



OPINION

Regulatory technical standards on colleges for central counterparties supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012

I. Legal basis

1. According to Article 18(6) of 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 (the Regulation, or EMIR), the European Securities and Markets Authority (ESMA) shall develop draft regulatory technical standards specifying the conditions under which the Union currencies referred to in paragraph 2(h) of Article 18 of the Regulation are to be considered as the most relevant and the details of the practical arrangements for the functioning of the college referred to in paragraph 5 of Article 18 of the Regulation (draft regulatory technical standards on CCP colleges).
2. On 27 September 2012, ESMA submitted draft regulatory technical standards on CCP colleges to the European Commission pursuant to Article 10(1) of Regulation No (EU) 1095/2010 (the ESMA Regulation) along with other draft regulatory and implementing technical standards developed by ESMA under the Regulation.
3. On 19 December 2012, the Commission endorsed the other draft regulatory and implementing technical standards developed by ESMA under the Regulation. The Commission did not endorse ESMA's draft regulatory technical standards on CCP colleges.
4. On 31 January 2013, the Commission informed ESMA that it did not endorse ESMA's draft regulatory technical standards on CCP colleges because it considered them not compatible with the primary legislation (EMIR). In particular, the Commission considers that some of the provisions included in ESMA's draft regulatory technical standards on CCP colleges exceed the mandate given by the legislator to specify the details of the practical arrangements of the agreement for the establishment and functioning of CCP colleges.
5. Pursuant to Article 10(1) of the ESMA Regulation, ESMA has a period of six weeks to amend its draft regulatory technical standards on CCP colleges on the basis of the Commission's proposed amendments and resubmit them to the Commission in the form of a formal opinion.
6. ESMA's competence to deliver an opinion is based on Article 10(1) of the ESMA Regulation. In accordance with Article 44(1) of the ESMA Regulation the Board of Supervisors has adopted this opinion.

II. Background

7. Article 18 of the Regulation imposes two constraints on the establishment of CCP colleges. Firstly, Article 18(1) of the Regulation requires that a National Competent Authority (NCA) establish a CCP college within 30 days of receiving a complete application for authorisation as a CCP under the Regulation. Secondly, Article 18(5) of the Regulation provides that a CCP college cannot be established until the authorities eligible for participation in the CCP college have first agreed, in writing, the terms on which the CCP college will operate. Given that: 1) the competent authority for a CCP has 30 calendar days from the submission of a complete application to set up a college (Article 18 of EMIR); and 2) the competent authority shall duly consider the opinion of the college before granting the authorisation to a CCP; the competent authority might be liable for not respecting these provisions if a college member refuses to participate in a college and might be impeded from authorising a CCP if the college is not established.
8. When drafting its draft regulatory technical standards on CCP colleges, ESMA was concerned that a NCA which is eligible for participation in a CCP college might elect not to agree to the terms for the operation of the CCP college, thus preventing the establishment of the CCP college and possibly the authorisation of the CCP.
9. ESMA considered that such a veto power over the authorisation of CCPs, on the part of individual NCAs, is not consistent with the extensive provisions governing the authorisation of a CCP as set out in Article 17 of the Regulation. In order to prevent individual NCAs from having a veto right over the authorisation of CCPs, ESMA therefore proposed in its draft regulatory technical standards on CCP colleges that any authority which is eligible for participation in a CCP college, but which chose not to agree to the terms for the operation of the CCP college, would not block the operation of the college that could proceed with its function to the extent that the voting procedures established in EMIR could be implemented.
10. However, the Commission considers that ESMA's proposed structure exceeds the mandate given by the legislator to specify the details of the practical arrangements of the agreement for the establishment and functioning of CCP colleges.
11. The Commission interprets Article 18 of the Regulation as imposing an obligation on NCAs to participate in any CCP college for which they are eligible. The Commission considers that, where an NCA chose not to agree to the terms for the operation of the CCP college, such failure would entail a breach of Union law. This means that an action could be brought under Article 258 of the Treaty on the Functioning of the European Union. On the basis of this position, the Commission has proposed amendments to ESMA's draft regulatory technical standards on CCP colleges which were included in its letter of 31 January 2013.

III. ESMA opinion

12. ESMA considers that although proceedings in the European Courts of Justice are a possible way to ensure a commitment by college members to join the college without delays, the timeframe required for the establishment of a CCP college under EMIR is not compatible with such proceedings.

