CCP Austria Abwicklungsstelle
für Börsengeschäfte GmbH
Strauchgasse 1-3, 1010 Wien
Tel. +43 1 533 22 44
Fax +43 1 533 22 44 -5880
www.ccpa.at

To
European Securities and Markets Authority (**ESMA**)

Vienna, August 24, 2017

RESPONSE

of CCP Austria Abwicklungsstelle für Börsengeschäfte GmbH

regarding 'Consultation Paper – ESMA's Guidelines on CCP conflicts of interest management'

Dear Sir or Madam,

CCP Austria Abwicklungsstelle für Börsengeschäfte GmbH (hereinafter 'CCP Austria') has read the above-mentioned ESMA Consultation Paper on the conflicts of interest management by CCPs (hereinafter the **'proposed guidelines'**) with great interest. We welcome the possibility to respond to this consultation paper and comment on the proposed guidelines as follows:

As one of the smallest CCPs clearing cash market products only and holding no banking license, **CCP Austria wants to clearly emphasise the importance of ESMA's consideration of the varying sizes and cleared products of CCPs within the European Union**. The effort and expenses in the application of mandatory guidelines can increase disproportionately in case of a small CCP compared to systemically relevant ones.

Q1: Do you agree with the definition and with the scope here above described?

CCP Austria agrees with the definition and scope of sources of potential conflicts of interests as regards CCPs if their extent is appropriate and manageable by the CCP itself. We note that these are guidelines on Level 1 measures issued under ESMA's general clarificatory powers,

rather than specifically-empowered Level 2 or 3 guidelines. As such, the scope of application of these guidelines should be carefully and restrictively defined. In particular, **conflicts of interest that do not affect interests of the CCP should be excluded from the scope**.

- From this starting point, we have major concerns that the definition of 'relevant persons' for a CCP in the proposed guidelines are too extensive. In particular, the proposed guidelines include in the definition of a relevant person *'staff and close family relationships as […] relatives by blood or marriage up to the second degree, […]*', which should be considered by the CCP. By contrast, the requirements of Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (hereinafter 'MiFID II'), for example, are less restrictive. In particular, Art 2 paragraph 3a Commission Delegated Regulation (EU) 2017/565 (supplement to MiFID II) defines a 'person with whom a relevant person has a family relationship' in the context of personal transactions as follows:

  '(a) the spouse of the relevant person or any partner of that person considered by national law as equivalent to a spouse;

  (b) a dependent child or stepchild of the relevant person;

  (c) any other relative of the relevant person who has shared the same household as that person for at least one year on the date of the personal transaction concerned;'

  Additionally, Art 33 Commission Delegated Regulation (EU) 2017/565 concerning conflicts of interest potentially detrimental to a client merely states the term 'relevant person', being defined as:

  '(a) a director, partner or equivalent, manager or tied agent of the firm;

  (b) a director, partner or equivalent, or manager of any tied agent of the firm;

  (c) an employee of the firm or of a tied agent of the firm, as well as any other natural person whose services are placed at the disposal and under the control of the firm or a tied agent of the firm and who is involved in the provision by the firm of investment services and activities;

  (d) a natural person who is directly involved in the provision of services to the investment firm or to its tied agent under an outsourcing arrangement for the purpose of the provision by the firm of investment services and activities;'

  Therefore, we have **strong concerns if the disclosure of every relative up to the second degree by every staff member is proportionate, reasonable and feasible**. Therefore, we would propose to **replace in paragraph 12 the part of the definition of a relevant**

person by "*staff and close family relationships as […] relatives by blood or marriage up to the first degree, […]*".

- Moreover, the definition of 'staff' should be aligned with Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (hereinafter 'EMIR'), distinguishing between 'board', 'senior management', 'chief officers' and 'employees'.

- The proposed guidelines also include as a potential source of conflicts of interest the relationship between clearing members, clients or between a clearing member and a client, which should be considered by the CCP. We have strong concerns about the requirement to address/consider potential conflicts of interest between these parties in the CCPs conflicts of interest management, in particular as a CCP would not necessarily be aware of the identity of the clients of its clearing member may have. A CCP cannot therefore be aware of all conflicting interests within its customer base and more important there is no legal basis to manage conflicts of interest within the customer base and, more importantly, has no legal basis for managing conflicts of interest within the customer base and or enforcing mitigating measures at that level.

  Clearing members and clients should retain responsibility to identify and manage their own conflicts of interests with other clearing members or clients. Therefore, we request that **this requirement be deleted from paragraph 19**.

