EMIR with respect to the Client's assets and positions, decide to liquidate any of the clearing members house or client positions (including those of the Client) or execute any action foreseen in its rules in case of default for example because it assesses that prompt action is required to contain losses and liquidity pressures arising from the default."

(c) EMIR does not prevent in Article 2 and more specifically in the definition of a clearing member an individual from becoming a clearing member. However, should an individual apply to become a clearing member, it will need to prove to the CCP, among other requirements, that, like any other clearing member:

- it fulfils the capital requirements applicable to clearing members;
- its financial accounts are audited;
- it has the operational capacity, in terms of staff, systems and processes to meet its obligations towards the CCP, including with respect to risk management;
- it is connected to the system managed by the CCP and, directly or indirectly, to the relevant payment and settlement systems; and
- it has sufficient banking and contingency arrangements in place.

A CCP's participation requirements and risk-management controls should take into account any additional risks that may arise from having individuals as participants

ESMA_QA_887

Submission Date

03/05/2023

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Level 2 Regulation

COMMISSION DELEGATED REGULATION (EU) No 153/2013 Regulatory technical standards on requirements for central counterparties

Topic

EU-CCPs

Additional Legal Reference

Article 45(4) of EMIR - old CCP question 18 dated 11/02/2014

Subject Matter

Use of margins posted by non-defaulted Clearing Members (old CCP question 18 dated 11/02/2014)

Question

(a) Can a CCP have provisions in their rules under which the CCP can reduce pro-rata the amount of variation margin it is due to pay clearing members with a positive change in their positions in order to cover losses resulting from the default of another clearing member (variation margin haircutting) where:

1. The variation margin reduction is limited to a pre-defined monetary amount (e.g. an assessment of up to EUR XX million per clearing member)?
2. The variation margin reduction is limited to an amount which is relative to the exposure that the clearing member brings to the CCP (e.g. an assessment of up to X times the clearing member's prefunded default fund contribution)?
3. There is no pre-defined monetary or relative limit on the size of the variation margin reduction?

b) Can a CCP have provisions in their rules under which the CCP can use margins posted by a non-defaulting clearing member to cover a liquidity shortfall resulting from the default of a clearing member?

ESMA Answer

11-02-2014

Original language

a) EMIR provides that a CCP shall not use the margins posted by non-defaulting clearing members to cover losses resulting from the default of another clearing member (Article 45(4) of EMIR). However, while variation margin represents an amount of margin for the purpose of Article 39 of EMIR (i.e. it is required to be recorded in the separate records and accounts maintained for individually segregated clients as set out in CCP Question 8(2)(e)), such margin represents a payment flow between the counterparties of the original contract and does not represent margin posted by clearing members for the purpose of Article 45(4) of EMIR. Article 45(4) is therefore not applicable. It is compatible with EMIR for a CCP to reduce the amount of variation margin that it is due to pay clearing members with a positive change in their positions in order to cover losses resulting from the default of another clearing member.

EMIR also provides that the clearing members of a CCP shall have limited exposures toward the CCP (Article 43(3) of EMIR) and that a CCP shall ensure that the closing out of any clearing member's positions does not expose the non-defaulting clearing members to losses that they cannot anticipate or control (Article 48(2) of EMIR). Therefore, it is compatible with EMIR for a CCP to have provisions in its rules under which the CCP can reduce the amount of variation margin that it is due to pay clearing members with a positive change in their positions in order to cover losses resulting from the default of another clearing member and where:

1. the variation margin reduction is limited to a pre-defined monetary amount
2. the variation margin reduction is relative to the exposure that the clearing member brings to the CCP.
3. there is no pre-defined monetary or relative limit on the variation margin reduction.

In the first case, the losses to which non-defaulting clearing members are exposed are pre-defined and such losses can be controlled by the clearing member reducing the exposure that it has to the CCP. In the case of 2 and 3 above, the losses to

which non-defaulting clearing members are exposed can be calculated as they are a function of the aggregate positions cleared by those clearing members and such losses can be controlled by the clearing member reducing the aggregate positions that it clears with the CCP.

In the three cases above, the exposures are limited on the basis that they can both be anticipated and controlled.

b) EMIR provides that a CCP shall not use the margins posted by non-defaulting clearing members to cover losses resulting from the default of another clearing member (Article 45(4) of EMIR). However, the reuse of margins posted by a non-defaulting clearing member to cover a liquidity shortfall resulting from the default of a clearing member (e.g. the CCP using financial instruments posted as margins by non-defaulting clearing members as collateral for a repo transaction) is compatible with EMIR insofar as it does not represent the final application of such margins to extinguish the losses resulting from the default of another clearing member. This follows from Article 39(8) of EMIR which provides that a CCP shall have a right of use relating to margins or default fund contributions collected via a security financial collateral arrangement and Article 44(3) of Commission Delegated Regulation (EU) No 153/2013 which provides that a CCP may re-use financial instruments posted as margins, default fund contributions or contributions to other financial resources where the purpose of the re-use is for managing the default of a clearing member (among other possible uses and subject to other specified limitations). When extinguishing losses resulting from the default of a clearing member a CCP must follow the default waterfall prescribed in Article 45 of EMIR (and elaborated in Chapter IX of Commission Delegated Regulation (EU) No 153/2013. Therefore, if the total pool of assets held by the CCP is not reduced then transforming margins from one form to a more liquid form is compatible with EMIR.

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Additional Legal Reference

Article 2 of EMIR - old CCP question 14 dated 5/08/2013

Subject Matter

Definitions (old CCP question 14 dated 5/08/2013)

Question

Article 2(28) of EMIR provides that an “independent member” of the board means a member of the board who has no business, family or other relationship that raises a conflict of interests regarding the CCP concerned or its controlling shareholders, its management or its clearing members, and who has had no such relationship during the five years preceding his membership of the board. If a board member is considered independent in respect of the parent company of a CCP (according to the definition under Article 2(28) of EMIR), can this person also fulfil the requirements for being an independent board member of the CCP?

