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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 constitutes 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.