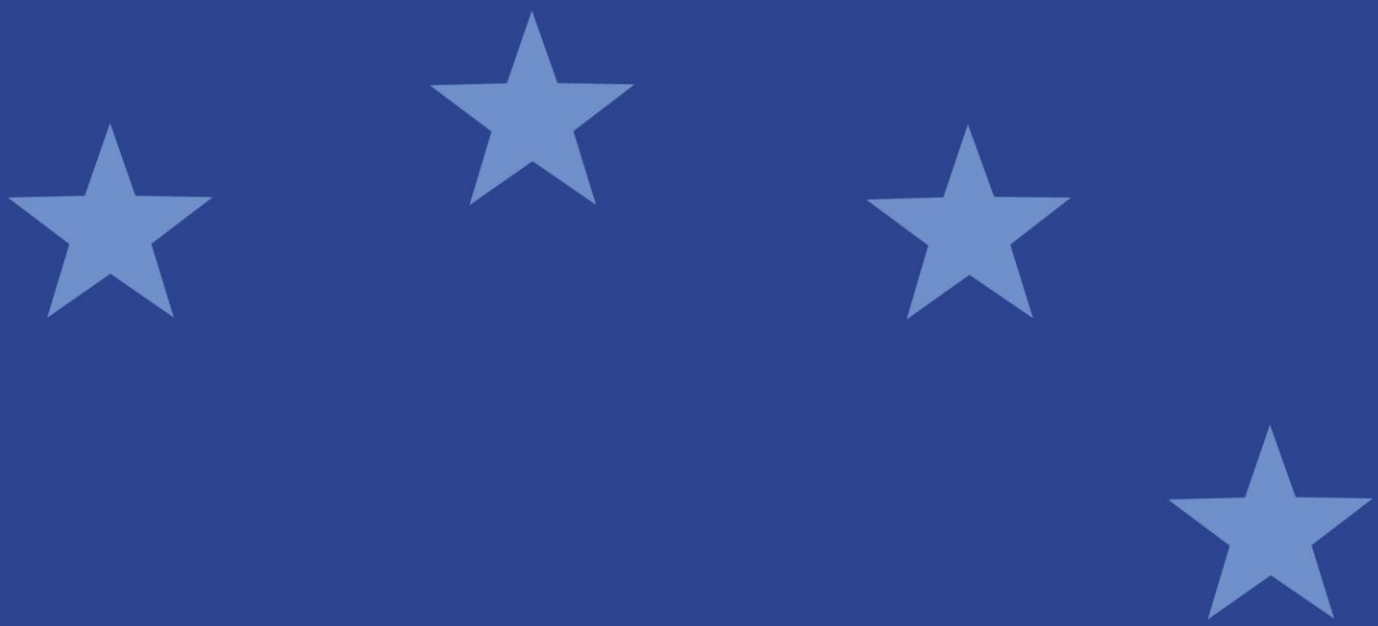
esma European Securities and Markets Authority

ESMA review of CCP colleges under EMIR



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Acronyms used

CCP	Central Counterparty
EMIR	European Market Infrastructure Regulation – Regulation (EU) 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories – also referred to as — EMIR
ESMA	The European Markets and Securities Authority
ITS	Implementing Technical Standards
NCA	National Competent Authority
Q&A	Question and answer
RTS	Regulatory Technical Standards
RTS on CCPs	Commission Delegated Regulation (EU) No 153/2013

1 Executive Summary

Reasons for publication

The European Securities and Markets Authorities (ESMA) is publishing this report pursuant to Article 21 of Regulation (EU) No 648/2012 (EMIR) which provides that ESMA shall fulfil a coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes. For the purposes of such coordination role, ESMA is required, at least annually, to conduct a peer review analysis of the supervisory activities of all competent authorities in relation to the authorisation and the supervision of central counterparties (CCPs) in accordance with Article 30 of Regulation (EU) No 1095/2010 (ESMA Regulation).

Contents

This report is focused on the supervisory activities of competent authorities in relation to the authorisation of CCPs under EMIR and is based on the experience of ESMA in the CCP colleges formed pursuant to Article 18 of EMIR. This review is not based on the usual peer review methodology but on the experience of ESMA in the initial phase of the college process, namely their establishment, their review of CCP applications for authorisation under EMIR, their review of the competent authorities' risk assessments, and their adoption of the joint opinions on CCP authorisations.

ESMA is a member in every college in order to ensure the consistent and correct application of EMIR and it has played an active role in facilitating the work of CCP colleges.

Accordingly, this report provides an overview of ESMA's contribution to the work of CCP colleges and, as a review analysis, presents ESMA's assessment of the degree of convergence reached by national competent authorities (NCAs) in the authorisation of CCPs. The report also identifies best practices developed by some NCAs in this context. This review analysis does not consider NCAs' activities in relation to the on-going supervision of CCPs, as that process has only recently commenced. Finally, this report does not cover the effects in terms of actual resources available at different CCPs and whether the application of the same EMIR requirements has led to material differences among CCPs, which might result in unfair competition. This very relevant topic will be the object of specific reviews by ESMA once all CCPs have gone through authorisation.

Next Steps

This report is for information purposes only. On the basis of this review, ESMA has not identified any issues in respect of which it should issue guidelines and recommendations pursuant to Article 16 of the ESMA Regulation, or any other form of legal instrument.

