

OPINION

European Commission's Proposal for EU Regulation on CCP Recovery and Resolution

1 Legal basis

1. ESMA's competence to provide an opinion on the European Commission's Proposal for EU Regulation on CCP Recovery and Resolution (the Regulation) is based on Article 34(1) of EU Regulation No 1095/2010 ('ESMA Regulation')¹, as ESMA is competent regarding CCPs under EU Regulation No 648/2012 (EMIR)² and under the Proposal for an EU Regulation on CCP Recovery and Resolution.

2 Background

2. On 28 November 2016, the European Commission published its [proposal](#) for an EU Regulation on CCP Recovery and Resolution (the proposal). The proposal is intended to implement in the EU the approach developed at international level by the Committee on Payments and Market Infrastructures - International Organisation of Securities Committees (CPMI-IOSCO), and the Financial Stability Board (FSB) for the recovery and resolution of systemically relevant financial institutions, including financial market infrastructures (FMIs) such as CCPs.
3. The proposal entrusts CCP's National Competent Authorities (NCAs) under EMIR with the supervision of CCP recovery and early intervention powers, while it calls on Member States to designate National Resolution Authorities (NRAs) to develop CCP resolution plans and ensure the resolvability of CCPs established in their Member State. The proposal envisages that the EMIR colleges will have to reach joint decisions on recovery issues, while resolution colleges will have to be established and reach joint decisions on resolution issues. ESMA will have a mediation role to facilitate EMIR colleges and Resolution Colleges reaching a joint opinion on certain recovery and resolution issues or decide thereupon when no opinion is reached within a 4-month deadline. Moreover, the proposal

¹ 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.

² 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 (Text with EEA relevance)

amends EMIR to introduce a procedure for the suspension of the clearing obligation in case a CCP enters into resolution.

4. The proposal assigns ESMA with a key role in this Regulation. In particular, the proposal tasks ESMA to:
 - (i) develop 5 Regulatory Technical Standards (RTS) and 2 Guidelines,
 - (ii) participate in resolution colleges (together with EBA),
 - (iii) exercise binding mediation and make decisions when the supervisory college or the resolution college does not reach a joint opinion on certain issues,
 - (iv) receive certain notifications and publish on its website the list of resolution authorities and any resolution actions, and
 - (v) provide, upon the resolution of a CCP, an opinion on the suspension of the clearing obligation (and further extension of that suspension).

3 ESMA opinion

3.1 Overall assessment of the proposal

5. ESMA welcomes the proposal put forward by the Commission that completes the EU regulatory framework for CCPs, by providing a sound regime for CCP recovery and resolution.
6. ESMA considers that the proposal is balanced, proportionate and consistent with other existing relevant EU legislation, including EMIR and the Bank Recovery and Resolution Directive (BRRD)³, and with international guidance provided by CPMI-IOSCO and FSB on CCP recovery and resolution.
7. Overall, ESMA supports the regulatory approach presented in the proposal and appreciates the involvement of EMIR colleges on CCP recovery issues and the establishment of Resolution Colleges to deal with CCP resolution issues.
8. ESMA appreciates the key role that the Regulation assigns to it, recognising it as the reference European Supervisory Authority (ESA) for CCPs, and stands ready to undertake the tasks assigned to it under the proposal.
9. In this opinion, ESMA would like to express its views on a few issues related to the impact of the proposal on its organisation, resources, and role, and, more generally, to some arrangements related to CCP recovery and resolution.

³ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions.

3.2 Organisational implications on ESMA

1) ESMA Board of Supervisors to include CCP Resolution Authorities as observers

10. In order to ensure that the CCP resolution authorities may provide input to the work of ESMA under this Regulation, the ESMA Regulation (Article 40.5) is amended to allow the members of the Board of Supervisors to be accompanied by a representative from the resolution authority, who shall be non-voting.
11. The ESMA Board of Supervisors has already practices, processes and procedures dealing with the participation of observers and changing compositions of relevant competent authorities, which would allow for a smooth implementation of the above provision.

2) The establishment of a new ESMA Resolution Committee

12. ESMA is required to set up an internal committee (the ESMA Resolution Committee) to prepare RTS, Guidelines and decisions on mediation for further approval by the ESMA Board of Supervisors. To prepare its decisions under the Regulation and ensure full input of EBA members, this Resolution Committee should be composed of the National Resolution Authorities designated under the proposal, whereby certain competent authorities under Regulation 1093/2010 (EBA regulation), namely supervisors and resolution authorities of credit institutions, shall also be invited to participate as observers. The proposal also requires ESMA to ensure structural separation between the resolution committee and other functions referred to in the ESMA regulation.
13. This implies that all processes, including the involvement of the ESMA Resolution Committee (including the development of RTS and guidelines), can only be finalised after the designation by the Member States of the CCP resolution authorities and the establishment of this committee. In order to advance work on the development of RTS and Guidelines, ESMA will initiate preparatory work relying on existing arrangements so that draft RTS and Guidelines can be finalised by the Resolution Committee upon its establishment, in view of a final approval by the Board of Supervisors.