13. ESMA does, however, recognise that its mandate to specify the details of the practical arrangements of the agreement for the establishment and functioning of CCP colleges is not broad enough to appropriately address the veto right inadvertently introduced by the Regulation.
14. Instead, ESMA acknowledges that resolution of this issue will need to wait until a review of the Regulation takes place.
15. While ESMA does not consider that the amendments proposed by the Commission, in its letter of 31 January 2013, address the existence of a veto right in a manner that is consistent with the timeframe required for the establishment of a CCP college under the Regulation, ESMA does consider that such amendments are sensible and can serve as a threat in case of college members wanting to exercise a veto right. ESMA therefore amended its draft regulatory technical standards on CCP colleges on the basis of the Commission's proposed amendments.
16. Nevertheless, ESMA considers that where an NCA elects not to agree to the terms for the operation of the CCP college, thus preventing the establishment of a CCP college and the authorisation of the CCP, that NCA should be required to justify such decision. In order to ensure that NCAs are required to provide such justification, ESMA will issue Guidelines and Recommendations concerning the terms on which CCP colleges should operate. In the event that a competent authority does not intend to agree to the terms for the operation of the CCP college, it will therefore need to inform ESMA, stating its reasons.
17. A standard written agreement adopted through ESMA Guidelines and Recommendations under Article 16 of the ESMA Regulation will facilitate the establishment of colleges. In addition, a comply or explain mechanism to which NCAs should be bound, can work as an early mechanism to ensure the establishment of the college, before the proceedings with the European Court of Justice are activated. For this reason provisions in this respect have been included in the revised draft regulatory technical standards.
18. Revised draft regulatory technical standards on CCP colleges, redrafted on the basis of the Commission's proposed amendments, are enclosed at Annex I.



ANNEX I

Draft regulatory technical standards on colleges for CCPs

COMMISSION DELEGATED REGULATION (EU) No .../..

of [date]

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 with regard to regulatory technical standards on colleges for central counterparties

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories¹, and in particular Article 18(6), thereof,

Whereas:

- (1) In order to ensure a consistent and coherent functioning of colleges across the Union it is necessary to specify the arrangements for the participation in the colleges for CCPs to facilitate the exercise of the tasks specified in Regulation (EU) No 648/2012.
- (2) The exclusion of a central bank of issue of a relevant Union currency of financial instruments cleared in the CCP does not affect the rights of such central bank of issue to request and receive information in accordance with Article 18(3) and Article 84 of Regulation (EU) No 648/2012.
- (3) The activity of a CCP may be relevant for a particular central bank of issue in view of the volumes cleared in the currency issued by such central bank. However, the relevance of a currency for the participation of a central bank of issue in the college of the CCP should be determined by the share represented by that currency from among the CCP's average open cleared positions, in order to maintain a proportionate size of the college.
- (4) To ensure college meetings achieve an effective result, the objectives of any meeting or activity of the college should be clearly identified by the competent authority of the CCP, in consultation with the college members. Those objectives should be circulated well in advance to the participants together with documentation prepared by the CCP's competent authority or by other members of the college, so as to create effective discussion.
- (5) The function of colleges is to facilitate the exercise of the tasks specified in Regulation (EU) No 648/2012 and the tasks assigned to college members as well as their composition, establishment and management of colleges have been articulated by the legislator in the Regulation as legal obligations and, therefore, they are binding and directly applicable in all Member States. For the practical functioning of a college a written agreement should be adopted by the members of that college. In order to ensure the use of standard written agreements across CCP colleges, incorporating best practice on college operations, consistent approaches by competent authorities and consistent practical arrangements for the operation of colleges across the Union, and to facilitate the swift establishment of CCP colleges within the deadline established by Article 18(1) of Regulation (EU) No 648/2012, ESMA should issue Guidelines and Recommendations in accordance with the procedure laid down in Article 16 of Regulation (EU) no 1095/2010.

¹ OJ L 201. 27.7.2012, p. 1.

- (6) Nothing in this act should prejudice the power of the Commission to launch infringement proceedings in accordance with Article 258 of the TFEU, as well as the actions provided for in Articles 265 and 271(d) of the TFEU.
- (7) To ensure the timely and up to date exchange of information amongst college members, the college should meet regularly and allow the opportunity for college members to discuss and provide input to the competent authority's review of the arrangements, strategy, process and mechanism employed by the CCP to comply with Regulation (EU) No 648/2012, as well as to discuss the competent authority's evaluation of the risks to which the CCP is, or may be, exposed and that it could pose.
- (8) To ensure all the views of the college members are duly taken into account, the competent authority should do its utmost to ensure that any disagreement among authorities that have a right to become members of a college are resolved before finalising the written agreement for the establishment and functioning of the college. ESMA should facilitate the finalisation of the agreement through its mediation role, where appropriate.
- (9) In order for college members to be able to consider effectively and reach a joint opinion on a risk assessment of the CCP, it is necessary that practical arrangements concerning the contents of the risk assessment be provided.
- (10) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (11) ESMA has consulted, where relevant, the European Banking Authority (EBA), the European Systemic Risk Board and the members of the European System of Central Banks (ESCB) before submitting the draft technical standards on which this Regulation is based. In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and the Council of 24 November 2012 establishing a European Supervisory Authority (European Securities and Markets Authority)², ESMA has conducted open public consultations on such draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.