2 Introduction

1 According to Article 21(6)(a) of EMIR, ESMA shall at least annually conduct a peer review analysis of the supervisory activities of all competent authorities in relation to the authorisation and the supervision of CCPs in accordance to Article 30 of the ESMA Regulation.

2 This report presents the outcome of the first peer review undertaken by ESMA pursuant to Article 21(6)(a) of EMIR. Given that most CCP colleges have only recently completed the process for the CCP authorisation pursuant to Article 14 of EMIR, ESMA did not apply the usual methodology for peer reviews but decided to undertake this first review on the basis of the experience of ESMA staff in this initial phase, in order to present an overall review of CCP colleges by the end on 2014, within the given time and resources constraints. In particular, the review focused on the activities of NCAs[1] in relation to the authorisation of CCPs.

3 This first review analysis was conducted in the last quarter of 2014 and, thus, considered the activities of NCAs during the processing of CCP applications for authorisation under Article 17 of EMIR from the time period since the establishment of the first CCP college (June 2013) and through the first three quarters of 2014 (reference period: June 2013 - October 2014). During the reference period, 18 CCPs established in the EU filed a complete application for authorisation under Article 17 of EMIR[2], 18 Colleges were established pursuant to Article 18 of EMIR, and 14 CCPs[3] have been granted authorisation under Article 14 of EMIR. At the time of writing this report, 4 other CCP applications were still being assessed against the EMIR requirements – see below Box 1 on CCP colleges.

4 This first review analysis focused on the activities of NCAs as chairing authorities of the CCP colleges, including their actions during i) the establishment of the college, ii) the preparation of the risk assessment as the basis for the college opinion, iii) the sharing of relevant information on the CCP application with the college; iv) the organisation of the college vote on the opinion on the authorisation of the CCP under EMIR.

5 The activities of NCAs as (non-chairing) members of colleges have been taken into account in this review with respect to such NCAs' contribution to the review of the CCP application in preparation for their vote on the opinion on the authorisation of the CCP under EMIR.

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[1] The NCAs under the scope of this review are those authorities that Member States have designated as the competent authority responsible for carrying out the duties resulting from EMIR for the authorisation and supervision of CCPs established in their territory in accordance with Article 22 of EMIR. ESMA is responsible for maintaining on its website the list of the designated competent authorities: see http://www.esma.europa.eu/page/Competent-authorities-responsible-authorisation-and-supervision-central-counterparties-CPPs.

[2] In one case, the deadline for the authorisation of a CCP was extended due the introduction by the CCP of significant changes to the risk model presented in the initial application that lead the CCP's competent authority, in agreement with the college, to withdraw its prior determination of completeness and request the CCP to provide the necessary additional information to amend and complement, as appropriate, its initial application. As of 17 November 2014, this CCP's application is not yet complete.

[3] In accordance with Article 88(1) of EMIR ESMA publishes on its website the list of CCPs authorised under Article 14 of EMIR: see http://esma.europa.eu/system/files/ccps_authorised_under_emir.pdf

6 This review does not consider NCAs' activities in relation to the on-going supervision of CCPs, as the authorisation process under EMIR was concluded for most CCPs only in the second half of 2014. The activities of NCAs in relation to the (on-going) supervision of CCPs will be assessed in the next peer review reports. Issues for follow-up as part of the on-going supervision process are, however, introduced in Chapter 4 of the report.

7 In accordance with Article 30 of the ESMA Regulation, this review includes an assessment of the degree of convergence reached in the application of Union law (EMIR) and in supervisory practice, including application of the regulatory technical standards and implementing technical standards promulgated under EMIR, and the guidelines and recommendations adopted under Articles 10 to 16 of the ESMA Regulation, and the extent to which the supervisory practice achieves the objectives set out in Union law (see point (b) of Article 30.2 of the ESMA Regulation). This review analysis also identifies best practices developed by some competent authorities which might be of benefit for other competent authorities to adopt (see point (b) of Article 30.2 of the ESMA Regulation). This review does not include the assessment at points a)[4] and d)[5] of Article 30(2) of the ESMA Regulation, which have been, at the current stage, considered less relevant with respect to focus of this review, namely the activities of NCAs' in relation to the college opinion for the authorisation of CCPs.

8 This report is structured as follows. As the review is based on the experience of ESMA in the CCP colleges, Chapter 3 describes ESMA's contribution to the work of the colleges regarding three main areas: i) the functioning of the colleges, ii) the establishment of a common interpretation of EMIR, and iii) the promotion of a consistent implementation of EMIR across colleges. Chapter 4 presents ESMA's review of the colleges' activities, providing i) an overall assessment of the degree of convergence in the implementation of EMIR throughout the authorisation process for CCPs and ii) a list of best practices that ESMA has identified throughout its participation in the colleges, and iii) issues for follow-up. Finally, Chapter 5 highlights some key conclusions on the effectiveness of the colleges during the authorisation process for CCPs.

[4] The adequacy of resources and governance arrangements of the competent authority, with particular regard to the effective implementation of the regulatory technical standards and implementing technical standards referred to in Articles 10 to 15 of the ESMA regulation and of the acts referred to in Article 1(2) of the ESMA Regulation and the capacity to respond to market developments.

[5] The effectiveness and the degree of convergence reached with regard to enforcement of the provisions adopted in the implementation of Union law, including the administrative measures and sanctions imposed against persons responsible where those provisions have not been complied with.

