



European Multilateral Clearing Facility N.V.

European Securities and Markets Authority

Via <http://www.esma.europa.eu/consultation/59059/response>

Amsterdam, 3 August 2012

EMCF thanks the ESMA for the opportunity to respond the Consultation Paper on Draft Regulatory Technical Standards ESMA is required to draft under the Regulation of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories.

EMCF is a member of EACH, the European Association of Central Counterparty Clearing Houses, and supports the contribution to the consultation submitted by the association in respect of the CCP requirements.

EMCF supports the objectives of EMIR, in particular as they relate to the authorization and supervision of CCPs, which contributes to the creation of a level playing field for CCP services in Europe.

We wish to highlight our comments on the proposed Regulatory Technical Standards as follows:

CHAPTER VII, MARGINS

Article 4 MAR

The requirement from article 41(5) of EMIR regarding the conditions for the implementation of portfolio margin can be interpreted in a more principle based form. We suggest therefore that article 4 MAR (2) and article 4 MAR (4) are replaced by a clause that stipulates that portfolio margin is only allowed if the CCP complies with article 1 SBT (Model Validation) and article 3 SBT (Back testing) in chapter XIII.

If however ESMA prefers the current rule based approach, we request alignment of the length of the time series used in article 2 MAR (1) and article 4 MAR (2)a (6 months vs. two years) as otherwise the margin calculations for portfolios are internally inconsistent i.e. we are effectively comparing apples and oranges by using time series of different length.

CHAPTER X, DEFAULT WATERFALL

Article 1 DW

Calculation of the amount of the CCP's own resources to be used in the default waterfall

The article stipulates that the amount of dedicated own resources for the purpose set out in Article 45(4) EMIR is at least equal to the 50 per cent of the capital, including retained earnings and reserves, held in accordance with Article 16(2) of EMIR.

Our comments in this proposal are as follows:



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1. The amount is excessive and rather “an arm and a leg” than “skin in the game”;
2. The motivation provided reads as follows: “For the incentive to be effective, the percentage of capital dedicated to the skin in the game should be substantial. For this reason ESMA is considering 50 per cent of the minimum capital requirements to be the appropriate percentage for the “skin in the game”.

There are many other percentages which can be considered “substantial”, and the CP fails to make clear why the percentage of 50 was chosen. We feel ESMA is under the obligation to properly motivate its choices;

Article 2 DW

Article 2 (2) DW provides that in case the dedicated own resources fall below the amount required by Article 1 DW, presumably because of a (partial) use in case of a default, only the residual amount of skin in the game remains available for default handling until such time as the dedicated resources are reinstated. Article 2 (3) DW provides for a time window of maximum three months for such reinstatement.

This may lead to a situation in which a CCP is in limbo for a certain period. Swift reinstatement would provide a clear signal to the market as to whether the CCP which has used the dedicated resources is a going or a gone concern. At the same time the shareholder exposure is reduced during the three months period, which may be an incentive not to reinstate the resources as soon as possible.

We consider that this may create risks rather than reduce risks. In particular in the framework of interoperability arrangements, a situation in which the outlook of a CCP would be not clear, seems highly undesirable.

This potential result of the proposed RTS can be mitigated by reducing the percentage to a level at which it still is a serious blow to the CCP and its shareholders, but not a blow which could lead to make or break questions. We propose a percentage of ten.

Lastly we would like to point out that the text of article 45 EMIR does not require the dedicated resources to be set as a percentage of the capital of Article 16 EMIR. However by doing so in the Article 1 DW RTS through the wording “capital, including retained earnings and reserves, held in accordance with Article 16(2) EMIR” the skin in the game is then linked to the actual capital rather than the minimum required capital, the latter being the intention. This provides an incentive to maintain capital at the lowest possible level, which appears undesirable.

CHAPTER XII INVESTMENT POLICY

Article 3 INV

This article stipulates that where cash is maintained in accordance with paragraph 1 Article 3 INV, i.e. with a party other than a central bank, then not less than 98 per cent of such cash shall be deposited through arrangements that ensure the collateralization of



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the cash with highly liquid financial instruments meeting the requirements under Article 1 INV.

Under existing interoperability arrangements meeting regulatory approval, cash assets may be deposited by a CCP with Clearstream Banking Luxembourg (CBL) as account provider in an account in the name of the CCP as pledgor, with a right of pledge granted to a linked CCP. No collateral arrangements between EMCF acting as pledgor and CBL exist and we are not aware of such arrangements being in place with our linked CCPs. We have doubts on the question whether such arrangements can be readily put in place. This means that cash collateral is likely to become highly impractical for interoperability arrangements, and that collateral will be restricted to bonds.

A further and more serious issue occurs in the -non-hypothetical- case of intraday margin calls. A CCP might require intraday margin late in the afternoon, and would receive the same in cash at a point in time close to the close of a payment system, when the repo market or similar collateralization mechanism are no longer available for value that day. This issue is also related to the RTS being drafted by the EBA in view of the requirement expressed in Article 3 (2) sub C of the draft commission delegated regulation on capital to deduct from the capital any resources not invested in accordance Article 47 (1). The amount of such margin calls would have to be deducted from capital. Please note that access to the possibility to place overnight cash with a central bank is not self-evident.

In the case of larger amounts, a CCP receiving the proceeds of the intraday call, would subsequently have to inform its regulator of falling temporarily below the capital threshold. Overall, a CCP might be tempted not to issue the intraday call at all, when it is clear that a breach of the investment policy and subsequently of the capital requirements would follow. We feel it is not wise to create such choices, whereby the CCP may be tempted to choose the breach with what the CCP will consider to be the smallest adverse effects. We feel this can be remedied by making an exception to the 98% rule for intraday margin calls or by ensuring access to the possibility to place overnight cash with a central bank at all times.

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About European Multilateral Clearing Facility

EMCF provides competitive central counterparty clearing services for the Multilateral Trading Facility (MTF) market and Regulated Exchanges. Established in March 2007, EMCF provides CCP services for BATS Chi-X Europe, Burgundy, CATS, QUOTE MTF, TOM, NASDAQ OMX Nordic as well as NASDAQ OMX First North. EMCF is the most competitive European CCP, providing tangible savings for the industry. EMCF offers clearing participants a transparent fee schedule, charging the lowest fee across European markets with participants having access to the lowest fees in the world. In 2011, clearing volumes average 4 million transactions per day, representing nearly 40% of total European equity volumes, ranking it Europe's top cash equities CCP. EMCF cleared over 1 billion transactions in 2011, with a gross value in excess of EUR 6 trillion.