HAS ADOPTED THIS REGULATION:

Article 1

Determination of most relevant currencies

1. The most relevant Union currencies shall be identified on the basis of the relative share of each currency in the CCP's average end-of-day open positions across all financial instruments cleared by the CCP, calculated over a period of one year.
2. The most relevant Union currencies shall be the three currencies with the highest relative share calculated in accordance with paragraph 1 provided that each individual share exceeds 10%.
3. The calculation of the relative share of the currencies shall be calculated on an annual basis.

² OJ L 331, 15.12.2010 p. 84



Article 2

The operational organisation of colleges

1. After assessing that an application is complete as referred to in Article 17(3) of Regulation (EU) No 648/2012, the CCP's competent authority shall circulate a proposal for the written agreement under Article 18(5) of Regulation (EU) No 648/2012 to the members of the college determined in accordance with Article 18(2) of Regulation (EU) No 648/2012. That written agreement shall include a process for annual review. It shall also include an amendment process whereby changes may be initiated at any time by the CCP's competent authority or by other members of the college, subject to approval by the college in accordance with the procedure set out in this Article.
2. Where the members of the college referred to in paragraph 1 do not express any comments within 10 calendar days, the CCP's competent authority shall proceed with the adoption of the written agreement by the college and with the establishment of the college in accordance with Article 18(1) of Regulation (EU) No 648/2012.
3. Where the members of the college express comments regarding the proposal for the written agreement circulated pursuant to paragraph 1, they shall submit those comments together with a thorough explanation to the CCP's competent authority within 10 calendar days. If relevant, the CCP's competent authority shall prepare a revised proposal and convene a meeting to agree on the final written agreement taking into account the deadline referred to in Article 18(1) of Regulation (EU) No 648/2012.
4. The college shall be deemed to be established following the adoption of the written agreement.
5. All members of the college will be bound by the written agreement adopted in accordance with paragraphs 1 to 5 of this Article.

Article 3

Membership and participation in the colleges

1. Where a request for information is made to a college by a competent authority of a Member State which is not a member of the college in accordance with Article 18(3) of Regulation (EU) No 648/2012, the CCP's competent authority, after having consulted the college, shall decide on the most appropriate way to provide and request information to and from the authorities that are not members of the college.
2. Each member of the college shall designate one participant to attend the meetings of the college and may designate one alternate, with the exception of the CCP's competent authority which may require additional participants who shall have no voting rights.
3. Where the central bank of issue of one of the most relevant Union currencies corresponds to more than one central bank, the relevant central banks shall determine the single representative who will participate in the college.
4. Where an authority has the right to participate in the college under more than one of points (c) to (h) of Article 18 (2) of Regulation (EU) No 648/2012, it may nominate additional participants who shall have no voting rights.
5. Where in accordance with this Article there is more than one participant from a college member, or there are more college members belonging to the same Member State than number of votes that can be exercised by those college members in accordance with Article 19(3) of Regulation (EU) No



648/2012, that college member or those college members shall inform the college which participants shall exercise voting rights.

Article 4

Governance of the colleges

1. The CCP's competent authority shall ensure that the work of the college facilitates the tasks to be performed according to Articles 15, 17, 49, and 54 of Regulation (EU) No 648/2012.
2. The college shall notify ESMA of any tasks that the college wishes or is required to perform in addition to paragraph 1. ESMA shall have a coordination role in monitoring the tasks performed by a college and shall ensure that its objectives are in line with those of other colleges as far as possible.
3. The CCP's competent authority, shall at least ensure that:
 - (a) the objectives of any meeting or activity of the college are clearly identified;
 - (b) the college meetings or activities remain effective, while ensuring that all college members are fully informed of the college activities that are relevant to them;
 - (c) the timetable for meetings or activities of the college is defined so that their outcome provides assistance to the supervision of the CCP;
 - (d) the CCP and other key stakeholders have a clear understanding of the role and functioning of the college;
 - (e) the activities of the college are regularly reviewed and remedial action is taken if the college is not operating effectively;
 - (f) the agenda is set for an annual crisis management planning meeting amongst members of the college in cooperation with the CCP if necessary.
4. To ensure the efficiency and effectiveness of the college, the CCP's competent authority shall act as a central point of contact for any matter related to the practical organisation of the college. The CCP's competent authority shall ensure that the following tasks are at least performed:
 - (a) draw-up, update and circulate the contact list of college members;
 - (b) circulate the agenda as well as documentation for meetings or activities of the college;
 - (c) record minutes of the meetings and formalise action points;
 - (d) manage the college website or other electronic information-sharing mechanism, if any;
 - (e) where practical, provide information and specialised teams where appropriate, to assist the college in its tasks;
 - (f) share information in an appropriate manner among members of the college.
5. The frequency of college meetings shall be determined by the CCP's competent authority having regard to the CCP's size, nature, scale and complexity, the systemic implications of the CCP across jurisdictions and currencies, the potential impacts of the activities of the CCP, external circumstances and potential requests by college members. There shall be at least an annual meeting



