

BME CLEARING response to the ESMA Consultative Paper on ‘ESMA’s Guidelines on CCP conflicts of interest management’

BME CLEARING would like to thank the opportunity to give its views on this Consultative Paper.

Before answering the proposed questions, we would like to make a previous observation on the definitions included in the document. The definition of *relevant person* includes those external individuals who provide services to the CCP, such as consultants, external advisors, etc. We would like to highlight that it will not be possible to apply these rules to the same extent than to the other relevant persons. These rules should be applicable in particular aspects directly related to the activities that such external relevant persons are performing in the CCP business.

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

BME CLEARING agrees with the definition of conflicts of interest, however, we consider that it is not possible for CCPs to take into consideration potential conflicts between clearing members themselves, between clients themselves, or between a clearing member and a client. CCPs can manage conflicts of interest that may arise between the CCP or their employees and third parties but they cannot manage conflicts of interest that may arise between third parties. We therefore suggest to delete such requirement from paragraph 19.

Regarding the definition of a length of time during which the potential or real conflict of interest is presumed to continue to have effects after the conflict ceased, we believe that it is not reasonable to predefine such length of time. Every conflict of interest is different, and the length of time during which it is presumed to persist depends on many circumstances which may be outside the CCP. The obligation to keep any information on conflicts of interest updated would be a better approach for this purpose.

Q2. Do you think that the CCPs should implement such organizational agreements to avoid an inappropriate use of confidential information?

CCPs have in place internal measures to protect confidential information according to their specific circumstances such as the type of information they manage, their organizational structure, possible affiliation to a listed Group of companies. In that sense, we believe that the approach should be more flexible.

In particular, we consider that the reference in paragraph 21 to the use of appropriate security measures falls out of the scope of conflict of interest management.

Moreover, paragraph 23 requires the signature of a confidentiality agreement by staff members and clearing members involved in the risk committee and the default management groups. It is our view that CCPs should be allowed to address this issue through other means

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

EMIR states the obligation to establish procedures to manage conflicts of interest. In that regard, paragraphs 24 and 25 are fully in line with the obligations established in EMIR. However, we would like to comment on the measures of paragraph 26.

In our view, the limitation of the number of contracts or mandates of board members and executive directors is not reasonable. This limitation is established for listed companies with the aim of assuring time availability and commitment of their board members.

External auditor appointment is already regulated in the Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts and Regulation (EU) 537/2014 on specific requirements regarding statutory audit of public-interest entities. We would therefore suggest to delete this measure from the document.

As regards employees which intend to perform activities outside the CCP which may conflict with their responsibilities at the CCP, the requirement of the CCP pre-approval before accepting such new engagement falls in the scope of labour procedures of the CCP and its exclusivity policy. We believe that the obligation to communicate such situation would be enough to manage a potential conflict of interest.

Q4. Do you believe that the CCPs should apply such rules concerning the gifts?

We believe that the remuneration and gifts policy of the CCPs should not establish a quantitative threshold.

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

We believe that post trade activities developed by CCPs do not lead to insider information or potential conflicts of interest arising from their ownership of financial instruments. Therefore, we suggest not to include any mandatory pre-approval process nor any portfolio disclosure which would result in an unnecessary burden.

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

We fully agree that CCP staff should be adequately trained and informed on their obligations related to conflicts of interest and its management procedures. However, we believe that CCPs should be allowed to decide on the training approach.

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

We agree that the compliance officer must review conflicts of interest policy, although we would not define a mandatory concrete periodicity for the review. The periodicity should be decided by CCPs, according to their activity, size and specific characteristics.

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?

In our view the proposed specific organisational arrangements for CCPs pertaining to a group are disproportionate.

In general terms, these arrangements seem to assume that every decision of the board members and executive directors will be made in detriment of the CCP. It is necessary to bear in mind that national laws settle the board members' duties of due diligence and loyalty and their full responsibility in the performance of their obligations.

Moreover, we believe that some of the issues included in these paragraphs are in the scope of labour policies rather than the management of potential conflicts of interest.

As regards the composition of the Board of subsidiaries of the Group, paragraphs 39 and 42, we believe that conflicts of interest management of the CCP cannot be the basis for adding organisational requirements to the composition of the Boards of the companies of a Group.

The obligation to have CCP representation in the Boards of the mother company and its subsidiaries would potentially result in additional conflicts of interest in the mother company and its subsidiaries Boards. Furthermore, this requirement would clash with national laws and regulations. The possible increase of the number of independent members of the CCP board, disregards their full responsibility in the performance of their obligations and the duties of due diligence and loyalty of every board member irrespective of their condition of independent.

Furthermore, we would suggest to delete or to restrain paragraph 45. Board of Directors main obligation is to supervise, while the executive directors are in charge of the management of the company.

As mentioned previously, some of the proposed arrangements, particularly paragraphs 46, 47 and 48, exceed the area of conflicts of interest management. They fall in the scope of labour policy as they address staff wages, bonuses or recruitment processes and, therefore, they should not be included in this paper.

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 agree that the procedure to detect conflicts of interest must follow paragraphs 50, 51 and 52. However, the proposed rules included in paragraphs 53, 54 and 55 are, in our view, too prescriptive.

As regards the resolution measures, it seems that they propose penalty proceedings after an infringement, which is not the case in conflicts of interest management. Moreover, we think that some of the proposals such as *exemption of duties and assignment to another staff member* or *the termination of the contract of the conflicted staff member* could be considered disciplinary sanctions which may collide with national labour laws.

With reference to the obligation to report to the board the conflicts of interest that have occurred and any mitigating measures which have been decided on an annual basis, we believe that frequency of such reporting should depend on the concrete characteristics and circumstances of each CCP.