ESMA Answer

05-08-2013

Original language

An independent director of the parent company of a CCP might be considered to satisfy the criteria for appointment as an independent director of a CCP; however this is not automatic and should be analysed properly. In particular, it would need to be carefully considered as to whether the individual’s relationship with the parent company of the CCP raised a conflict of interest regarding the CCP. For example, the individual would likely owe duties to the parent company of the CCP and be required to act in the best interests of that company. These interests and duties might conflict with the interests of the CCP.

Article 3(4) of the RTS on CCPs also requires that “a CCP that is part of a group shall take into account any implications of the group for its own governance arrangements including whether it has the necessary level of independence to meet its regulatory obligations as a distinct legal person and whether its independence could be compromised by the group structure or by any board member also being a

member of the board of other entities of the same group..."

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Level 2 Regulation

COMMISSION DELEGATED REGULATION (EU) No 153/2013 Regulatory technical standards on requirements for central counterparties

Topic

EU-CCPs

Additional Legal Reference

Article 26 of EMIR - old CCP question 13 dated 21/05/2014

Subject Matter

Organisational requirements (old CCP question 13 dated 21/05/2014)

Question

a) Article 3(3) of Commission Delegated Regulation No 2013/153 requires a CCP to ensure that the functions of the chief risk officer, chief compliance officer and chief technology officer are carried out by different individuals and provides that these positions shall be held by employees of the CCP entrusted with the exclusive responsibility of performing these functions. Can these officers have other duties in addition to taking responsibility for the risk, compliance and technology functions respectively?

b) Pursuant to Article 3(2) of RTS 153/2013, a CCP shall not share its staff with other group entities, unless under the terms of an outsourcing arrangement in accordance with Article 35 of EMIR. Does the term “staff” extend to the senior management of the CCP (for example the chief executive officer of the CCP) or is it limited to those individuals with clerical or administrative roles

ESMA Answer

21-05-2014

Original language

(a) Recital 13 of Commission Delegated Regulation No 2013/153 explains that the rationale for requiring CCPs to have at least a chief risk, chief compliance and chief technology officer is to ensure that CCPs operate with the necessary level of human resources, are accountable for the performance of their activities, and provide competent authorities with relevant contact points.

The reference to “exclusive responsibility” in Article 3(3) of Commission Delegated Regulation No 2013/153 should be read in light of this recital. In particular, “exclusive responsibility” pertains to the fact that one single individual should have sole responsibility for the function of risk, another distinct individual should have sole responsibility for the function of compliance and a third distinct individual should have sole responsibility for the function of technology. “Exclusive responsibility” does not require that these individuals only undertake duties pertaining to their role as the chief risk, compliance or technology officer.

However, it should be carefully considered before these individuals take on any duties outside of the scope of the risk, compliance or technology functions to ensure that the individual is indeed appropriately dedicated to the function for which they are responsible.

b) In line with other European legislation, the term “staff” encompasses any person working for the CCP who is directly engaged in the services or activities which the CCP is authorised to provide or perform, and any natural person directly managing or supervising such persons. In particular, the Chief Executive Officer, although being a member of the board, is directly managing the CCP and therefore the provisions applicable to the staff should apply to the Chief Executive Officer.

Where a CCP maintains a two-tiered board system, the term “staff” does not encompass the members of the supervisory board.

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Level 2 Regulation

COMMISSION DELEGATED REGULATION (EU) No 153/2013 Regulatory technical standards on requirements for central counterparties

Topic

EU-CCPs

Additional Legal Reference

Article 42 of EMIR - old CCP question 12 dated 11/02/2014

Subject Matter

Default Fund (old CCP question 12 dated 11/02/2014)

Question

(a) Articles 42(2), 42(3) and 43(2) of EMIR require each CCP to hold financial resources including a default fund sufficient in size to cover losses arising from the default of the two largest members. However the CCP has the right in a default to transfer the positions of clients with porting arrangements to other clearing members. For the purposes of calculating the size of its default fund(s) and members' contributions, can a CCP exclude those client positions that are held in segregated and portable accounts?

(b) Article 30 of Commission Delegated Regulation (EU) No 153/2013 requires that "when implementing an internal policy framework for defining the types of extreme but plausible market conditions that could expose the CCP to greatest risk, a CCP shall specify (for each market to which a CCP is exposed in a clearing member default scenario) extreme but plausible conditions based at least on... (a) a range of historical scenarios... that would have exposed the CCP to greatest financial risk; and (b) a range of potential future scenarios... drawing on both quantitative and qualitative assessments of potential market conditions".

1. Is a CCP required to exactly replicate actual historical events in order to satisfy the requirement to use a range of historical scenarios or can a CCP use only quantitative and qualitative scenarios which are generated based on statistics derived from historical price changes?

2. When replicating actual historical events is a CCP required to exactly replicate actual historical price changes in all cleared instruments or can a CCP approximate prices moves based on similar instruments or market indices?

ESMA Answer

11-02-2014

(a) ESMA has considered the argument for not including certain client positions when calculating the size of the default fund to be that these client positions would not be impacted by the default of the clearing member because they are expected to be ported to another clearing member. However, these client positions might have an effect on the overall position of the clearing member, i.e. the default of one or more clients could increase the likelihood of default of the clearing member. Excluding these positions from the calculation of the size of the default fund could therefore expose the CCP to uncovered risks and this is contrary to the objectives of EMIR.

Furthermore, it is possible that client positions would not be ported but would be liquidated by the CCP and it is possible that some of the clients of one of the CCP's two largest clearing members would expect to port their positions to the other largest clearing member, which would not be possible where those two largest clearing members default concurrently.

Excluding client positions from the calculation of the size of the default fund could therefore expose the CCP to uncovered risks and is contrary to the objectives of EMIR.

(b.1) A CCP is required to specify extreme but plausible conditions based on a range of historical scenarios and additionally a range of potential future scenarios. The range of potential future scenarios is required to draw on quantitative and qualitative assessments of potential market conditions.

Both sets of scenarios must be developed and applied (historical scenarios and potential future scenarios drawing on quantitative and qualitative assessments). The use of statistics derived from historical price changes alone would not satisfy the requirement to use a range of historical scenarios.

When defining its potential future scenarios a CCP might include the use of statistics derived from historical price changes. However, the CCP would still need to include quantitative and qualitative assessments in the development of its potential future scenarios.