  We appreciate that potential or real conflicts of interest can continue to have effects after the conflict ceased and understand that this should be taken into account when assessing the potential or real conflict of interest, as mentioned in paragraph 20.

  However, we would be reluctant to pre-define a length of time during which potential conflicts of interest are presumed to continue to have effects after the conflict ceased. Each conflict of interest situation is different and unique. We would suggest clarifying in paragraph 20 that such time period should only be determined in cases where a conflict of interest is actually occurring and only in cases where this is relevant.

Q2: Do you agree with the definition and with the scope here above described?

Paragraph 23 requires that a specific confidentiality agreement be signed by staff members and clearing members involved in the CCP's risk committee and in the default management groups.

We agree that CCPs should have appropriate arrangements in place to safeguard that confidential information from inappropriate use, and that there should be strict confidentiality obligations for these parties. The CCP should also ensure that these confidentiality obligations are known by and apply to all involved parties.

However, we think that the guidelines should allow a **more flexible approach** to fulfil this objective. Flexibility is required to account for the different sizes and set ups of the various CCPs. The choice of the approach for implementing these arrangements should be left to the respective CCP.

In general, a CCP already has existing provisions covering all relevant confidentiality obligations. For instance, a committee's terms of reference or the CCP's employment contracts may already include sufficient confidentiality provisions. In that case, **we do not see the need to sign additional (specific) confidentiality agreements**, as it would not add any additional benefits, and it would be duplicative and unnecessary burdens for compliance staff, and could create confusion in the cases where a person obtains confidential information but (wrongly) assumes that the confidentiality requirements do not apply to him because he has not (yet) been asked to sign a confidentiality agreement.

The requirement under paragraph 23 to **sign specific confidentiality agreements should only be considered in the cases where no other confidentiality arrangements are in place**. We suggest amending the guidelines to allow for this more flexible approach.

Q3: Do you consider that the proposed rules of conduct as appropriate to limit the risks of conflicts of interest?

Limitation of the number of contracts or mandates board members and executive directors may have

Regarding the limitation of the number of contracts or mandates board members and executive directors may have, we would suggest **clarifying the rules by including specific limitations**.

We recommend that the **limitation remains proportionate**. It is in the interest of a CCP to have board members that allow the representation on a group board level or in other subsidiaries, taking rules of conduct into account. As CCPs are often part of a bigger corporate group, group mandates are common and have proven to work effectively, including with possible conflicts of interest being appropriately managed. A very strict and quantitative limitation would impair the ability of a CCP to attract highly-qualified and experienced managers and board members from group level. This could be **problematic, taking into account that some CCPs are active in niche markets where specific expertise and deep knowledge is highly necessary**. In addition, there may be instances where a representation at the level of the group board is helpful for steering a service provider. In the event of a possible conflict of interest, the respective board member or employee would be excluded or refused from negotiations or decision-making or voting processes in accordance with accepted market practices and general conflicts of interests laws.

Moreover, in Austria, the Austrian Stock Exchange Act (AktG) and the Austrian Law on companies with limited liability (GmbHG)[1] for the limitation of board member mandates in capital companies already exist. Therefore, there is evidently no need to adopt rules of limitation of the number of board member mandates.

We would also suggest to reproduce MiFID II approach which sets at Article 45 paragraph 2: 'Executive or non-executive directorships held within the same group or undertakings where the market operator owns a qualifying holding shall be considered to be one single directorship'.

[1] See § 86 para. 4 AktG and § 30a para. 2 GmbHG.

External auditors

Potential conflicts of interests with **external auditors are already sufficiently covered by requirements in Regulation (EU) No 537/2014** and additional national law measures. These requirements specify certain activities that are prohibited in situations where they would conflict with their activities as the external auditor of a firm. In order to prevent misinterpretations of the term 'external audits having a link with or receiving benefit from the CCP' we would suggest adding a reference to the existing rules or deleting this specific requirement.

Disclosure of personal interests of staff and its close family relationship, which conflict or may conflict with the CCP's interests

As already stated in point Q1, we have strong concern if the disclosure of every relative up to the second degree by every staff member is proportionate, reasonable and feasible. To ask for disclosure of their personal interests is exuberant and seems not workable in practice. Hence, CCP Austria repeats its proposal to replace in paragraph 12 the part of the definition of a relevant person by "staff and close family relationships as […] relatives by blood or marriage up to the first degree, […]"at this point.