3) Other organisational changes

14. Concerning the notifications and publication duties envisaged in the Regulation, ESMA would develop internal procedures to manage such notifications and perform the relevant website updates when due. With respect to the new clearing obligation suspension, ESMA would also develop dedicated internal procedures to allow the Board of Supervisors to issue an opinion within 24 hours (48 hours for extension of the suspension), including the required consultation of the ESRB.

3.3 ESMA resources

15. Concerning the budgetary implication, in the explanatory memorandum presenting the regulation proposal, it is concluded that the tasks assigned to ESMA “will not require the

establishment of additional posts and can be carried out with existing resources, in most cases based on work already done by EBA in the context of BRRD implementation”.

16. As further argued below, ESMA disagrees with such a conclusion.
17. It should be recalled that, although the single rulebook-related work under EMIR has been largely delivered, the resources assigned to CCP matters do not provide for spare capacity considering the recurrent regulatory tasks regarding CCPs under EMIR (participation in CCP colleges, validations under Article 49, annual peer reviews, annual EU-wide stress tests, and other policy work promoting supervisory convergence in the field of EMIR, not to mention recognition of third country CCPs and international regulatory work streams relating to CCP at CPMI-IOSCO and to a certain extent at IOSCO and ESRB level).
18. Prioritising new single rulebook initiatives on CCP Recovery and Resolution issues (RTS and Guidelines under the proposal) over existing competencies and supervisory convergence work on CCPs would be contrary to the ESMA 2016-2020 strategic orientation. In order not to affect negatively ESMA’s work plan in the short term, additional resources are required to develop the required RTS and Guidelines.
19. Furthermore, such additional resources are also necessary in the medium term, i.e. after the adoption of the RTS and Guidelines, as it is questionable that the current ESMA staff members participating in the 18 EMIR colleges could also effectively cover the additional 18 Resolution Colleges to be established under the proposed Regulation. This is especially challenging in the first years after entry into force of the Regulation, when on the one side, resolution colleges have to review resolution plans and impediments, and on the other side, EMIR colleges will add the review of recovery plans to their regular workload under EMIR. Moreover, the resource implications for the set-up and the management of the ESMA Resolution Committee should not be underestimated.
20. ESMA should hence be allocated additional resources that would first work on the RTS and Guidelines, and then would be assigned to ongoing regulatory tasks, such as participation in resolution colleges, and regulatory convergence work of the Resolution Committee, e.g. development of Q&As, opinions, as well as potential mediation cases.
21. Therefore, ESMA is of the opinion that the co-legislators should consider the above-mentioned budgetary implications and to include a provision in the CCP Recovery and Resolution Regulation for ESMA to draft a report on the budgetary impact of the Regulation, as it was the case for EMIR.

3.4 Composition of resolution colleges

22. Concerning the composition of resolution colleges, the proposal envisages that resolution colleges will be composed of members of the CCP colleges as defined in EMIR and some further relevant authorities. ESMA appreciates that, while including further categories of relevant authorities, the proposal necessarily has to draw a line and excludes some other authorities to preserve the efficient and effective functioning of such colleges. However,

ESMA would like to highlight that in other legislations, such as the CSD Regulation, when a market infrastructure (a CSD in this case) is considered of substantial importance for the functioning of the financial markets and the protection of investors in a host Member State, specific cooperation arrangements are envisaged for the supervision of the CSD activities in the host Member State. Considering the operations of CCPs and the impact that they might have for the stability of particular countries, it is important that the composition of the resolution colleges properly reflects this dimension.