(b.2) A CCP might use similar instruments or market indices as a proxy for actual historical price changes so long as such proxies are carefully documented, validated and ensure that no relevant historical price changes have been excluded

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Level 2 Regulation

COMMISSION DELEGATED REGULATION (EU) No 153/2013 Regulatory technical standards on requirements for central counterparties

Topic

EU-CCPs

Additional Legal Reference

Article 41 of EMIR - old CCP question 9 dated 3/12/2018

Subject Matter

Margin requirements (old CCP question 9 dated 3/12/2018)

Question

(a) Under a cross-margining arrangement, two (or potentially more) CCPs set margin requirements on the basis of the portfolio of positions that a clearing member holds across the two CCPs. Is this approach consistent with the requirements of EMIR and the associated Commission Delegated Regulations?

(b) Article 24(1) of Commission Delegated Regulation (EU) No 153/2013 establishes the confidence intervals that a CCP shall at least respect in calculating the initial margins, over the time period defined in Article 25 of Commission Delegated Regulation (EU) No 153/2013 and assuming a time horizon for the liquidation of the position as defined in Article 26. Is the CCP obliged to respect the same confidence intervals if, for the purpose of margin calculations, it uses different time horizons, in addition to those prescribed in Articles 25 and 26 of Commission Delegated Regulation (EU) No 153/2013?

ESMA Answer

03-12-2018

Original language

(a) Although EMIR does not directly address cross-margining, there are a number of provisions in EMIR and Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) applicable to CCPs that need to be considered for the feasibility of cross-margining arrangements. In this respect, Article 41 of EMIR is

particularly relevant to consideration of cross-margining arrangements: a CCP must secure exposures with margin and a claim on, or guarantee from, another CCP cannot substitute for that. Other relevant provisions within EMIR that would require consideration are Article 45 of EMIR (Default Waterfall) which provides that margins must be used to cover the losses of 'the CCP' – i.e. margins cannot be used to cover the losses of another CCP; Article 47 of EMIR (Investment Policy) which provides (in conjunction with Article 44 of the RTS on CCP requirements) for limited circumstances in which a CCP might not place collateral received as margin with the operator of a security settlement system (see CCP Question 4); Article 39 of EMIR (Segregation and Portability) which provides that clearing member and client positions and assets must be recorded in the accounts of 'the CCP' – i.e. they cannot be recorded in the accounts of another CCP as an alternative.

Where it is not margin but the CCP's own capital that is being used to provide the guarantee to another CCP under a cross-margining arrangement, then the CCP would likely need to capitalise that guarantee under the provisions of the RTS on CCP requirements (as an exposure not covered by financial resources under Articles 41 to 45 of EMIR).

(b) Article 24 of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) establishes that a CCP shall calculate the initial margins to cover the exposures arising from market movements for each financial instrument that is collateralised on a product basis, over the time period defined in Article 25 of the RTS on CCP requirements and assuming a time horizon for the liquidation of the position as defined in Article 26 of the RTS on CCP requirements, respecting at least the confidence intervals of 99,5% for OTC derivatives and 99% for other financial instruments.

Article 25 of the RTS on CCP requirements, establishing the minimum requirement on time horizon for the historical volatility, specifies that it should be calculated based on data covering at least the latest 12 months. Similarly, Article 26 of the

RTS on CCP requirements establishes the minimum requirement for the liquidation period, that being at least five business days for OTC derivatives and two business days for other financial instruments.

The CCP is expected to calculate the minimum amount of margin required by EMIR on the basis of these criteria, subject to Articles 26(4) and 25(2) of the RTS on CCP requirements which permit a CCP to use different time horizons, both for the calculation of historical volatility and the liquidation period, in certain circumstances.

In this case, the CCP is not obliged to apply the minimum confidence intervals defined in Article 24 of the RTS on CCP requirements, as they specifically apply to the requirements under Articles 25 and 26 of the RTS on CCP requirements.

Nevertheless, the CCP shall assure that, in any case, the resulting margin amount is equal or higher than the one calculated in accordance with all of the parameters defined in Articles 24 to 28 of the RTS on CCP requirements.

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Level 2 Regulation

COMMISSION DELEGATED REGULATION (EU) No 153/2013 Regulatory technical standards on requirements for central counterparties

Topic

Other issues (CCP)

Additional Legal Reference

Article 39 of EMIR - old CCP question 8 dated 31/03/2015

Subject Matter

Segregation and portability (old CCP question 8 dated 31/03/2015)

Question

Article 39(3) of EMIR states that: "A CCP shall offer to keep separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from those held for the account of other clients ('individual client segregation')". Article 39(10) of EMIR states that "Assets refer to collateral held to cover positions and include the right to the transfer of assets equivalent to that collateral or the proceeds of the realisation of any collateral...".

(a) Under Article 39(6) of EMIR, what is the definition of client requirement and excess margin? Will clearing members be obliged to post this margin directly at the CCP? Additionally, how should a clearing member allocate excess margin over various CCPs it is linked to?

(b) Does EMIR allow CCPs to offer unsegregated accounts in which the assets and positions of clearing members are not segregated from those held for the accounts of the clearing member's clients?

(c) At what time do clearing members have to comply with requirements on segregation and portability under Article 39 of EMIR?

(d) May a CCP meet the requirements of Article 39(3) of EMIR by identifying only the value of collateral due to a client; or is it necessary to identify the specific assets due to a client?

(e) Under Article 39(3) of EMIR, the requirement for individual segregation is a requirement that the CCP offer to keep separate records and accounts enabling each clearing member to distinguish in accounts with the CCP, the assets and positions held for the account of a client from those held for the account of other clients. Does individual client segregation require:

1. That assets be segregated at the level of the security settlement system (for financial instruments) or at the level of the central bank (for cash) or at the level of the authorised financial institution (where alternative highly secured arrangements are permitted)?

2. That payments associated with the positions of an individually segregated client (i.e. variation margin payments, premium payments, etc.) be recorded in the separate records and accounts maintained for the individually segregated client at the CCP?

(f) Article 39.9(c) of EMIR provides that assets covering the positions recorded in an account shall not be exposed to losses connected to positions recorded in another account.