Box 1: Colleges for CCPs

According to Article 18 of EMIR, within 30 calendar days of the submission of a complete application in accordance with Article 17 of EMIR, a CCP's competent authority shall establish, manage and chair a college to facilitate the exercise of the tasks related to the procedure for granting and refusing authorisation pursuant to Article 17, the extension of activities and services pursuant to Article 15 of EMIR, the review of models and parameters pursuant to Article 49 of EMIR, and the approval of interoperability arrangements pursuant to Article 54 of EMIR. The establishment and functioning of the college shall be based on a written agreement between all its members. On 4 June 2013, ESMA adopted Guidelines and Recommendations regarding written agreements between members of CCP colleges which provide a template for the written agreement between college members.

The college shall consist of: a) ESMA; b) the CCP's competent authority; c) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States with the largest contributions to the default fund of the CCP referred to in Article 42 of EMIR on an aggregate basis over a one-year period; d) the competent authorities responsible for the supervision of trading venues served by the CCP; e) the competent authorities supervising CCPs with which interoperability arrangements have been established; f) the competent authorities supervising central securities depositories to which the CCP is linked; g) the relevant members of the ESCB responsible for the oversight of the CCP and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established; h) the central banks of issue of the most relevant Union currencies of the financial instruments cleared.

According to Article 19 of EMIR, within four months of the submission of a complete application by the CCP in accordance with Article 17 of EMIR, the CCP's competent authority shall conduct a risk assessment of the CCP and submit a report to the college. Within 30 calendar days of receipt, and on the basis of the findings in that report, the college shall reach a joint opinion determining whether the applicant CCP complies with all the requirements laid down in this Regulation. If no joint opinion is reached, the college shall adopt a majority opinion within the same period. ESMA shall facilitate the adoption of the joint opinion in accordance with its general coordination function.

Within the reference period, the NCAs of the 18 applicant CCPs that have submitted a complete application have, upon determination of the application's completeness, promptly established the corresponding colleges in accordance with Article 18 of EMIR. As the CCPs' applications have reached completeness on different dates, each college has followed its own calendar including for the college vote on the adoption of the joint opinion. As of 31 October 2014, 14 colleges had adopted a joint or majority opinion in accordance with Article 19 of EMIR, following which the respective CCPs were granted an authorisation under Article 14 of EMIR. Another 4 colleges are still going through the process of reviewing the respective CCP applications.

Table 1 below provides an overview of the colleges for CCP and the status of the respective CCPs' authorisation process.

Table 1: Colleges for CCPs and status of authorisation process[6]				
No.	**CCP**	**NCA**	**College established**	**Date of authorisation**
1	Nasdaq OMX Clearing AB	Finansinspektionen	Yes	18 March 14
2	European Central Counterparty N.V.	De Nederlandsche Bank (DNB)	Yes	1 April 14
3	KDPW_CCP	Komisja Nadzoru Finansowego (KNF)	Yes	8 April 14
4	Eurex Clearing AG	Bundesanstalt für Finanzdienstleistungsaufsicht (Bafin)	Yes	10 April 14
5	Cassa di Compensazione e Garanzia S.p.A. (CCG)	Banca d'Italia	Yes	20 May14
6	LCH.Clearnet SA	Autorité de Contrôle Prudentiel et de Résolution (ACPR)	Yes	22 May14
7	European Commodity Clearing	Bundesanstalt für Finanzdienstleistungsaufsicht (Bafin)	Yes	11 June 14
8	LCH.Clearnet Ltd	Bank of England	Yes	12 June 14
9	Keler CCP	Central Bank of Hungary (MNB)	Yes	4 July 14
10	CME Clearing Europe Ltd	Bank of England	Yes	4 August 14
11	CCP Austria Abwicklungsstelle für Börsengeschäfte GmbH (CCP.A)	Austrian Financial Market Authority (FMA)	Yes	14 August 14
12	LME Clear Ltd	Bank of England	Yes	3 September 14
13	BME Clearing	Comisión Nacional del Mercado de Valores (CNMV)	Yes	16 September 14
14	OMIClear - C.C., S.A.	Comissão do Mercado de Valores Mobiliários (CMVM)	Yes	31 October 14
15	ICE Clear Europe Ltd	Bank of England	Yes	
16	Holland Clearing House	De Nederlandsche Bank (DNB)	Yes	
17	AthexClear	Hellenic Capital Market Commission (HCMC)	Yes	
18	SKDD-CCP Smart Clear d.d.	Croatian Financial Services Supervisory Agency (HANFA)	Yes	

[6] In accordance with Article 88(1) of EMIR, ESMA publishes on its website the list of CCPs authorised under Article 14 of EMIR: see http://esma.europa.eu/system/files/ccps_authorised_under_emir.pdf.

3 ESMA's experience in colleges for CCPs

9 In accordance with Article 18 of EMIR, **ESMA is a member in all 18 CCP colleges** established by NCAs under EMIR.

10 Although ESMA has no voting rights on the adoption of joint opinions of the college pursuant to Article 19(3) of EMIR, it has played an active role in facilitating the work of the colleges in line with the various tasks mandated under EMIR (Titles III to V) – see Box 2 below.

Box 2: ESMA's tasks with respect to the functioning of colleges and the authorisation and supervision of CCPs under EMIR

A) "Regulatory" tasks, namely:

i. Developing draft regulatory (and implementing) technical standards with respect to:
   1. the colleges for CCPs, under Article 18 of EMIR; and
   2. the (organisational and prudential) requirements for CCPs, under Articles 26, 29, 34, 41, 42, 44, 45, 46, 47, and 49 of EMIR.

