

OPINION

Common indicators for new products and services under Article 15 and for significant changes under Article 49 of EMIR

1 Legal basis

1. ESMA's competence to deliver an opinion to competent authorities is based on Article 29(1)(a) of Regulation (EC) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)¹ (ESMA Regulation).
2. Pursuant to Article 29(1)(a) of ESMA Regulation, ESMA shall provide opinions to competent authorities for the purpose of building a common Union supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union.
3. ESMA has specific competences in respect of colleges of supervisors as set out in the ESMA Regulation. In particular, pursuant to Article 21(1) of the ESMA Regulation, ESMA shall contribute to promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors. In addition, in accordance with Article 21(6) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories² (EMIR), ESMA shall fulfil a coordination role between authorities competent for the supervision of central counterparties (CCPs) and across the CCP colleges, established pursuant to Article 18 of EMIR, with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes.

2 Background

4. According to Article 15 of EMIR, a "*CCP wishing to extend its business to additional services or activities not covered by the initial authorisation shall submit a request for extension to the CCP's competent authority. The offering of clearing services for which the CCP has not already been authorised shall be considered to be an extension of that authorisation. The extension of authorisation shall be made in accordance with the procedure set out under Article 17*".

¹ OJ L 331, 15.12.2010, p. 48.

² OJ L 201, 27.7.2012, p.1.

5. This procedure requires the CCP's competent authority to duly consider the opinion of the CCP college reached in accordance with Article 19 of EMIR.
6. However, EMIR neither defines the notion of "additional services and activities" nor it specifies on the basis of which criteria services or activities have to be considered as "additional". In order to ensure consistent application of Article 15 of EMIR, ESMA has already published a Q&A (EMIR Q&A CCP 6(a)) which clarifies that an extension of authorisation would be needed where the CCP intends to undertake additional activities or services which expose the CCP to new or increased risks, e.g. on classes of financial instruments with a different risk profile or that have material differences from the CCP's existing product set³.
7. According to Article 49 of EMIR, a CCP "*shall obtain their* [i.e. its competent authority and ESMA] *validation before adopting any significant change to the model and parameters*". Moreover, any significant changes to adopted models and parameters shall be subject to an opinion of the CCP college reached in accordance with Article 19.
8. However, EMIR neither defines the notion of "significant change" nor it specifies on the basis of which criteria changes to adopted models and parameters should be considered as a significant change.
9. ESMA is of the view that a common approach at EU level on the implementation of Articles 15 and 49 of EMIR would foster coherence of supervisory practices regarding CCP colleges established under EMIR and foster consistent application of the relevant provisions of EMIR. This need has already been identified in the ESMA report on the review of CCP colleges under EMIR in 2015⁴.
10. Therefore, ESMA decided to adopt this opinion to ensure a more consistent application of Article 15 and 49 of EMIR and to ensure transparency on the proposed common approach. This will also help national competent authorities to guide the CCPs in identifying planned new activities and services which qualify as "additional" and therefore require an extension of authorisation under Article 15 or changes which qualify as "significant" and therefore trigger the procedure under Article 49 and in planning the necessary time for their related regulatory approval processes.

³ As a practical example, the Q&A considered a CCP authorised to clear single-name Credit Default Swaps contracts where the reference entities are corporate entities and clarified that, in this example, the CCP would need to apply for an extension of authorisation where it intends to clear single-name Credit Default Swaps contracts where the reference entities are sovereigns or Credit Default Swaps contracts where the reference is an index.

⁴ ESMA review of CCP colleges under EMIR, ESMA/2015/20, 8 Jan 2015, https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-20-_report_on_esma_review_of_ccp_colleges.pdf.

3 Opinion

3.1 Article 15 of EMIR

11. Regarding the application of the Article 15 of EMIR, ESMA is of the view that in the following circumstances services and activities should be considered additional and therefore a CCP has to apply for an extension of its authorisation:
 - a. any service or activity (including services linked to clearing) which expose the CCP to new or increased risks;
 - b. any service or activity (including services linked to clearing) in respect of a class of financial instruments with a different risk profile or with material differences from the products cleared by a CCP⁵;
 - c. any service or activity (including services linked to clearing) in respect of a classes of financial instruments not specified in the CCP's authorisation decision.

12. In addition, ESMA is of the view that the competent authorities should consider the following non-exhaustive list of indicators when determining whether any activity or service (including services linked to clearing) is covered by the current authorisation for the purpose of Article 15 of EMIR. For avoidance of doubt, the identification of an indicator does not lead to an automatic application of Article 15.

13. Indicators for the possible existence of “additional” activities and service under Article 15 of EMIR:
 - I. New risk management framework will have to be developed or the existing one will need to be amended (for example, new stress scenarios will be introduced);
 - II. The capital of the CCP will have to be adjusted by more than 10%;
 - III. The CCP will need to adapt its operational or organizational structure (at any point in the product cycle, to default management, settlement, etc.);
 - IV. New or different methods for obtaining prices will have to be adopted as compared with existing methods used by the CCP;
 - V. The risk committee has to give an advice on the clearing of new classes of instruments;
 - VI. A new default fund will be established or the current default fund will be increased immediately or in the foreseeable future;
 - VII. New product specifications will need to be developed with features which cannot be derived from existing products;
 - VIII. New access conditions will be required to allow clearing members to be registered for clearing the new markets/products.