1. Can a CCP apply surpluses in a clearing member's house account to an omnibus client

account or an individually segregated client account?

2. Can a CCP, with a clearing member's permission, use the clearing member's own assets

(i.e. assets that were not posted by a client of the clearing member) to support the registration of client trades?

(g) Are CCPs expected to allow each clearing member to operate more than one house or omnibus client account under Article 39 of EMIR?

(h) Are CCPs required to provide segregated accounts for indirect clients?

(i) Are non-EU clearing members of EU CCPs providing services to clients subject to the segregation requirements in Article 39?

(j) Are EU clearing members of non-EU CCPs required to comply with Article 39 when offering client clearing on non-EU CCPs?

(k) Under Article 39(6) of EMIR, are clearing members obliged to post excess margin directly at the CCP if the collateral provided by the client is not eligible at the CCP? What if the margins collected by clients are in the form of a bank guarantee in favour of the clearing member?

(l) Can a CCP have a provision in its rules and/or operating procedures under which the CCP can, if so requested by a clearing member, transfer the positions and assets held for the account of a defaulted client of that clearing member from the segregated account holding those positions and assets into the house account of the clearing member to facilitate the management of the client default by the clearing member?

(m) Can a participant of a trading venue which is also a clearing member of the relevant CCP deny its clients the protections established under Article 39 of EMIR where it executes trades on behalf of its clients and subsequently clears those trades with the relevant CCP?

(n) If a CCP automatically pays variation margins in respect of an individually segregated client account to the clearing member each day (auto repay), is the clearing member required to return the collateral to the client?

ESMA Answer

31-03-2015

Original language

(a) The terms ‘client requirement’ and ‘excess margin’ are not defined in EMIR. However, Article 39(6) of EMIR is clear that for individually segregated clients, any margin called from a client, which is over and above the amount called by the CCP to cover the positions of that client, must be posted to the CCP. The current practice of clearing members calling excess margin and retaining it is not permitted under EMIR for clients opting for individual segregation. Where a clearing member has collected additional margin in respect of particular client positions that has opted for individual client segregation, the excess margin should be passed to the CCP that clears those positions.

In the case where the relevant positions are with multiple CCPs, clearing members should ensure that the approach taken is made transparent to clients and where the clients opted for individual segregation, they will need to agree on the allocation of the excess margins to the different CCPs.

In the case where an individually segregated client has provided some assets to the clearing member that are not related to clearing activities at the CCP, then those assets do not have to be posted to the CCP if:

- the clearing member and the client have contractually agreed so in advance, and
- the assets are not dedicated to cover the current positions with the CCP and are clearly identified as such.

The two conditions above should be supported by appropriate documentation.

(b) No, EMIR does not allow the use of unsegregated accounts. Article 39(2) and 39(3) of EMIR provide that CCPs must offer both 'individual client segregation' and 'omnibus client segregation' (these terms being defined in Articles 39(2) and 39(3) of EMIR). While CCPs might offer other levels of protection in addition to individual client segregation and omnibus client segregation (e.g. an omnibus gross margin client model), omnibus client segregation is the minimum level of client protection that can be used under EMIR.

This is because Article 39(4) of EMIR requires that a clearing member distinguish, in accounts with the CCP, the clearing member's own assets and positions from those assets and positions held for the accounts of the clearing member's clients. Article 39(9) of EMIR includes further criteria which must be met by the accounts held by a clearing member with a CCP. These provisions are not compatible with the use of unsegregated accounts.

(c) The requirements on clearing members that are established in EMIR (e.g. those in Articles 38 and 39 of EMIR) apply to clearing members of all CCPs established in the European Union. These obligations therefore come into force at and should be met by the time that the CCP is authorised under EMIR.

(d) In the case of a default of a clearing member, Article 48(6) of EMIR requires that a CCP's model of individual segregation provides for the transfer of the assets and positions held for the account of an individually segregated client to another clearing member or provides for the CCP to actively manage its risks in relation to those positions, including liquidating the assets and positions. Where the transfer of the assets and positions held for the account of an individually segregated client to another clearing member does not take place then, pursuant to Article 39(9) of EMIR, the CCP's model of individual segregation should ensure that the assets recorded in the individually segregated account are not exposed to losses connected to positions recorded in another account. Accordingly it is not sufficient that the account at the CCP identifies only the value due to the account of the client. It must identify the specific assets (e.g. the particular or equivalent securities) due to the account of the client.

Alternative approaches to segregation that identify only the value due to the accounts of the clients (while recording the assets provided for the account overall) may be offered in addition, provided they meet the relevant requirements of Article 39 of EMIR, but they do not meet the requirement to offer individual client segregation.

(e)(1) Individual segregation within the meaning of Article 39(3) of EMIR applies to assets and positions held at CCP level. Hence, individual segregation does not have to be necessarily reflected at the level of the security settlement system, central bank or alternative highly secured arrangements with authorised financial institutions. However, it should be noted that Article 47(5) requires that assets belonging to the CCP should be distinguished from assets belonging to clearing members when deposited with a third party.

(e)(2) Article 14(3) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCPs) requires that a CCP shall make, and keep updated, a record of the amounts of margins called by the CCP and the corresponding amount actually posted by the clearing member with respect to each individually segregated client account. Variation margin payments, representing amounts of margins called by the CCP are therefore required to be recorded in the separate records and accounts maintained for the individually segregated client at the CCP. However, this requirement does not imply that payment instructions must be made for every individually segregated account separately. CCPs may therefore issue one payment instruction for multiple accounts at the same time, so long as they issue separate margin calls for each account (house, omnibus client, individually segregated client account) and correctly record these margin calls, and the payments which correspond to them, in the records of each account.

(f)(1) The objective of the provisions in Article 39 of EMIR is to ensure that clients of clearing members are granted a high level of protection (see Recital 64 of EMIR) . Furthermore, Article 45 of EMIR provides that a CCP shall use the margins posted by a defaulting clearing member prior to other financial resources when covering losses.

CCPs are therefore permitted to have rules and procedures which facilitate the use of surplus margin on a defaulted clearing member's house account (that would otherwise have been payable by the CCP to the estate of the clearing member) to meet any obligation of the clearing member in respect of losses on a client account of that clearing member.