B) "Coordination" tasks, such as:

i. Facilitating the adoption of the joint opinion under Article 19(2) of EMIR; and
ii. Fulfilling a coordination role between NCAs and across colleges with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes, pursuant to Article 21(6) of EMIR.

C) "Supervisory convergence" tasks, including

Activities performed

i. Participating in colleges under Article 18 of EMIR;
ii. Issuing guidelines and recommendations for establishing consistent, efficient and effective assessments of interoperability arrangements, under Article 54 of EMIR;
iii. Issuing guidelines and recommendations on standard written agreement for the establishment and functioning of CCP colleges;
iv. Issuing guidelines and recommendations regarding the implementation of the CPSS-IOSCO Principles for Financial Market Infrastructures in respect of Central Counterparties;[7]
v. Issuing an opinion on voting procedures for CCP colleges; and
vi. Issuing and constantly updating Q&As on EMIR Implementation.

Activities on-going or to be started

vii. Validating significant changes to CCPs' risk models and parameters under Article 49 of EMIR; and
viii. Initiating and coordinating (on an annual basis) a Union-wide assessment of the resilience of CCPs to adverse markets developments in accordance to Article 32(2) of the ESMA Regulation, under to Article 21(6)(b) of EMIR.

[7] ESMA issued in September 2014 Guidelines and Recommendations regarding the implementation of the CPSS-IOSCO Principles for Financial Market Infrastructures (PFMIs) in respect of CCPs, to clarify that when carrying out the duties resulting from EMIR for the authorisation and supervision of CCPs, competent authorities should ensure that CCPs established in their territory comply with the requirements in EMIR in accordance with the PFMIs and operate in a manner that is consistent with them - see: http://www.esma.europa.eu/system/files/2014-1133_en.pdf

11 In particular, through its **regulatory, coordination and supervisory convergence role,** ESMA has aimed at promoting a common supervisory approach in the implementation of EMIR, by proposing common practices for colleges, developing a common practical application of EMIR provisions, and ensuring a consistent application of EMIR requirements for CCPs across colleges. In doing so, ESMA cooperated with NCAs, leveraging on its internal governance structures, namely the Post Trading Standing Committee (PTSC) and ultimately the Board of Supervisors, to develop and agree common policy views, the legal instruments (RTS, Guidelines and Recommendations, Opinion) and other tools (Q&As and best practices) aiming at promoting a common supervisory approach, as further presented below.

12 The following sub-sections describe in more detail ESMA's contribution to the work of the CCP colleges in respect of the following three main areas: i) the functioning of the colleges, ii) the establishment of a common practical application of EMIR, and ii) the promotion of a consistent implementation of EMIR across colleges.

3.1 *ESMA's contribution to the functioning of colleges*

13 In accordance with Article 18(6) of EMIR, ESMA developed ***Regulatory Technical Standards (RTS) on colleges for CCPs***[8], in order to ensure the consistent and coherent functioning of colleges across the Union. These RTS specified how to determine the central banks of issue of the three most relevant Union currencies to be included in a college, and the details of practical arrangements for the functioning of the college, including aspects relating to the operational organisation of, the participation in, and the governance of the colleges, the exchange of information among authorities, voluntary sharing and delegation of tasks.

14 In order to facilitate a seamless establishment of colleges and the consistent working arrangements of colleges, ESMA also issued in June 2013 ***Guidelines and Recommendations regarding written agreements between members of CCP colleges***[9] (under Article 16 of the ESMA Regulation), including a standard written agreement for the establishment and functioning of CCP colleges as well as a process for the swift adoption of such written agreements[10].

15 ESMA also adopted an ***Opinion on voting procedures***[11] (under Article 29(1)(a) of the ESMA Regulation) clarifying certain aspects of the voting procedure for the adoption of an opinion by a college, in order to ensure the efficient, effective and consistent functioning of the CCP Colleges through uniform voting procedures and consistent approaches throughout the Union. Indeed, although EMIR sets out specific voting rights depending on the size of the CCP college and on the effect of specific voting modalities,

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[8] See Commission Delegated Regulation (EU) 876/2013: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:244:0019:0022:EN:PDF.

[9] See: http://esma.europa.eu/system/files/2013-661_report_gr_on_college_written_agreement_-_final_for_publication_20130604.pdf.

[10] When presented with a written agreement for the establishment and functioning of a CCP college that does not depart from the standard written agreement, an NCA should agree to such written agreement within 12 calendar days from receipt and should avoid requesting changes to the written agreement that introduce a departure from the standard written agreement.

[11] See: http://esma.europa.eu/system/files/2014-576.pdf.

it did not expressly address certain aspects of the voting procedure, including how to count non-voting members of a CCP college for the determination of the quorum and of the majorities required to adopt an opinion, or whether abstentions are possible.

