

## OPINION

### Voting Procedures for CCP colleges under EMIR

1. ESMA's competence to deliver an opinion to competent authorities is based on Article 29(1)(a) of Regulation (EC) No 1095/2010 (ESMA Regulation). In accordance with Article 44(1) of the ESMA Regulation the Board of Supervisors has adopted this opinion.
2. Pursuant to Article 29(1)(a) of ESMA Regulation, ESMA shall provide opinions to competent authorities for the purpose of building a common Union supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union.
3. ESMA's competences in respect of colleges of supervisors in the context 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 (EMIR) are laid down in Article 18 thereof which is based on Article 21(1) of the ESMA Regulation<sup>1</sup>. In particular, pursuant to Article 18 and as explained in Recital 52 of EMIR, ESMA shall be involved in the authorisation and supervisory process of CCPs and should be a participant in every college of supervisors for CCPs (CCP Colleges) in order to ensure the consistent and correct application of EMIR.

#### I. Background

4. Pursuant to Article 18(1) of EMIR, a CCP's competent authority shall establish, manage and chair a CCP College to facilitate the granting or refusal of authorisation under Article 17 of EMIR.
5. Pursuant to Article 17(4) of EMIR, a CCP's competent authority shall grant authorisation to the CCP only where it is fully satisfied that the CCP complies with all the requirements laid down in EMIR and in making such an assessment the CCP's competent authority shall duly consider the opinion of the College, reached in accordance with Article 19 of EMIR.
6. CCP colleges have been established in respect of a number of CCPs' applications for authorisation under EMIR and a number of CCP colleges are in the process of reaching an opinion pursuant to Article 19 of EMIR. Although the main aspects of the functioning of the college are laid down in Article 18 of EMIR and further specified in Commission Delegated Regulation No 876/2013<sup>2</sup> (RTS on CCP Colleges) and in the ESMA Guidelines and Recommendations regarding written agreements between members of CCP colleges (ESMA/2013/661), the practical experience has shown that there are elements of the voting procedure for the adoption of such opinions that should be clarified.

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<sup>1</sup> Pursuant to Article 21(1) of the ESMA Regulation, ESMA shall contribute to promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors established in the legislative acts referred to in Article 1(2) of this regulation, which includes EMIR, and foster the coherence of the application of Union law among such colleges of supervisors

<sup>2</sup> OJ L 244, 3.9.2013, p.84.



7. The adoption of an opinion by the CCP College is an essential and obligatory element of the authorisation process for CCPs under EMIR. Although EMIR sets out specific voting rights depending on the size of the CCP College and on the effect of specific voting modalities, EMIR does not expressly address certain aspects of the voting procedure, including how to count non-voting members of a CCP College (College members) or whether abstentions are possible.
8. In light of the importance of the adoption of an opinion by a CCP College, and in order to ensure the efficient, effective and consistent functioning of the CCP Colleges through uniform procedures and consistent approaches throughout the Union, ESMA considers it necessary to adopt this opinion clarifying certain aspects of the voting procedure for the adoption of an opinion by a CCP College.

## II. ESMA opinion

9. For the purpose of this opinion, 'Non-Voting College members' are:
  - a. ESMA, which has no vote, in accordance with Article 19(3) of EMIR;
  - b. Any College member whose vote does not count pursuant to the operation of Article 19(3) of EMIR.
10. Where, in accordance with Article 3(3) of the RTS on CCP Colleges, the central bank of issue of one of the most relevant Union currencies corresponds to more than one central bank and the relevant central banks have determined the single representative who participates in the college, this representative should have one vote. This vote is held on behalf of the central bank of issue. As a result, when the representative of the central bank of issue casts its vote, this vote should represent the collective view of the relevant central banks and commit them jointly.
11. ESMA considers that no College member can delegate its vote to another College member.
12. ESMA considers Non-Voting College members should not be counted for the determination of the majorities in Article 17(4) and 19(3) of EMIR.
13. ESMA considers that the existence of a quorum in order for a decision to be taken by a CCP College (two-thirds of College members, in accordance with Article 4(6) of the RTS on Colleges) should be determined with reference to the number of College members who have votes to cast (and not with reference to Non-Voting College members).
14. ESMA considers that once the quorum referred to in Article 4(6) of the RTS on Colleges has been determined, no further quorum should be determined for the validity of a vote by the College.
15. ESMA considers that pursuant to Article 19(3) of EMIR, College members should express their opinion. However, if a College member abstains from casting its vote, then the result of the vote should be calculated as follows:
  - a. under Article 17(4) it should be determined with reference to the number of College members that have a vote to cast, i.e. the explicit abstentions and the College members that did not participate in the meeting where the vote is cast are counted in the denominator of the majorities referred to in Article 17(4) and are not counted as positive or negative votes in the numerator of those majorities.

- b. under Article 19(3) it should be determined with reference to the number of College members that have cast their vote, i.e. explicit abstentions and the College members that did not participate in the meeting where the vote is cast are not counted in the denominator of the majority referred to in Article 19(3). For this purpose, a simple majority opinion will be considered adopted if the votes in favour exceed the votes against.
16. ESMA considers that if no joint or majority opinion is reached in accordance with Article 19(1) subparagraph 3 of EMIR, then the College should take a second vote within the timeframe set out in Article 19(1) subparagraph 2. Following the second vote, if none of the majorities under Article 17(4) of EMIR are reached, then the competent authority can proceed with the authorisation of the CCP.
17. ESMA considers that a majority of two-thirds of College members, for the purpose of Article 17(4) of EMIR, is a majority of two-thirds of all College members that have a vote to cast, i.e. including the relevant (voting) College members of the Member State where the CCP is established.
18. ESMA considers that where a majority of two-thirds of College members have expressed a negative opinion under Article 17(4) fourth sub-paragraph, the competent authority cannot proceed with the authorisation of the CCP before the expiration of the 30-day period set out in Article 17(4).