⁵ In line with the EMIR Q&A CCP 6(a).

3.2 Articles 49 of EMIR

14. Regarding the application of Article 49 of EMIR, ESMA is of the view that the following non-exhaustive list of indicators should be considered by the competent authorities when determining whether a change to a CCP's models and parameters ought to be considered as significant for the purpose of Article 49 of EMIR. For avoidance of doubt, the identification of an indicator does not lead to an automatic application of Article 49.

15. Indicators for the existence of significant changes under Article 49 of EMIR:

- I. The change results from the introduction of one or more new products or services that do not materially differ from the ones that the CCP is already authorised to clear or provide (therefore do not trigger the extension of authorisation process under Article 15), but which:
 - a. are based on a new set of risk factors or indicators; and/or
 - b. involve the development or implementation of new:
 - i. default fund;
 - ii. stress scenarios;
 - iii. pricing model, pricing histories, procedures detecting pricing uncertainties or ensuring reliable settlement prices, data used as input to risk models, or changes in the risk calculation or risk parameterization modules or operational or organizational developments linked to the change;
 - iv. delivery/settlement procedures, including the settlement of a new currency.
- II. The change introduces a new set of eligible collateral with a different risk profile in terms of credit and/or liquidity risk factors;
- III. The change implies the development or implementation of new stress scenarios, including either historical or hypothetical scenarios or both, or the modification of the calibration or of the definition of the existing scenarios, for the purpose of determining:
 - a. default fund exposures;
 - b. collateral haircut;
 - c. liquidity risk;
 - d. credit and counterparty risk;
 - e. operational risk.
- IV. The change leads to an adjustment of the pre-funded financial resources (in the immediate or foreseeable future), as detailed below:
 - a. decrease/increase of the CCP capital greater than +/- 10%;
 - b. decrease/increase of the total pre-funded financial resources (including margin requirements, default fund and skin-in-the-game), greater than +/-5%;
 - c. decrease/increase of the margin requirements and/or stress test exposures on an individual underlying, a class of financial instruments⁶, greater +/-10%;
 - d. decrease/increase of the default fund contributions of any clearing member, greater than +/-5%.

⁶ As published on the ESMA website under "List of Central Counterparties authorised to offer services and activities in the Union".

3.3 Exchange of information and engagement of college members in the context of Article 15 or Article 49

3.3.1 Exchange of information and consultation procedure

16. Where a competent authority identifies any of the abovementioned indicators to be considered in the context of Article 15 or Article 49, the competent authority should i) inform the CCP college of the proposal for a change in the activities and services or in the risk models and parameters of the CCP within 5 working days following the identification of the relevant indicator(s) and ii) not later than 20 working days from the identification of the relevant indicator(s), share with the college its initial assessment of whether Article 15 or Article 49 should apply.
17. If the competent authority determines that Article 15 or Article 49 should apply, it should not authorise the CCP to adopt the change before the relevant consultation process has been completed and the outcome considered. In particular, a competent authority should not authorise the CCP to provide a new service or activity in the absence of an opinion of the college and it should not authorise a CCP to introduce a significant change to risk models or parameters without having received the validation of ESMA and having considered the opinion of the college.
18. Where the initial assessment of the CCP competent authority leads to the conclusion that there are no additional services or activities for the purposes of Article 15 or that there is no significant change in the risk models and parameters of the CCP for the purposes of Article 49 despite the identification of any of the abovementioned indicators, the members of the CCP college should be given 5 working days from the receipt of the information referred to in the previous paragraph to express their view on the initial assessment. Where one member of the college disagrees with the assessment of the competent authority, any college member may request that at minimum a conference call of the college be organised to discuss conflicting views. The CCP competent authority should consider the views expressed when finalising its assessment. The competent authority should not authorise the CCP to implement the proposed change before having finalised its assessment.
19. In accordance with the ESMA Guidelines regarding written agreements between members of CCP colleges⁷, activities or services or changes not fulfilling any of the above relevant indicators for the purposes of Article 15 or 49 of EMIR can be included in the competent authority's reporting on its on-going supervisory activity to the college. For the sake of the clarity, this is without prejudice to the right for any college member to seek for further information.

⁷ ESMA/2013/661: https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-661_report_gr_on_college_written_agreement_-_final_for_publication_20130604.pdf.

3.3.2 Urgent changes under Article 49

20. However, where a competent authority identifies that at least one indicator is met for the purpose of Article 49, it may allow a CCP subject to its jurisdiction to implement urgent changes necessary to better protect the CCP from supervened (e.g. exogenous) and increased risks (i.e. changes leading to an increase of the margin requirements, default fund contributions, collateral requirements, or a strengthening of any other risk control mechanisms) before the review has been completed and the college consulted. These changes are expected to increase the overall amount of financial resources collected by the CCP. The college should be promptly informed of these changes. Where following the completion of the review the competent authority concludes that the change is significant, the procedure established in Article 49 need to apply.

3.3.3 Investigations by the competent authority

21. If a CCP is of the view that an upcoming new activity does not fall within the scope of Article 15 or an upcoming change is not significant for the purpose of Article 49, and has not notified its competent authority, the competent authority should investigate how the CCP has reached that conclusion once it comes in possession of the relevant information. In particular, the competent authority should check how the CCP assessed the relevant indicators.