

Supervisory Briefing

On CCP's Ongoing Monitoring of Operational Capacity of Clearing Members under Article 37(2) of EMIR



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1 Purpose and Scope

1. In accordance with Article 23a(1) of EMIR¹, ESMA plays a coordination role between competent authorities and across colleges 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, especially with regard to supervisory areas which have a cross-border dimension or a possible cross-border impact.
2. As follow-up to the 2022 peer review on due diligence of clearing members, this supervisory briefing has been designed to provide guidance to National Competent Authorities (NCAs) as regards the review of CCPs' ongoing monitoring of operational capacity of clearing members under Article 37(2) of EMIR, which was identified as a matter for supervisory convergence.

2 Status of this document

3. This supervisory briefing is issued in accordance with Article 29(2) of the ESMA Regulation², which allows ESMA to develop new practical instruments and convergence tools to promote common supervisory approaches and practices. The content of the briefing is not subject to any 'comply or explain' mechanism for NCAs.
4. The supervisory briefing is addressed to NCAs designated under Article 22 of EMIR.
5. This supervisory briefing is intended to be published and could be updated with additional topics as need may be.

3 Background

6. In accordance with the requirements under Article 37 of EMIR, a CCP should require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the CCP. A CCP should have procedures in place to monitor that participation requirements are met on an ongoing basis. A CCP's participation requirements should be objective, publicly disclosed, and permit fair and open access.
7. The 2022 CCP peer review on due diligence of clearing members (the peer review)³ showed that CCPs generally assess that their clearing members have sufficient

¹ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1–59).

² Regulation (EU) 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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84–119).

³ https://www.esma.europa.eu/sites/default/files/2023-12/ESMA91-1505572268-3108_2022_CCP_Peer_Review_report.pdf

operational capacity at the time of their initial admission. Indeed, CCPs' membership criteria often include that clearing members i) have in place adequate IT systems, ii) have access to relevant payment services and systems, iii) possess the necessary resources and expertise to use the clearing services and iv) have in place adequate operational risk management and business continuity tools.

8. However, the peer review identified that CCPs are not always focusing on the continuous monitoring of the clearing members' operational capacity to ensure that the clearing members continue to comply with the respective membership criteria.
9. This supervisory briefing sets out common expectations on NCAs' supervisory activities regarding their supervised CCPs' ongoing monitoring of operational capacity of clearing members under Article 37(2) of EMIR.
10. These expectations encompass four elements: a) adequate IT systems, b) access to payment systems and services; c) the resources and expertise required to use the service and d) the operational risk management and business continuity.
11. NCAs are expected to comply with these expectations in a proportionate manner, taking into account the size, relevance and risks managed by each CCP, and the risks taken in relation to each clearing member.
12. The content of this briefing is not exhaustive and does not constitute new policy.

4 Supervisory Expectations

13. NCAs should ensure that their supervised CCPs monitor and regularly review their clearing members' operational capacity, in a proportionate manner taking into account their operational risk profile, where relevant at least on an annual basis and where justified anytime when there is a relevant change, such as changes to their IT systems, that are relevant for their relationship with the CCP, and to related technologies or outsourcing arrangements that may significantly affect their operations in the CCP. The monitoring arrangements developed by a given CCP should be considered in light of its peculiar risk profile, taking into particular consideration the risk profile of their participants' base and its operating environment (eg. regulated entities). Furthermore, NCAs should ensure that their supervised CCPs are requiring their clearing members to notify them about any relevant changes that are important for their relationship with the CCP.
14. In particular, NCAs are expected to review and assess their supervised CCPs' ongoing monitoring of the clearing members' operational capacity, through the relevant tools based on their supervised CCP's risk profile. NCAs could consider covering them under i) the annual review exercise under Article 21 of EMIR, ii) ad-hoc desk-based reviews whenever the CCP introduces relevant changes, or iii) on-site inspections or on-site visits.

15. The ongoing monitoring of the clearing members' operational capacity should ensure that the clearing members continue to comply with the underlying participation requirement, which is becoming more important due to the interrelated operational resilience requirements applying to the CCPs under Regulation (EU) 2022/2554 on digital operational resilience for the financial sector (DORA). Moreover, NCAs should meet the following expectations.

Adequate IT systems

16. NCAs should ensure that CCPs implement adequate ongoing monitoring tools to ensure that the technical capabilities that were relevant for the admission of the clearing members remain adequate, such as technical and connectivity requirements, software systems, means of communication, etc. These tools can include annual due diligence questionnaires (where deemed useful), periodic testing of the operational reliability of the clearing members, and, where relevant, specific evaluations prior to admitting existing clearing members to new clearing services.
17. In particular, NCAs should ensure that CCPs have in place an efficient process for their clearing members to notify them where appropriate about any relevant changes on their IT systems for their relationship with the CCP that impact their operational capacity.

Access to payment systems and services

18. NCAs should ensure that CCPs monitor that their clearing members have access the relevant CCP payment systems and in case of material incidents reassess their payments performance against the corresponding participation requirements. Furthermore, NCAs should ensure that CCPs review the effectiveness of their clearing members' back-up arrangements, where commercial bank accounts are used, which should be properly tested at least on an annual basis.

The resources and expertise required to use the service

19. NCAs should ensure that CCPs are informed in a timely manner of any changes in the clearing members' representatives and verify that the relevant clearing members' new staff members are provided with comprehensive training that is necessary to participate in the CCP's system. Furthermore, NCAs should ensure that CCPs run regular reachability test with clearing members and review the performance of the relevant contact persons.

Operational risk management and business continuity

20. NCAs should ensure that CCP put in place effective operational risk monitoring controls to monitor the ongoing compliance with the CCP's operational risk policies, which include i) annual due diligence questionnaire, ii) where appropriate, periodic due diligence visits, and iii) disclosures from the clearing members in case of any operational development, such as a use of new service provider that may materially affect the clearing member's ability to comply with the membership criteria on operational capacity.