ESMA_QA_892

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

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