16 Moreover, ESMA also has used a number of non-regulatory tools to ensure the consistent and coherent functioning of colleges across the Union with respect to the review of CCP applications for authorisation. For example, ESMA has developed **standard templates** for:

a) ***college members' questions on the CCP's application for authorisation.*** This template is a spread-sheet that is used by college members when they wish to submit questions to the NCA chairing the college and by the NCA chairing the college to provide answers to college members (often in cooperation with the CCP). The template was successful in helping to:

i. link (and cluster) college members' questions with the respective CCP requirements under EMIR and the related RTS;

ii. promote a transparent overview of matters of concern amongst college members;

iii. avoid duplication of questions put to the CCP;

iv. maintain track of the status of questions posed by college members and to identify those open questions that remained to be addressed prior to the college vote on the adoption of a joint opinion;

v. facilitate college members forming an informed view on the CCP's compliance with EMIR and the related RTS.

b) the ***Risk Assessment*** that the CCP's NCA must provide to the college pursuant to Article 19 of EMIR. This risk assessment is the basis on which college members adopt a joint opinion regarding the authorisation of the CCP under EMIR. This template is a document which outlines the main areas that must be covered by the risk assessment and poses specific questions to the CCP's NCA to assist it in demonstrating how the CCP addresses the requirements of EMIR and the related RTS. The template was successful in helping to ensure that:

i. the risk assessment presented to college members fully demonstrates how the CCP addresses the requirements of EMIR and the related RTS;

ii. the risk assessment addresses how the CCP addresses certain key requirements - through the use of specific questions;

iii. there is a harmonised approach to risk assessments across CCPs and in turn a harmonised approach to the underlying requirements themselves.

17 Furthermore, in its coordination role, ESMA has assisted, where requested, the chairing NCA in organising the work of the college. One example of this has been the sharing of

experience and best practices across colleges (see Section 4.2). For instance on several occasions ESMA advised the chairing NCA with regards to the timeframes along which they should organise the college work during the authorisation process. The success of this intervention was demonstrated through the respective chairing NCAs establishing college processes that allowed sufficient time for the college to properly undertake its role in the authorisation process and for individual college members to satisfy themselves of the CCP's compliance with the requirements of EMIR. In particular, the inclusion of sufficient time for the questions of college members to be answered ahead of the submission of the Risk Assessment, and the scheduling of in-person meetings of the college to address remaining open questions in order to facilitate the smooth adoption of a joint opinion.

18 ESMA investigated the possibility of building a central technology portal for the sharing of documents and information within the CCP colleges. A number of chairing NCAs had already commenced the build of such technology platforms and a single platform was ultimately not considered necessary. ESMA did however play a role in the use of such tools by certain colleges, in particular working with chairing NCAs and college members to ensure the compatibility of such tools and their associated legal documentation with EMIR, including in respect of its confidentiality and professional secrecy provisions.

3.2 *ESMA's contribution to the common practical application of EMIR*

19 In its coordination role, and through its participation across CCP colleges, ESMA identified issues related to the practical application of specific requirements in EMIR or the related RTS that required further analysis and discussion amongst NCAs in order to build a common supervisory culture across the Union's CCPs. ESMA compiled these issues and on a regular basis submitted "operational issues notes" for discussion by the ESMA Post-Trading Standing Committee in order to promote a uniform approach to these specific requirements and to ensure their consistent implementation across the Union.

20 The requirements that necessitated further analysis and discussion amongst NCAs included organisational, business conduct and prudential aspects. Some concerned specific matters under other Titles of EMIR, such as Title III regarding the scope of CCP authorisation, the deadline for authorisation, and the process for a CCP to apply for an extension of its activities and services and for the assessment of such applications.

21 In most cases, the common practical application agreed through the above-mentioned discussions amongst NCAs was publicly disclosed though the **Q&A on the implementation of EMIR**[12] which ESMA has adopted under Article 29(2) of the ESMA Regulation[13] and updated from time to time. Since 20 March 2013, ESMA has issued 56 Q&As regarding CCPs (including all sub-questions addressed therein). The Q&As are not

[12] See CCP questions in Q&A XI on Implementation of EMIR – update of 24 October 2014: http://www.esma.europa.eu/system/files/2014-1300_qa_xi_on_emir_implementation_october_2014.pdf
[13] Article 29 of the ESMA Regulation concerns the establishment of a common supervisory culture.

part of the official regulatory framework, but instead provide responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of EMIR. These questions cover the full spectrum of the EMIR framework for CCPs, including questions regarding organisational aspects, business conduct aspects and prudential aspects.

3.3 *ESMA's contribution to the consistent implementation of EMIR*

22 As member of each supervisory college, ESMA has actively contributed to the college reviews of each CCP's application for authorisation under EMIR and the review of each chairing NCA's risk assessment. ESMA has done so by posing questions for clarification and raising issues of attention or concern to be addressed before the authorisation. In particular, ESMA has aimed to ensure consistency across colleges in the assessment of each CCP's compliance with the requirements in EMIR and the related RTS.

23 Based on their own review of individual CCP applications, ESMA representatives in the colleges were active in contributing to the college discussions and assessment of CCP compliance with the organisational, conduct of business and prudential requirements under EMIR, as further specified in the related RTS. ESMA has established an internal team which has expertise and experience across these requirements and the team adopted a uniform methodology for assessment of compliance across CCPs and types of requirement.

24 For instance, as regards prudential requirements, the methodology of ESMA staff included assessment of each CCP against 181 checkpoints derived from the respective EMIR and RTS provisions. ESMA staff sought to inform the college review of each CCP's application for authorisation and the college review of the respective NCAs' Risk Assessments through the presentation of evidence regarding the CCP's compliance with each of these 181 points as applicable. ESMA posed a significant number of detailed requests for clarification or further information.