For the avoidance of doubt, surplus margin on a client account of a defaulted clearing member cannot be used to meet any losses on the defaulted clearing member's house account(s).

(f)(2) Articles 39(4) and 39(9)(a) of EMIR require that clearing members distinguish their own assets in separate accounts at the CCP from those assets held for the account of their clients.

Where a clearing member desires to use its own assets (i.e. assets that were not posted by a client of the clearing member) to fulfil the margin requirements of the client account, then such assets could be recorded in a client account at a CCP, however in doing so the assets would be treated as assets held for the account of clients of the clearing member. This would mean that upon a default of the clearing member, the assets would be exposed to losses connected to the client account in which the assets were recorded and could no longer be used to meet any losses on the defaulted clearing member's house account(s).

(g) Article 39(2) of EMIR requires CCPs to offer to keep separate records and accounts (in the plural) enabling each clearing member to distinguish in accounts (in the plural) with the CCP the assets and positions of the clearing member from those held for the account of its clients ('omnibus client segregation'). Article 39(3) of EMIR requires that upon request CCPs shall offer clearing members the possibility to open more accounts in their own name or for the account of their clients. CCPs are therefore expected to offer clearing members the possibility to open more than one omnibus client account, when requested to do so.

(h) Article 3(1) of RTS 149/2013 (RTS on OTC derivatives) requires a CCP to set up, on the request of a clearing member, accounts to enable the assets and positions of the client to be recorded separately from the assets and positions of the indirect clients of the client. Accordingly, at the request of a clearing member, the CCP must, at a minimum, set up an omnibus segregated account in which only the positions and assets of the indirect clients of a client may be recorded. The CCP may also, at the request of a clearing member, set up individually segregated

accounts in which the positions and assets of indirect clients of a client may be recorded, but there is no obligation to do so.

(i) Under Article 39(5), clearing members must offer their clients, at least, the choice between omnibus client segregation and individual client segregation and inform them of the costs and level of protection associated with each option. The references to clearing members in Article 39 are not limited to EU clearing members, so all clearing members of EU CCPs are required to comply. Similarly, the references to clients in Article 39 are not limited to EU clients. CCPs are expected to require all clearing members to comply with the relevant EMIR provisions through their rules.

In the case that a third country insolvency regime applicable to a clearing member could interfere with the provision of omnibus client segregation or individual client segregation, including intrinsic client protections, in the manner set out in Articles 39 and 48, the clearing member should offer its clients alternative possibilities that ensure those clients receive, at least, the choice of omnibus client segregation and individual client segregation. Alternative possibilities may include clearing solutions provided by an affiliate or other clearing member of the CCP.

When, notwithstanding the alternatives offered, the client chooses to use the third country clearing member and risks remain due to the third country insolvency regime, the clearing member must disclose those risks in full to the client at the outset of the relationship, in accordance with both Articles 39(5) and 39(7)).

(j) No but EU clearing members will only be allowed to be a clearing members of a non-EU CCP which has been recognised as meeting equivalent requirements to EMIR under the process set out in Article 25. This will include an assessment of the CCP's segregation arrangements.

(k) Where a client that has opted for individual client segregation provides a clearing member with additional margin which is not eligible collateral at the CCP, then the clearing member does not have an obligation to transform such additional margin into eligible collateral. The CCP has no obligation to accommodate this collateral however the clearing member should pass such additional margin to the CCP if the latter has the operational and technical means to receive it. However, under no circumstances would such additional margin be eligible to meet margin calls made by the CCP.

Where the collateral provided by the client is a bank guarantee in favour of the clearing member then the clearing member is not required to post to the CCP an amount of eligible collateral equal to the value of the bank guarantee that exceeds the margin called from the client by the clearing member.

(l) It is the responsibility of the clearing member to inform the CCP of the account to which positions and assets held by the clearing member should be allocated. The contractual arrangement between a clearing member and its client may provide for the positions and assets held for the account of the client to be transferred to the house or proprietary account of the clearing member in the event of a default of the client. Accordingly, there should be no restriction on the ability of a CCP to transfer the positions and assets held for the account of a defaulted client into the house account of the clearing member on instruction of that clearing member, subject to that clearing member not being in default itself and in accordance with any applicable valuation and other rules and/or operating procedures of the CCP. This existence of such a process should be clearly disclosed by CCPs and clearing members; for example, as required by Article 39(7) of EMIR and would need to be compatible with the applicable insolvency law.

(m) No, even if the client does not have an explicit contractual relationship covering the clearing of these trades. Article 2(1)(15) of EMIR provides that a 'client' is "an undertaking with a contractual relationship with a clearing member of a CCP which enables that undertaking to clear its transactions with that CCP". Given that the trade is cleared by a CCP, then the contractual relationship entered into by the client enables the clearing of the transaction with the CCP. Therefore, even if the contractual arrangement governing the provision of trading services does not explicitly cover the provision of clearing services by the firm executing the trade on behalf of its client, the latter should be considered a client under EMIR and should benefit from the client protections established therein.

(n) According to article 39(6) of EMIR, when a client opts for individual segregation any margin in excess of the client's requirement shall be posted to the CCP. As such, any excess collateral allocated to an individually segregated account must either be maintained at the CCP in accordance with article 39(6) or returned to the client. CCPs should offer clearing members the possibility of holding excess margin allocated to an individually segregated account at the CCP in that account (i.e. switching off auto repay), provided that the CCP can hold the currency in which the cash variation margin is denominated overnight in compliance with the CCP's investment policy.

When variation margins are denominated in currencies that the CCP cannot hold overnight (e.g. because it has no overnight investment facilities for such currencies - typically, currencies not accepted for initial margins), consistent with CCP answer 8k, the CCP has no obligation to accommodate these currencies and the clearing member is required to return the collateral to the client, unless the latter, via a documented request, instructed the clearing member to hold the client's repaid variation margins in a non-clearing account meeting the conditions in answer 8a.