3.5 ESMA mediation role in colleges

23. As mentioned above, ESMA will have a mediation role to facilitate EMIR colleges and Resolution Colleges reaching a joint opinion on certain recovery and resolution issues or decide thereupon when no opinion is reached within a 4-month deadline. According to Recital 28, ESMA's decision process in case of mediation should involve the ESMA Resolution Committee.
24. In particular, upon request by the chairing authority, ESMA may assist colleges in reaching the joint decisions required under the proposal, in accordance with Article 31(c) of the ESMA Regulation. Moreover, the proposal tasks ESMA with a binding mediation role when colleges cannot reach a joint decision on some specific matters⁴ (normally within a period of 4 months), whereby a college member can refer the matter to ESMA in accordance with Article 19 of the ESMA Regulation and the competent authority has to decide in accordance with ESMA's decision.
25. It is noted that Article 17(4) of EMIR envisages that ESMA's binding mediation can be activated only when a majority of two-thirds of the college have expressed a negative opinion and only by any of the concerned members "based on that majority of two-thirds". Instead, as described above, the Regulation proposal envisages that any member of the (EMIR or Resolution) college can refer a matter to ESMA for mediation, irrespective of whether there is a (simple or qualified) majority expressing a negative opinion. This would also apply to the EMIR colleges when called to reach an opinion on recovery plans and certain remediation measures.⁵
26. ESMA supports the introduction of binding mediation. With reference to the arrangement currently envisaged in the proposal, ESMA recognises that it is a difficult exercise to define arrangements striking the right balance between the recognition of emerging majorities in a college and the right of dissenting college members to refer a matter for binding mediation. Given the political dimension of this matter, ESMA refrains to advise the

⁴ In **EMIR Colleges**, in case of decisions on a) the assessment of the recovery plan, b) the application of measures to (a) reduce the risk profile of the CCP, (b) to enhance the CCP's ability to be recapitalised in a timely manner to meet its prudential requirements and (d) to make changes to the default waterfall, recovery measures and other loss allocation arrangements so as to improve the resolvability and resilience of critical functions.

In **Resolution colleges**, in case of decision on a) the resolution plans, b) specific alternative measures to address or remove impediments to resolvability, namely j) changes to the legal or operational structures of the CCP or group entity, k) the set up by the CCP of a (Union) parent financial holding company, n) the set up by the parent undertaking of a separate financial holding company to control a subsidiary CCP.

⁵ See footnote above.

legislators on any specific arrangement. However, it wishes to share some considerations based on the existing experience under the EMIR colleges. Firstly, the two-third majority under EMIR has never materialised and the envisaged protection of the rights of individual college members can be questioned. Secondly, it should be considered that the larger the college, the more diluted the relative weight of individual members, especially of those that have effective interests at stake (e.g. the competent authorities of the clearing members) and that might have conflicting perspectives on resolution tools with the competent and resolution authorities of the CCP.

3.6 Provisions on Recovery Plans

27. While tasking ESMA to develop RTS further specifying the contents of the resolution plan, the proposal does not envisage any RTS on recovery plans. Instead, it includes in an Annex a Section A only listing the items that a recovery plan shall include.
28. The proposal does not prescribe what recovery tools can, or cannot, be included in the recovery plan, when they should be used and under what conditions.
29. ESMA considers that it would be useful to introduce further detailed requirements on the content of recovery plans to ensure a higher level of convergence. For example, more detailed provisions could further specify what recovery tools could be used to allocate default losses (e.g. Variation Margin Gain Haircutting - VMGH vs cash calls) or to cover non-default losses (e.g. CCP recapitalisation mechanisms vs parent holding guarantee), while providing the necessary flexibility to CCPs to select the set of recovery tools that better fits its organisational structure and ecosystem. In the absence of further detailed requirements, under the current proposal a CCP would have full discretion, subject to supervisory approval, to use, for instance, VMGH to cover non-default losses due to operational losses caused by mismanagement, even before a capital reduction is considered, which would raise concerns from several perspectives.
30. ESMA stands ready to develop RTS (or guidelines) on recovery plans, should the co-legislators opt for introducing such a mandate for further detailing these requirements.

3.7 All-encompassing waiver of EMIR requirements for a “Bridge CCP”

31. The proposal envisages as a recovery tool, the possibility for a Resolution Authority and/or another public authority to establish a Bridge CCP to which assets, rights, obligations and liabilities of the CCP in resolution are transferred, with the view to sell out the Bridge CCP at a later stage.
32. Moreover, subject to the approval by the competent authority, the Bridge CCP that is not yet authorised under EMIR can be exempted to comply with the requirements under EMIR for a maximum period of 12 months.
33. ESMA considers it important to share some considerations on these provisions given the impact that it might have on the implementation of EMIR and on the EU CCP landscape.

In particular, ESMA understands the need to introduce a waiver for the Bridge CCP (which is of a temporary nature) to be exempted from some organisational and capital requirements. However, it is suggested that due consideration is given to whether some EMIR requirements cannot be waived, especially the prudential requirements (such as margins or default fund contributions), to avoid putting at risk the resilience of the Bridge CCP and compromise the credibility of its future sell out.