

**Submission Date**

27/04/2023

# ESMA\_QA\_861

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## **Additional Information**

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### **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 14 of EMIR - old CCP question 6 dated 31/03/2015

## **Subject Matter**

## Authorisation of a CCP (old CCP question 6 dated 31/03/2015)

### Question

- (a) What constitutes an activity or service covered by the initial authorisation of a CCP as referred to in Article 15(1) of EMIR?
- (b) By when must a CCP be fully compliant with EMIR?
- (c) Can the clock be stopped on application deadlines when an NCA is waiting for further information from the CCP? Can the CCP continue operating under the national regime until a final decision has been made on its authorisation under EMIR?
- (d) What services and activities can a CCP be authorised under EMIR to provide or perform?
- (e) Is a CCP required to comply with all of the requirements laid down in EMIR for all of the services that it provides and activities that it performs?
- (f) Can a CCP be authorised to provide a service that prevents its clearing members to clear contracts between each other?

### ESMA Answer

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31-03-2015

Original language

(a) Article 14(3) of EMIR provides that an authorisation shall specify the services or activities which the CCP is authorised to provide or perform including the classes of financial instruments covered by such authorisation. 'Classes of derivatives' is a defined term in EMIR and reference to 'classes of financial instrument' provides a guide as to granularity at which the services or activities authorised will be granted. Applying this definition to activities and services suggests that authorisation should be granted on the basis of activities or services which share a common risk profile. Therefore, 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 set.

As a practical example, a CCP might be authorised to clear single-name Credit Default Swaps contracts where the reference entities are corporate entities. 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.

(b) In order to continue to offer clearing services in the EU, CCPs must submit an application for authorisation to their NCA by 15 September 2013. The CCP is not required to be compliant with EMIR at this stage. However, its application must demonstrate clearly how it will become compliant before it receives authorisation. The NCA has thirty working days from the submission of the application to deem it complete or incomplete. If the NCA deems an application incomplete, it shall set a deadline by which the applicant CCP must provide the additional information. Once the NCA has deemed the application complete it has four months in which to submit a report to the college including an opinion on whether the CCP complies with EMIR. The opinion of the NCA and of the college could include conditions that the CCP needs to respect before the authorisation is granted.

(c) Until a decision is made on the authorisation of a CCP under EMIR, the respective national rules shall continue to apply, pursuant to Article 89(4) of EMIR. If the NCA deems an application incomplete, it shall set a deadline by which the applicant CCP must provide the additional information. The relevant deadlines pertaining to the review of a CCP's application for authorisation under EMIR (six months for a final decision, including one month for the establishment of a college and four months for a risk report to the college) do not begin until the CCP has submitted an application which the NCA deems complete, i.e. the 'clock' does not start until the application is considered to be complete. However, once the NCA has deemed an application complete, this constitutes confirmation that it has the information necessary to assess the CCP's compliance. As such, there is no possibility for it to 'stop the clock' once an application has been deemed complete.

Nevertheless, if an applicant CCP sought to prolong the transitional period indefinitely by failing to submit the required information, the NCA may conclude that this provides sufficient evidence to support a recommendation for refusal of the application for authorisation.

(d) Article 14(3) of EMIR provides that an authorisation decision under Article 14(1) shall specify the services or activities which a CCP is authorised to provide or perform. Article 14(3) also provides that an authorisation decision under Article 14(1) shall be granted only for activities linked to clearing. Article 2(3) of EMIR defines 'clearing' as the process of establishing positions (including the calculation of net obligations) and ensuring that financial instruments, cash, or both, are available to secure the exposures arising from those positions.

Therefore in order for an authorisation decision under Article 14(1) of EMIR to include the performance of a particular activity, that activity would need to present an objective link with the definition of "clearing" under Article 2(3) of EMIR.

It follows that under EMIR CCPs will not be able to provide services or perform activities which are not linked to clearing (such as auctioneer activities related to EU emission allowances).

This is without prejudice to Article 14(5) of EMIR which provides that an authorisation decision under Article 14(1) of EMIR shall not prevent Member States from adopting or continuing to apply, in respect of CCPs established in their territory, additional requirements including certain requirements for authorisation under Directive 2006/48/EC.

(e) Article 17(4) of EMIR provides that the competent authority shall grant authorisation only where it is fully satisfied that the applicant CCP complies with all of the requirements laid down in EMIR. This applies in respect of all of the services provided by a CCP and all of the activities performed by the CCP, including those which are considered as being linked to clearing.

Article 4(3) of Commission Delegated Regulation (EU) No 153/2013 provides that if a CCP provides services linked to clearing that present a distinct risk profile from its functions and potentially pose significant risks to it, the CCP shall manage those additional risks

adequately. This is an additional requirement to that provided for in Article 17(4) of EMIR. Therefore where a CCP provides services or performs activities, which are considered as being linked to clearing and which present a distinct risk profile from its functions and potentially pose significant risks to the CCP, then the CCP is required to comply with all of the requirements laid down in EMIR (Article 17(4) of EMIR) and to ensure that it manages those additional risks adequately.

It follows that under EMIR CCPs will not be able to provide some of their services or perform some of their activities to standards which are below the minimum requirements established by Title IV of EMIR (such as guaranteeing the performance of market participants without collecting margins and/or without maintaining a default fund and dedicated own financial resources).

(f) No. CCPs cannot be authorised to offer services preventing the interposition of the CCP between clearing members, i.e. preventing clearing members to clear contracts with other clearing members