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Level 2 Regulation

COMMISSION DELEGATED REGULATION (EU) No 153/2013 Regulatory technical standards on requirements for central counterparties

Topic

EU-CCPs

Additional Legal Reference

Article 47 of EMIR - old CCP question 4 dated 5/08/2013

Subject Matter

Article 47 of EMIR – Deposit of financial instruments

Question

Article 47(3) of EMIR states that financial instruments posted as margins or as default fund contributions, shall, where available, be deposited with operators of securities settlement systems that ensure the full protection of those financial instruments. Alternatively, other highly secure arrangements with authorised financial institutions may be used.

- (a) Can a CCP deposit all financial instruments posted as margins or as default fund contributions in an account with a CSD through a custodian? The financial instruments would be deposited with a custodian who then registers them at the CSD in the name of a nominee of the custodian. Is this practice compatible with EMIR provisions?
- (b) When can a security settlement system be considered unavailable for the purpose of Article 47(3) of EMIR?
- (c) Can the term 'where available' be construed such that a securities settlement system would not be considered available where it does not offer to keep separate records and accounts enabling a CCP to distinguish, in accounts with the operators of the securities settlement system, the assets and positions held for the account of a client?
- (d) Are the requirements of Article 47(3) of EMIR fulfilled where a CCP deposits financial instruments with CSDs (including ICSDs) that in turn deposit the instruments with other institutions via CSD links?
- (e) Can a CCP outsource certain operational aspects of the accounts that the CCP holds (in its own name) at a securities settlement system?
- (f) Do the requirements of Article 47(3) of EMIR apply only to financial instruments posted as margins or, default fund contributions, or also to financial instruments in which the CCP has invested, i.e. where margin or default fund contributions posted to the CCP in the form of cash are reinvested by the CCP in financial instruments?

ESMA Answer

05-08-2013

Original language

(a) The operators of a securities settlement system are those notified under the Settlement Finality Directive (98/26/EC). Custodian banks are not generally operators of securities settlement systems. It should be noted that EMIR entered into force before the CSD Regulation and the term CSD is currently not defined in EU legislation.

Depositing financial instruments with an operator of a securities settlement system via a custodian does not constitute a deposit with an operator of a securities settlement system for the purposes of Article 47(3) of EMIR. Such a structure would instead amount to a deposit with an authorised financial institution for the purposes of Article 47(3) of EMIR (assuming the custodian used is an authorised financial institution under Article 44 of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) and that the conditions defined in the same Article are respected to ensure that highly secured arrangements for the deposit of financial instruments are adopted).

(b) If a CCP is able to demonstrate that it cannot access a security settlement system that ensures the full protection of financial instruments, i.e. the protection of the CCP from custody risk (in a manner equivalent to the protection under the Settlement Finality Directive) and the protection of its clearing members and their clients from the default of the CCP or the protection of their clients from the default of their clearing members, then the CCP can deposit financial instruments through highly secured arrangements with authorised financial institutions subject to the

provisions in Article 45(1) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements).

(c) Under Article 39 of EMIR, the requirement for individual segregation is a requirement that the CCP offer to keep separate records and accounts enabling a clearing member to distinguish in accounts with the CCP, the assets and positions held for the account of one or more clients.

Individual segregation within the meaning of Article 39(3) of EMIR applies to assets and positions held at CCP level. Hence, individual segregation does not have to be necessarily reflected at the level of the security settlement system or alternative highly secured arrangements with authorised financial institutions.

Therefore, a security settlement system that ensures the full protection of the financial instruments cannot be considered unavailable only because it does not offer individual segregation of client assets.

(d) Yes, provided that the CCP demonstrates to its competent authority that the arrangements do not prevent compliance with Article 47(3) of EMIR, namely that the CSD and the linked CSD ensure the full protection of the financial instruments.

(e) While the deposit of financial instruments under an arrangement whereby the account at the securities settlement system is held in the name of an authorised financial institution does not constitute a deposit with a securities settlement system for the purposes of Article 47(3) of EMIR, it is ESMA's understanding that third party service providers (such as custodian banks) may sometimes be used by CCPs to manage certain operational aspects of accounts that the CCP holds (in its own name) at a securities settlement system. CCP Answer 4(a) should not be read as

preventing the continued use of such outsourcing arrangements.

EMIR explicitly contemplates that a CCP might outsource certain aspects of its operational functions, services or activities. Outsourcing of the operation of accounts that a CCP holds with a securities settlement system would be no different to the outsourcing of any other activity. Such outsourcing arrangements would of course be subject to the requirements for outsourcing which are prescribed in Article 35 of EMIR and subject to the restriction discussed above such that title to the account at the securities settlement system must be in the name of the CCP (this would entail the contractual relationship being between the securities settlement system and the CCP with the custodian acting as agent).

(f) The reference in Article 44(1) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCPs) to Article 45 of the same RTS should be a reference to Article 43 of that Commission Delegated Regulation. Article 43 refers to Article 47(1) of EMIR, i.e. investment of the CCP's financial resources. This means that the requirement to deposit financial instruments with operators of security settlement systems where available, or with certain other institutions where not, applies to investments by the CCP that represent the reinvestment of margin and default fund contributions posted to the CCP in the form of cash.

ESMA_QA_851

Submission Date

27/04/2023

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Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Additional Legal Reference

Article 48 of EMIR - old CCP question 3 dated 4/02/2016

Subject Matter

Default management (old CCP question 3 dated 4/02/2016)

Question

(a) What is the requirement on a CCP for portability of client assets in a member default scenario –for both individual and omnibus accounts?

1. Port the “required collateral” only, less outstanding variation margin payments i.e. the value of assets used to cover liabilities; or
2. Port the assigned value of the assets, less outstanding variation margin payments (post-haircut); or
3. Port the proceeds from liquidation of assets, less outstanding variation margin payments; or
4. Port the assets themselves, less outstanding variation margin payments?

(b) Articles 48(5) and 48(6) of EMIR provide that, if a clearing member defaults, “the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions... to another clearing member designated by [the client or clients]...”. They further provide that if porting of client positions “has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risk in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of its clients”.

How long should the predefined transfer period be, and can a CCP liquidate the client(s) position(s) and assets before the end of the predefined transfer period if it deems that necessary for risk management purposes?

(c) Can a CCP require the client(s) to designate a back-up clearing member prior to the default of its primary clearing member as a precondition for triggering the procedure for porting in the event of the default of the primary clearing member?