25 In several cases, the input of ESMA staff has supported the college process by identifying issues of attention or of concern with regards to the CCP's compliance with the EMIR framework. Effective cooperation with the NCA has also led to specific examples of induced changes in the CCP rules, policies, procedures or methodologies prior to the authorisation, in order to address the raised concerns. These include:

c) A CCP that proposed to provide services and activities not linked to clearing. Article 14(3) of EMIR provides that an authorisation decision under Article 14(1) of EMIR shall be granted only for activities linked to clearing. Article 2(3) of EMIR defines 'clearing' as the process of establishing positions (including the calculation of net obligations) and ensuring that financial instruments, cash, or both, are available to secure the exposures arising from those positions.

Therefore in order for an authorisation decision under Article 14(1) of EMIR to include the performance of a particular activity, that activity needs to present an objective link with the definition of clearing under Article 2(3) of EMIR. It follows that under EMIR

CCPs are not able to provide services or perform activities which are not linked to clearing. In this case follow-up with the CCP induced changes to cease activities not linked to clearing – namely auctioneer activities related to EU emission allowances.

d) A CCP that considered the EMIR requirements as not applicable to services and activities the CCP performed in respect of instruments other than financial instruments. Article 17(4) of EMIR provides that the competent authority shall grant authorisation only where it is fully satisfied that the applicant CCP complies with all of the requirements laid down in EMIR. This applies in respect of all of the services provided by a CCP and all of the activities performed by the CCP.

   In this case follow-up with the CCP induced changes to cease providing some of the CCP's services or performing some of its activities to standards below the minimum requirements established by Title IV of EMIR (such as guaranteeing the performance of market participants without collecting margins and/or without maintaining a default fund and dedicated own financial resources).

e) A CCP that proposed to offer unsegregated accounts in which the assets and positions of clearing members were not segregated from those held for the accounts of the clearing member's clients. EMIR does not allow the use of unsegregated accounts. Article 39(2) and 39(3) of EMIR provide that CCPs must offer both 'individual client segregation' and 'omnibus client segregation' (these terms being defined in Articles 39(2) and 39(3) of EMIR). While CCPs might offer other levels of protection in addition to individual client segregation and omnibus client segregation (e.g. an omnibus gross margin client model), omnibus client segregation is the minimum level of client protection that can be used under EMIR.

   Article 39(9) of EMIR includes further criteria which must be met by the accounts held by a clearing member with a CCP. These provisions are not compatible with the use of unsegregated accounts. In this case follow-up with the CCP induced changes to cease offering unsegregated accounts.

f) A CCP that proposed not to have distinct individuals with sole responsibility for the functions of risk, compliance, and technology. Article 3(3) of the RTS on CCPs requires a CCP to ensure that the functions of the chief risk officer, chief compliance officer and chief technology officer are carried out by different individuals and provides that these positions shall be held by employees of the CCP entrusted with the exclusive responsibility of performing these functions.

   In this case follow-up with the CCP induced changes so that one single individual had sole responsibility for the function of risk, another distinct individual had sole responsibility for the function of compliance and a third distinct individual had sole responsibility for the function of technology.

g) A CCP asked for clarification as to whether its non-EU clearing members could be exempted from the segregation requirements in Article 39 of EMIR. Under Article 39(5) of EMIR, clearing members must offer their clients, at least, the choice between omnibus client segregation and individual client segregation and inform them of the

costs and level of protection associated with each option. The references to clearing members in Article 39 are not limited to EU clearing members, so all clearing members of EU CCPs are required to comply. Similarly, the references to clients in Article 39 are not limited to EU clients. CCPs are expected to require all clearing members to comply with the relevant EMIR provisions through their rules.

In this case follow-up with the CCP ensured that where a third country insolvency regime applicable to clearing members of the CCP interfered with the provision of omnibus or individual client segregation (in the manner set out in Articles 39 and 48 of EMIR), the clearing members offer their clients alternative possibilities that ensure those clients receive, at least, the choice of omnibus client segregation and individual client segregation.

h) CCPs that did not propose to develop and apply historical scenarios and potential future scenarios drawing on quantitative and qualitative assessments. The implementation of Article 30 of the RTS on CCPs requires that "when implementing an internal policy framework for defining the types of extreme but plausible market conditions that could expose the CCP to greatest risk, a CCP shall specify (for each market to which a CCP is exposed in a clearing member default scenario) extreme but plausible conditions based at least on... (a) a range of historical scenarios... that would have exposed the CCP to greatest financial risk; and (b) a range of potential future scenarios... drawing on both quantitative and qualitative assessments of potential market conditions".

In this case follow-up with the CCP induced changes so that the CCP specified extreme but plausible conditions based on a range of historical scenarios and additionally a range of potential future scenarios, with the range of potential future scenarios drawing on quantitative and qualitative assessments of potential market conditions.

26 In other cases, where the identified issues of attention or of minor concerns were of no prejudice to the CCP compliance with the requirements and the conduct of business rules under EMIR, the input of ESMA led to the identification of action plans to address such issues though on-going supervisory activities after the authorisation. The CCP's competent authority then committed to monitor and report to the college the implementation of the planned actions.

4 ESMA review of colleges' activities

27 The sub-sections below present the outcome of ESMA's review analysis, including i) an overall assessment of convergence in the implementation of EMIR throughout the authorisation process for CCPs, ii) a list of best practices that ESMA has identified throughout its participation in the colleges and that might be of benefit for other competent authorities to adopt, and iii) issues for follow-up.

4.1 *Overall assessment of convergence*

28 In general ESMA found there to be a good level of engagement and cooperation on the part of both i) the NCAs chairing the CCP colleges and ii) the other college members. Although ESMA does still see scope for further improvement, it recognises that for several NCAs the establishment of a supervisory college represents their first experience with such cooperation arrangements in respect of the CCPs they supervise. ESMA is confident that cooperation between NCAs will be further enhanced as college activities continue following the initial authorisation of the CCPs.