Moreover, CCP Austria considers that the term "personal interests" is too imprecise. It makes a great difference whether, for example, a staff member has the pure (private) interest in the financial market or the active participation in an association having connections to the financial sector. While the former does not necessarily imply a (potential) conflict of interest, the latter does. For this reason, we **would recommend replacing the term "personal interests" by "paid or unpaid secondary employment or association membership" or completely delete this requirement from paragraph 26**.

Q4: Do you agree with the definition and with the scope here above described?

We support the requirements for CCPs policy to contain clear rules concerning the acceptance of gifts. However, we believe that the reference to the notions of 'threshold' and 'value' may be too prescriptive, and that it may be more appropriate to require CCPs to set up a 'framework' for the acceptance of gifts, which would allow to cover a broader range of acceptability criteria.

Q5. Are you in favour that CCPs should adopt the above clear rules on the ownership of the financial instruments?

We welcome the approach to define clear rules on the ownership of the financial instruments.

Nevertheless, these rules should firstly focus on specific dangers of conflicts of interest and secondly respect the right towards data protection. We would therefore suggest a less prescriptive approach, based on risk assessment and focusing on dealing rather than ownership of financial instruments. This especially affects the rules regarding the **pre-approval process** and the **portfolio disclosures**.

Pre-approval process

A CCP should be able to determine on a risk based approach, for which department or staff a pre-approval request for specific financial instruments appears necessary. This means that only areas with a potential vulnerability for these kinds of conflicts should be considered in the approach. For most employees, there are no specific threats of conflicts of interest arising based on their ownership of financial instruments (CCPs are active in a post trade environment and we see limited room for potential conflicts of interest or insider trading). Furthermore, restrictions for specific financial instruments in certain situations (e.g. during an ongoing acquisition) are more effective and efficient than a pre-approval process. In addition, a pre-approval process will require the compliance officer to respond in a timely manner to the staff member concerned, in order to limit the chances of any negative impact due to the increase in the time to market. This will be very burdensome for CCPs, especially those that are not part of a larger group and which may not have the required resources. Thus, **the pre-approval process should only be one option rather than a mandatory approach**.

We would like also to highlight that the need for a pre-approval when performing any outside activity is more linked to the CCPs labour policies than to the management of conflicts of interest. Therefore, the need for a pre-approval should be left to the decision of the CCPs.

Portfolio disclosure

A disclosure of the financial instruments portfolio for staff is a strong intrusion into their privacy and should be considered with great care. In our experience, only selected persons or groups face risks for potential conflicts of interest basend on their portfolio. Thus, a portfolio disclosure requirement for all staff members appears not proportionate.. Furthermore, paragraph 26 already requires to disclose all (potential) conflicts

of interest and thus already allows the CCP to take measures to avoid situations where a conflict of interests might arise. In addition, the detection of actual conflicts of interest can be reached through a transaction based monitoring process.

In our opinion, it is more important to ensure that all staff members regarding are aware of potential areas that could lead to a conflict of interest. Therefore, we would recommend excluding **the portfolio disclosure requirement from paragraph 31 or allowing the CCP to limit the disclosure to specific financial instruments, specific persons or determined thresholds** of financial instruments on a risk based approach. .In particular, we believe that the request of disclosure the portfolio at the hiring of a staff member and its annually updated seems disproportionate, and may be overly burdensome both for the staff members and the CCP.

Moreover, we firmly disagree to set up rules to limit or monitor staff investments concerning entities, which are not controlled or even known by the CCP; such as clients or financial institutions (see paragraph 30).

Q6. Do you consider that the CPP staff should be trained on the applicable law and policies concerning the conflicts of interest as above described?

We think that CCP staff should be properly informed of the applicable rules and the relevant procedures in relation to conflicts of interests. Furthermore, CCP staff should acknowledge they are aware of these rules and procedures. CCPs should retain the ability to determine how CCP staff is informed and trained.

Q7. Do you agree on the above-proposed rules?

We would suggest a **more comprehensive approach**. In its responsibilities to oversee the compliance function, the CCP's board should monitor the effectiveness, rather than the efficiency, of the CCP's arrangements to prevent and manage the conflicts of interest. The efficiency of the mechanisms introduced to prevent and manage conflicts of interest could be one of several indicators used to assess the effectiveness of the process, but should not be the only aspect under consideration.

Q8. Do you agree on the above specific organisational arrangements a CCP pertaining to a group should adopt to avoid and mitigate the risk of conflicts of interest?

We agree to most of the organizational arrangements referring to a CCP itself, but we firmly disagree to the rules affecting entities, which are not controlled by the CCP.