(d) Article 48 of EMIR permits a CCP to liquidate the house positions of a defaulting clearing member and any client positions of that defaulting clearing member that the CCP has not been able to transfer to another clearing member.

i) Is it permissible for the CCP to actively manage its risk in relation to the positions held in more than one account by one or more transactions, rather than being required to execute transactions to manage the risks of the positions held in each account separately?

ii) If it is acceptable for the CCP to execute one or more transactions to manage its risks across more than one account, how should the costs of the transactions be

allocated between the affected accounts?

ESMA Answer

04-02-2016

Original language

(a) Article 48 of EMIR establishes the circumstances and parameters under which a CCP must transfer the assets and positions of the clients of defaulted clearing members or may liquidate such assets and positions.

Following a member default, a CCP is required to transfer the assets and positions recorded as being held for the account of the clients of the defaulted clearing member if the conditions defined in Article 48 are met. Otherwise, the CCP may try to transfer the assets and positions, on a best effort basis, but ultimately has the right to liquidate the assets and positions. If the assets of a client of the defaulted clearing members are only partially liquidated then the non-liquidated portion of the assets will be returned to the clients when they are known to the CCP or, if they are not, to the clearing member for the account of its clients.

Article 39(10) of EMIR provides that assets (in respect of segregation and portability) refers to collateral held to cover positions and includes the right to transfer assets equivalent to that collateral or the proceeds of the realisation of any collateral.

(b) Although EMIR does not specify a minimum (or maximum) for the predefined transfer period, it should be of sufficient length to enable the client(s) to make a request for porting, and for the CCP to trigger the porting as contemplated in Articles 48(5) & (6) of EMIR, within that period. Under Article 48(2) of EMIR a CCP “shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall ensure that the closing out of any clearing member’s positions does not disrupt its operations or expose the non-defaulting clearing members to losses they cannot anticipate or control”. Furthermore, EMIR Recitals 49, 65 and 67 emphasise the importance of a CCP having robust risk management arrangements. Accordingly, a CCP can opt for a short pre-defined period if it judges that such would be necessary to liquidate client(s’) position(s) and assets shortly after a clearing member default has occurred in order to contain losses or liquidity pressures. A CCP may extend the transfer period, however the legislator has indicated that liquidation should only take place following the end of a CCP’s predefined transfer period and a CCP cannot liquidate client(s’) position(s) and assets prior to the end of the predefined transfer period.

(c) Articles 48(5) and 48(6) of EMIR require that clients be able to designate another back-up clearing member upon request. It is not compatible with EMIR for a CCP to require that such designation has been made prior to the default of the client’s primary clearing member as a precondition for the CCP triggering the procedure for porting. However if a client has not designated a back-up clearing member prior to the default of the client’s primary clearing member and has not agreed that the CCP may choose a back-up clearing member for the client, then that may mean that porting is less likely to occur. Such a risk should be clearly disclosed by CCPs and clearing members; for example, as required by Article 39(7) of EMIR.

(d) In the event of the default of a clearing member, a CCP may liquidate (i) any house positions of the defaulting clearing members and (ii) any client positions of

the defaulting clearing member that the CCP has been unable to transfer to a new clearing member within the predefined transfer period specified in the CCP's operating rules . To minimise its market risk, the CCP may hedge or replace such positions. Article 39(9) of EMIR requires that positions recorded in different accounts are not netted against each other and that assets covering the positions in one account are not exposed to losses connected to positions held in a different account.

i) In the event the CCP elects to hedge or liquidate positions that are recorded in more than one account (which may include client accounts), the CCP may assess that executing one or more transactions across accounts would be likely to result in a quicker or more efficient reduction in market and operational risk compared to hedging or liquidating the positions held in each account separately.

For example, it may be more operationally effective for the CCP to include all positions to be hedged or liquidated in an auction for which participating clearing members are requested to provide a single auction price covering all instruments and positions being auctioned. This reduction in risk will benefit both the CCP and the affected clients.

Accordingly, a CCP's operating rules may permit it to manage the risks present in more than one account through one or more transactions.

For the avoidance of doubt, this does not preclude the CCP from hedging or liquidating the positions held in each account separately, where this is provided for in its operating rules. In some circumstances, the CCP may assess this is likely to be a more effective way of managing the default.

ii) Where the CCP elects to hedge or liquidate positions across accounts through one or more transactions, it should allocate the costs of hedging or liquidation of the positions on the basis of the market value of the positions held in each account at the point the transaction or transactions were executed.

Any extra cost or gain which remains unallocated following this initial allocation process based on market value may be allocated pro rata on the basis of the risks presented to the CCP by each account that was subject to hedging or liquidation.

The methodology a CCP implements to allocate costs to each account in the event of the default of a clearing member should be publicly disclosed in accordance with Article 39(7) of EMIR.

ESMA_QA_850

Submission Date

27/04/2023

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Topic

EU-CCPs

Additional Legal Reference

Article 48 of EMIR - old CCP question 3 dated 4/02/2016

Subject Matter

Default management (old CCP question 3 dated 4/02/2016)

Question

(a) What is the requirement on a CCP for portability of client assets in a member default scenario –for both individual and omnibus accounts?

1. Port the “required collateral” only, less outstanding variation margin payments i.e. the value of assets used to cover liabilities; or
2. Port the assigned value of the assets, less outstanding variation margin payments (post-haircut); or
3. Port the proceeds from liquidation of assets, less outstanding variation margin payments; or
4. Port the assets themselves, less outstanding variation margin payments?

(b) Articles 48(5) and 48(6) of EMIR provide that, if a clearing member defaults, “the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions... to another clearing member designated by [the client or clients]...”. They further provide that if porting of client positions “has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risk in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of its clients”.

How long should the predefined transfer period be, and can a CCP liquidate the client(s) position(s) and assets before the end of the predefined transfer period if it deems that necessary for risk management purposes?

(c) Can a CCP require the client(s) to designate a back-up clearing member prior to the default of its primary clearing member as a precondition for triggering the procedure for porting in the event of the default of the primary clearing member?

