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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
CCP / clearing-like activities

Question
In EMIR, a CCP is defined as a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer. 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. The definition of a CCP, however, seems to be fulfilled also by entities that are not authorised as CCPs, e.g. by firms acting as prime brokers. Prime brokers typically interpose themselves between the counterparties on a matched principal trading (MPT) basis. When they do this for markets for which it is customary to margin positions, they determine a net position on the basis of which they ask margin from their counterparties. With these activities it could be argued that prime brokers fulfil the definition of a CCP under EMIR. Another example of this are investment firms that operate an OTF offering MPT for derivatives (explicitly allowed under Article 20(2) of MiFID II).

Questions:

1. Is an authorisation as a CCP pursuant to Article 14 of EMIR mandatory for any legal person established in the Union meeting the definition of a “CCP” and providing “clearing services” in respect of financial instruments, or is it limited to entities offering clearing in OTC derivatives subject to the EMIR clearing obligation and/or in exchange-traded financial instruments? In this regard, is the intent of the legal entity (to offer clearing services as a CCP) relevant?

2. Are there other constitutive elements (e.g. intent, type of clients (retail/wholesale), loss mutualisation, unilateral margin) of the definition of “CCP”, apart from the “interposition”, i.e. becoming the buyer to every seller and the seller to every buyer, element (Article 2, point (1) of EMIR)?

3. What constitutes a “clearing service” in this context; should it be understood as “clearing” just as defined in Article 2, point (3) of EMIR or are there additional constitutive elements to be taken into account?

4. As regards the “interposition” element, where an investment firm (e.g. an OTF operator) executes transactions via matched principal trading (e.g. in accordance with Article 4(1), point (38), of MiFID II), do such matched principal trading transactions qualify as “interposition” (by the investment firm) for the purpose of the definition of a “CCP” pursuant to Article 2, point (1), of EMIR? If so, how would an investment firm (e.g. an OTF operator) using matched principal trading for the execution of transactions differ from a CCP?

5. Do CCP clearing services need to be performed by a separate legal entity from other regulated functions (e.g. the investment firm function), or can one legal entity perform CCP clearing services together with other activities (not linked to clearing) such as investment firm services?