CCP representation at board of parent company

In order to avoid duplicative or potentially conflicting requirements, we would recommend to **appropriately consider the governance models mandated under the national company law in Europe, and ensure that the provisions in the guidelines are compatible with the legal framework in the various member states**. This affects, in particular, the requirements outlined in paragraphs 39 and 40. For example, the requirement that a CCP should be well represented and in a **balanced manner at the level of board of the parent company, conflicts with the Austrian Stock Corporation Act (AktG). The AktG[2] determines that only the Supervisory Board of a company can appoint the Executive Board for five years maximum**. Moreover, according to § 86 para. 2 number 2 AktG an interlocking relationship (cross-over) between entities (member of Supervisory Board of entity A is member of the Executive Boards of parent entity B and vice versa at the same time) is de lege lata unlawful. In addition, some Austrian legal scholars are of the opinion that the appointment (e.g. the CEO of the CCP being a member of the board of the parent company) contradicts the group hierarchy and hence is unlawful considering the purpose of § 90 AktG. The latter dictates a legal incompatibility of dual functions in one entity.

Therefore, a subsidiary has no legal basis to influence decisions regarding the board of the parent company. This also applies for the rules outlined in paragraph 40. A subsidiary cannot influence the definition of roles for the board of the parent company or other companies it does not control. **We suggest limiting requirements for organisational arrangements to the level of the CCP itself**.

Proposed counterbalancing of board members

We fully share ESMA's objective to guarantee the CCP independence. In accordance with Article 27 para. 2 of EMIR, at least one third, but no less than two, of the members of the CCP's board shall be independent. We support this requirement, which is appropriately calibrated to ensure a balance of interests. However, we have strong concerns with regard to additional

[2] See § 75 AktG.

requirements to counterbalance group members at the level of the CCP board or the supervisory board. In light of the limited availability of people with appropriate skills and experience, it may become increasingly difficult for CCPs to find appropriate additional board members, especially with regard to CCPs being active in rather small financial markets or in niche markets.

We believe that paragraphs 46, 47 and 48 address several labour issues that should not be included in this paper, such as wages, bonuses or recruitment processes.

Proposed provisions for shared senior management

The proposed provisions in paragraph 44 as regards shared senior management cannot be commented since this paragraph can be interpreted in numbers of ways, since the senior management can also be an executive employee in another group entity. Therefore, in our opinion further **clarification is still required at this point**.

Proposed penalties in outsourcing arrangements

Furthermore, we recommend **excluding the requirement to define penalties for outsourcing agreements within the same group as outlined in paragraph 49**. Fixed penalties could weaken the environment for the prevention of conflicts of interest through additional pressure. The need to fulfil outsourcing agreements is sufficiently covered by existing determined reporting requirements, along with appropriate escalation and enforcement mechanisms.

Q9. Do you think that the above-described procedure is appropriate to investigate, to solve, to monitor and to record the conflicts of interest?

We believe this is a too prescriptive list of requirements. CCPs should have appropriate policies and procedures to manage, monitor and administer potential and actual conflicts of interest. However, these should be defined depending on the size of the CCP involved.

Concerning paragraph 52, as it will not be required to evidence any potential conflicts of interest we think it would be prudent to include that the Chief Compliance Officer shall investigate where there are reasonable grounds to do so (to prevent frivolous/false claims).

We would like also to have further consider the described procedures as appropriate, but see the need for clarification of the following terms:

- Referring to paragraph 55, the term '"sufficient independence"' in the context of the decision making process is not specified. In general, we would consider all persons not directly involved in the conflict of interest as sufficiently independent. Therefore, we would suggest to clarify the term '"sufficient independence"' in that manner. Further, it should be complemented that in case of doubt, a joint decision by different persons or bodies may be considered necessary to reach an objective decision making process for the conflict of interest.
- Referring to paragraph 56, it should be made clear that not all of the listed measures to remedy probable or existing conflicts of interest are mandatory. The measures taken should be based on a risk based approach.
- Referring to paragraph 59, the term '"material breaches"' should be specified to reach a consistent approach for the reporting requirements to the competent authority. Furthermore, the described timeline to report material breaches to the national competent authority should only start after the breach has been recognised and analysed to a reasonable extend.
- Referring to paragraph 60, the conflict of interest register should be aligned with current market standards for credit institutions. This affects especially the need to track and record trainings performed by the staff and received gifts, which is required in paragraph 60 but not in line with current market standards for credit institutions in our experience. Furthermore, we refer to point Q5.

In addition to this response, please be aware that we also fully support the feedback of the European Association of CCP Clearing Houses AISBL, of which we are a member.

Kind Regards,

CCP Austria Abwicklungsstelle für Börsengeschäfte GmbH