(d) Article 48 of EMIR permits a CCP to liquidate the house positions of a defaulting clearing member and any client positions of that defaulting clearing member that the CCP has not been able to transfer to another clearing member.

i) Is it permissible for the CCP to actively manage its risk in relation to the positions held in more than one account by one or more transactions, rather than being required to execute transactions to manage the risks of the positions held in each account separately?

ii) If it is acceptable for the CCP to execute one or more transactions to manage its risks across more than one account, how should the costs of the transactions be

allocated between the affected accounts?

ESMA Answer

04-02-2016

Original language

(a) Article 48 of EMIR establishes the circumstances and parameters under which a CCP must transfer the assets and positions of the clients of defaulted clearing members or may liquidate such assets and positions.

Following a member default, a CCP is required to transfer the assets and positions recorded as being held for the account of the clients of the defaulted clearing member if the conditions defined in Article 48 are met. Otherwise, the CCP may try to transfer the assets and positions, on a best effort basis, but ultimately has the right to liquidate the assets and positions. If the assets of a client of the defaulted clearing members are only partially liquidated then the non-liquidated portion of the assets will be returned to the clients when they are known to the CCP or, if they are not, to the clearing member for the account of its clients.

Article 39(10) of EMIR provides that assets (in respect of segregation and portability) refers to collateral held to cover positions and includes the right to transfer assets equivalent to that collateral or the proceeds of the realisation of any collateral.

(b) Although EMIR does not specify a minimum (or maximum) for the predefined transfer period, it should be of sufficient length to enable the client(s) to make a request for porting, and for the CCP to trigger the porting as contemplated in Articles 48(5) & (6) of EMIR, within that period. Under Article 48(2) of EMIR a CCP “shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall ensure that the closing out of any clearing member’s positions does not disrupt its operations or expose the non-defaulting clearing members to losses they cannot anticipate or control”. Furthermore, EMIR Recitals 49, 65 and 67 emphasise the importance of a CCP having robust risk management arrangements. Accordingly, a CCP can opt for a short pre-defined period if it judges that such would be necessary to liquidate client(s’) position(s) and assets shortly after a clearing member default has occurred in order to contain losses or liquidity pressures. A CCP may extend the transfer period, however the legislator has indicated that liquidation should only take place following the end of a CCP’s predefined transfer period and a CCP cannot liquidate client(s’) position(s) and assets prior to the end of the predefined transfer period.

(c) Articles 48(5) and 48(6) of EMIR require that clients be able to designate another back-up clearing member upon request. It is not compatible with EMIR for a CCP to require that such designation has been made prior to the default of the client’s primary clearing member as a precondition for the CCP triggering the procedure for porting. However if a client has not designated a back-up clearing member prior to the default of the client’s primary clearing member and has not agreed that the CCP may choose a back-up clearing member for the client, then that may mean that porting is less likely to occur. Such a risk should be clearly disclosed by CCPs and clearing members; for example, as required by Article 39(7) of EMIR.

(d) In the event of the default of a clearing member, a CCP may liquidate (i) any house positions of the defaulting clearing members and (ii) any client positions of

the defaulting clearing member that the CCP has been unable to transfer to a new clearing member within the predefined transfer period specified in the CCP's operating rules . To minimise its market risk, the CCP may hedge or replace such positions. Article 39(9) of EMIR requires that positions recorded in different accounts are not netted against each other and that assets covering the positions in one account are not exposed to losses connected to positions held in a different account.

i) In the event the CCP elects to hedge or liquidate positions that are recorded in more than one account (which may include client accounts), the CCP may assess that executing one or more transactions across accounts would be likely to result in a quicker or more efficient reduction in market and operational risk compared to hedging or liquidating the positions held in each account separately.

For example, it may be more operationally effective for the CCP to include all positions to be hedged or liquidated in an auction for which participating clearing members are requested to provide a single auction price covering all instruments and positions being auctioned. This reduction in risk will benefit both the CCP and the affected clients.

Accordingly, a CCP's operating rules may permit it to manage the risks present in more than one account through one or more transactions.

For the avoidance of doubt, this does not preclude the CCP from hedging or liquidating the positions held in each account separately, where this is provided for in its operating rules. In some circumstances, the CCP may assess this is likely to be a more effective way of managing the default.

ii) Where the CCP elects to hedge or liquidate positions across accounts through one or more transactions, it should allocate the costs of hedging or liquidation of the positions on the basis of the market value of the positions held in each account at the point the transaction or transactions were executed.

Any extra cost or gain which remains unallocated following this initial allocation process based on market value may be allocated pro rata on the basis of the risks presented to the CCP by each account that was subject to hedging or liquidation.

The methodology a CCP implements to allocate costs to each account in the event of the default of a clearing member should be publicly disclosed in accordance with Article 39(7) of EMIR.

ESMA_QA_661

Submission Date

13/01/2023

Status: Answer Published

Additional Information

Level 1 Regulation

Regulation 648/2012 - OTC derivatives, central counterparties and trade repositories (EMIR) - CCPs

Level 2 Regulation

COMMISSION DELEGATED REGULATION (EU) No 153/2013 Regulatory technical standards on requirements for central counterparties

Topic

EU-CCPs

Additional Legal Reference

Article 46 of EMIR - old CCP question 2 dated 20/03/2013

Subject Matter

Collateral requirements and recording of client assets (old CCP question 2 dated 20/03/2013)

Question

What is the requirement on a CCP for the recording of financial instruments posted to it as margins, default fund contributions or contributions to other financial resources? Is it possible for a CCP to record the value assigned to financial instruments post-haircut?

ESMA Answer

Original language

Article 46(1) of EMIR sets out the purpose of haircuts by making reference to the 'potential' for the value of the assets posted as collateral to decline. In order to adequately apply haircut requirements set-out in Article 46(1), a CCP needs to have procedures enabling the record of the pre-haircut value of financial instruments actually posted to the CCP by clearing members for their own account or the account of their clients. This is consistent with recording requirements set out in Article 14(3) of Commission Delegated Regulation No 2013/153. This concept is therefore not compatible with a situation where the CCP would have procedures providing for just the record of this post-haircut value and where it would routinely impose such a decline in full in respect of every financial instrument that is posted to the CCP at the expense of clients.