29 ESMA also notes that EMIR establishes a very strict timeline for the college to reach its joint opinion (maximum 4 months from the establishment of the college), and generally observed a strong commitment from college members to meet this timeline.

30 ESMA observed that in general the CCP colleges facilitated two-way cooperation: on the one hand, the chairing NCAs received good and constructive input from the college members which fed into their risk assessments; while on the other hand, college members received the information they required in order to vote on the adoption of the joint opinion. The common membership of many of the CCP colleges, along with ESMA's role in ensuring the harmonised application of EMIR across CCPs, was also observed to spread awareness of different CCP practices and resulted in robust challenge by college members, which eventually brought a much higher degree of convergence.

31 Concerning the NCAs chairing the CCP colleges, ESMA appreciated their efforts to establish the colleges in a timely manner, schedule college meetings according an effective and efficient timeline, prepare the Risk Assessment along the prescribed deadline and liaise with college members to address their questions and concerns in advance of the voting meeting of the college. Nevertheless, ESMA considers that some NCAs chairing the CCP colleges need to improve their willingness to share information with the college in a proactive and timely manner. In some cases college members would have found it easier to take an informed position on the proposed college opinion and the adoption of the joint opinion would have been easier to achieve where college members had been provided with timelier responses to their questions and comments. Where the NCA chairing the supervisory college was less willing to share information with the college, ESMA observed college members abstaining from casting their vote on, or voting against the adoption of the college opinion.

32 As regards the college members other than the NCA, ESMA observed some heterogeneity in the degree to which they participated in college discussions. In some cases this might reflect the different basis for college member participation in the college under Article 18 of EMIR (i.e. college members attend for different reasons, including supervision of trading platforms served by the CCP, to supervision of the CCP's clearing member, to supervision of interoperating CCPs). Such different interests may indeed justify a different focus between college members as to the matters discussed at college meetings. However, ESMA did observe that some college members relied heavily on other members (reportedly ESMA) to review the substantive parts of the CCP's application while themselves focussing on a narrow set of issues. This approach did not

necessarily undermine the college review of the CCP's application because when considered holistically the colleges comprised enough members who had substantively reviewed the CCP's application and when taking into account ESMA's approach to reviewing CCP applications (as described in Section 3.3 above). ESMA is content that all colleges did undertake a comprehensive review of the CCP's application and the Risk Assessment produced by the NCA chairing the college, and that CCPs have only been authorised where they are in compliance with the EMIR framework.

33 In terms of NCAs' compliance with the EMIR regulatory framework, ESMA has observed no evident cases of non-compliance with EMIR and the related RTS. In terms of NCAs' compliance with the Guidelines and Recommendations adopted by ESMA under EMIR, ESMA has not received any non-compliance statement by the relevant NCAs. In general the Opinion adopted by ESMA under EMIR is respected by NCAs.

34 Moreover, ESMA has observed a widespread adherence to the ESMA Q&As, which have proven to be an effective convergence tool for promoting common supervisory approaches and practices. In a small number of cases some NCAs have chosen not to implement particular Q&As preferring instead to defend a practice of their CCP which is contradictory to the harmonised application of EMIR as agreed by the ESMA Board of Supervisors. Failure to implement certain Q&As on the basis of national interest is regrettable, however ESMA has observed this to be the case in respect of a small number of NCAs and Q&As and notes that in general most NCAs have acknowledged their role in ensuring that EMIR is applied on a harmonised basis across CCPs. Given that Q&As are not part of the official regulatory framework, but instead provide responses to questions posed in relation to the practical application of EMIR, ESMA has limited powers to ensure compliance with them.

35 ESMA also notes that most NCAs chairing a supervisory college adopted the templates that were facilitated by ESMA, such as for the risk assessment and for managing college member questions on the CCP application. In summary, ESMA is of the view that the college activities related to the authorisation of CCPs under EMIR have resulted in a consistent implementation of the EMIR framework, although there do remain some areas for further alignment in order for a fully harmonised application of EMIR across CCPs.

4.2 *Best practices identified by ESMA*

36 Based on the observations described above, ESMA has identified a number of practices which are currently adopted by some NCAs chairing a supervisory college and which ESMA considers should be adopted more widely. ESMA considers that doing so would result in a greater degree of harmonisation in the application of EMIR and more effective and efficient CCP colleges.

a) Prompt circulation to all college members of relevant documentation, including the CCP's application and any additional documentation submitted by the CCP in support of its application during the review process. Given that the application of the CCP and the supporting documentation can be both voluminous and technical in content it is important for college members to be given as much time as

possible to undertake their review. Interpretation of such documentation may require the use of experts within the college member's organisation and/or otherwise require internal coordination in order to ensure a proper review. ESMA considers that if all NCAs chairing a supervisory college were to observe this practice then the risk identified previously that some college members have had to rely on other college members for undertaking a substantive review of the documentation would likely be diminished. This best practice also applies in respect of the more operational aspects of the college process, such as the timely provision of meeting minutes. The college agreement specifies the timeframe within which such organisational tasks should be accomplished and ESMA encourages NCAs chairing a supervisory college to familiarise themselves with the requirements of the college agreement in this regard. ESMA considers that the colleges could run more efficiently if the college agreement is respected in this regard. One related practice that ESMA observed in this regard was the pre-submission of a draft Risk Assessment Report to college members ahead of its formal circulation as prescribed under the college agreement. Where it occurred, early circulation of the risk assessment report enabled college members to input into the development of the report, ensuring that it covered in sufficient detail, all of the aspects they considered necessary in order to inform their vote on the adoption of the joint opinion.