of the college and if deemed necessary by the CCP's competent authority, a meeting each time that a decision needs to be taken under Articles 15, 17, 49, and 54 of Regulation (EU) No 648/2012. The CCP's competent authority shall organise, periodically, meetings between members of the college and the senior management of the CCP.

Article 5

Exchange of information among authorities

1. Each member of a college shall provide, in a timely manner, the CCP's competent authority with all information necessary for the operational functioning of the college and for the performance of the key activities in which the member participates. The CCP's competent authority shall provide the members of the college with similar information in a timely manner.
2. The CCP's competent authority shall at least provide the following information to the college:
 - (a) significant changes to the structure and ownership of the CCP's group;
 - (b) significant changes in the level of the CCP's capital;
 - (c) changes in the organisation, senior management, processes or arrangements when those changes have a significant impact on governance or risk management;
 - (d) a list of clearing members of the CCP;
 - (e) details of the authorities involved in the supervision of the CCP, including any changes in their responsibilities;
 - (f) information on any material threats to the CCP's ability to comply with Regulation (EU) No 648/2012 and relevant delegated and implementing regulations;
 - (g) difficulties that have potentially significant spill-over effects;
 - (h) factors which suggest a potentially high risk of contagion;
 - (i) significant developments in the financial position of the CCP;
 - (j) early warnings of possible liquidity difficulties or, major fraud;
 - (k) events of member default and any follow-up actions;
 - (l) sanctions and exceptional supervisory measures;
 - (m) reports on performance problems or incidents occurred and remedial actions taken;
 - (n) regular data on the activity of the CCP, the scope and frequency of which shall be agreed as part of the written agreement described in Article 2;
 - (o) overview of major commercial proposals, including new products or services to be offered;
 - (p) changes in the CCP's risk model, stress testing and back testing;
 - (q) changes in the CCP's interoperability arrangements, where applicable.



3. The exchange of information between the members of the college shall reflect their responsibilities and information needs. To avoid unnecessary information flows, the exchange of information shall be kept proportionate and risk-focused.
4. Authorities which receive confidential information from the college shall ensure that it is only used in the course of their duties in accordance with Article 84 (2) of Regulation (EU) No 648/2012.
5. The members of the college shall consider the most effective ways of communicating information to ensure continuous, timely and proportionate exchange of information.

Article 6

Voluntary sharing and delegation of tasks

1. College members shall agree upon detailed terms of any specific delegation arrangements and arrangements for the voluntary entrustment of tasks to other members, in particular in the case of delegations which will result in the delegation of a member's main supervisory tasks.
2. Parties to specific delegation arrangements and arrangements for the voluntary entrustment of tasks shall agree on detailed terms which cover at least the following topics:
 - (a) the specific activities in clearly specified areas that will be entrusted or delegated;
 - (b) the procedures and processes to be applied;
 - (c) the role and the responsibilities of each party;
 - (d) the type of information to be exchanged among the parties.
3. The sharing and delegation of tasks shall not purport to result in a change in the allocation of the decision-making power of the CCP's competent authority.

Article 7

Opinion of the college

1. The risk assessment report to be prepared by a CCP's competent authority in accordance with Article 19(1) of Regulation (EU) No 648/2012 shall contain, at least, the key risks that the CCP is exposed to and how the CCP proposes to mitigate these risks.
2. The report shall be submitted to the college within an appropriate timescale to ensure that college members are able to review it and contribute to it if required.
3. The written agreement referred to in Article 2 shall specify a quorum of two-thirds for meetings of the college.
4. The CCP's competent authority shall endeavour to ensure that each college meeting has a valid quorum for decisions to be taken. In the case that a quorum is not met, the chair shall ensure that any decisions that need to be taken are postponed until a quorum is present, taking into account the relevant time limits set out by Regulation (EU) No 648/2012.



Article 8

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, []

[For the Commission
The President]

[On behalf of the President]

[Position]