b) ESMA observed the frequency of college interaction to vary across colleges. In some cases there were a number of in-person meetings, in other cases a smaller number of meetings but greater use of conference calls. ESMA considers the modality of college interaction to be something that should be determined by each college based on the preferences of its specific set of college members. However, as a general point, ESMA notes that where the college had more frequent interaction (whether in person or by conference call) then the process of adopting the joint opinion went more smoothly. Similarly, ESMA observed it to be useful where the college held a preparatory meeting before the meeting at which the joint opinion was to be adopted. Both of these practices ensure that the questions and concerns of individual college members are addressed earlier in the college process so that there are no or few open questions/issues at the time of adoption of the joint decision.

c) In many cases the CCP's senior management was invited to provide a presentation at the college meetings and/or was available to answer questions directly at the college meeting. ESMA observed this practice to be very helpful in facilitating the work of the supervisory college. In particular, the college process was more efficient where college members were able to hear directly from the CCP's senior management, and pose questions directly to them. This practice minimises the time lag of having college member questions answered, enables the respective college member to immediately ask any follow up questions, and reduces the risk that questions are misinterpreted as they pass from the college member to the CCP.

d) Across colleges there is a variety of methods of communication. In some cases college members are able to share their questions and comments directly with the other college members, either through a manual contact list or through the use of a centralised and automated distribution list. In some cases, however, college members have to submit their questions and comments to the NCA chairing the college who then circulates the material to other college members. ESMA noted that in some colleges this subsequent distribution to all college members involved delays and in some cases did not happen without the prompting of the college member submitting the questions or comments. ESMA found that college members generally favour greater transparency in the operation of the CCP colleges and encourages NCAs chairing a supervisory college to adopt practices which involve more prompt sharing of information. By ensuring greater transparency and widespread sharing of information the college process can be more effective and efficient, for example by, avoiding the duplication of questions and issues across college members. Another related best practice is the continuous updating of the status of issues and questions that have been raised by college members. Such practice is useful for the college members raising the questions, in particular to anticipate when they can expect to receive a response, but also for the NCA chairing the supervisory college in terms of keeping track of which issues remain of concern to college members.

e) Finally one other point of best practice concerns the level of seniority of representatives of college members - particularly at voting meetings. In some cases the individual sent to a college meeting (particularly at voting meetings) did not have sufficient authority to unilaterally take a decision at the meeting on how to cast the vote of the college member. The ability to do so is important because in some cases new information is presented to the college at the meeting held to vote on the adoption of the joint opinion. It is highly inefficient if the college has to postpone its vote (or the college member has to abstain) because the individual representing the college member at the meeting does not have sufficient seniority to take a decision on how to vote based on the information presented at the college meeting. It is also contrary to clause 6.2 of the standard written agreement for the establishment and functioning of CCP colleges.

4.3 *Issues for follow-up*

37 As reported above, CCP colleges helped minimising the risk of inconsistencies during the authorisation process of different CCPs. In addition, CCP colleges continue to play an important role following the authorisation of a CCP under EMIR. ESMA continues to actively contribute to each college's involvement in the on-going supervision of the relevant CCP by posing further questions for clarification, raising issues of attention, and identifying issues for monitoring through on-going supervision. In doing so the objective of ESMA continues to be to ensure consistency across colleges in the implementation of the requirements in EMIR and the related RTS.

38 However, ESMA also sees a risk that following authorisation CCP colleges may become simply a mechanism for the exchange of information, rather than an effective supervisory

tool. In addition to continuing to identify and challenge issues of attention or of concern in order to strengthen the CCP's level of compliance with the EMIR framework, ESMA considers that more active involvement in the supervisory process would be desirable. Two immediate areas of priority in this regard are the extension of activities and services process under Article 15 of EMIR and the validation of significant changes to the CCP's models and parameters under Article 49 of EMIR. ESMA is working to ensure the consistent and harmonised use of these processes through the development of frameworks regarding their triggering and application.

39 To ensure consistent application of EMIR across colleges, ESMA will also monitor the way in which the EMIR requirements are applied in practice and the resultant available amount of resources that different CCPs will maintain, in particular when they clear similar products.

40 ESMA will monitor the implementation of these issues through the participation in colleges during the on-going supervision of authorised CCPs.

5 Conclusion

41 In general ESMA has found there to be a good level of engagement and cooperation on the part of both the NCAs chairing the CCP colleges and the other college members. Although ESMA does still see scope for further improvement, it recognises that for several NCAs the establishment of a supervisory college represents their first experience with such cooperation arrangements in respect of the CCPs they supervise. ESMA is confident that cooperation between NCAs will be further enhanced as college activities continue following the initial authorisation of the CCPs.

42 ESMA has identified some cases where certain issues should continue to be followed up with the CCP in order to strengthen its level of compliance with the EMIR framework. ESMA continues to actively contribute to each college's involvement in the on-going supervision of the relevant CCP by posing further questions for clarification, raising issues of attention, and identifying issues for monitoring through on-going supervision and by developing common approaches to the application of the processes envisaged in Article 15 and 49 of EMIR.