

OPINION

On the composition of CCP colleges under EMIR

I. Legal basis

1. ESMA's competence to deliver an opinion 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 has specific competence in respect of colleges of supervisors as set out in the ESMA Regulation. In particular, 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 under 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) and foster the coherence of the application of Union law among such colleges of supervisors.

II. 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 18(2) of EMIR, the college composition shall include, among others authorities, "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 on an aggregate basis over a one-year period" (Article 18 (2) (c)).

6. Pursuant to Article 1 of the Council Regulation (EU) No 1024/2013, of 15 October 2013¹, the European Central Bank (ECB) shall have “*specific tasks concerning policies relating to the prudential supervision of credit institutions, with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage*”.
7. For the exclusive purpose of carrying out the tasks conferred on it by Council Regulation (EU) No 1024/2013 “*the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law*” (Article 9 of the Council Regulation (EU) No 1024/2013).
8. The establishment of the Single Supervisory Mechanism (SSM)², which involves the ECB, will thus affect the composition of the CCP Colleges, where the ECB takes direct prudential supervisory responsibility from national competent authorities over clearing members which are credit institutions not qualifying as less significant under Article 6(4) of the Council Regulation (EU) No 1024/2013.
9. While the ECB may take over direct prudential supervision of all clearing members established in one of the three Member States with the largest contributions to the default fund of the CCP (e.g. because these clearing members all qualify as significant credit institutions under the SSM regulation), the national authority(ies) in that member state can still maintain other supervisory responsibility (e.g. financial conduct) over the same clearing members. Therefore, such authorities should continue to be member of the college.
10. Recital (54) of EMIR states that the college should vote in accordance to the general principle whereby each member has one vote, irrespective of the number of functions it performs in accordance with EMIR. However, according to the ESMA opinion on voting procedure for CCP colleges under EMIR (ESMA/2014/576, dated 28 May 2014), there is a possibility for a separate vote where a member of the college is appointed as a representative of the Eurosystem as central bank of issue under Article 18(2)(h) as this vote would represent the collective view of the Eurosystem’s members.
11. Considering that the ECB in its supervisory function and the Eurosystem as the central bank of issue are governed by the same decision-making body, when the ECB represents both functions in a college, it should be granted only one vote. Consistently, where a National Central Bank represents the Eurosystem as central bank of issue in a college where the ECB is also a member of that college, that National Central Bank cannot cast a separate vote on behalf of the Eurosystem, as the vote to be expressed by the ECB under Article 18(2)(c) and the vote to be expressed by the National Central Bank on behalf of the Eurosystem under Article 18(2)(h) would be the expression of the view of the same decision-making body.

¹ Conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

² Article 2(9) of the Council Regulation (EU) No 1024/2013 “Single supervisory mechanism” (SSM) means the system of the financial supervision composed by the ECB and the national competent authorities of participating Member States (...).”

12. Taking into account the above, ESMA considers it important to adopt this opinion in order to clarify which authorities qualify as a college member under Article 18(2)(c) of EMIR following the establishment of the SSM and to clarify the voting rights to be held by the ECB as college member.

III. ESMA opinion

Composition of the college

13. Where the ECB has taken over the direct prudential supervision of any 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, it should join the college under to Article 18(2)(c).
14. Where, following the taking over by the ECB of the direct prudential supervision, a national competent authority which is currently a member of the college pursuant to Article 18(2)(c) of EMIR maintains direct prudential supervisory responsibility or any other supervisory responsibility on some of the clearing members established in the three Member States with the largest contributions to the default fund of the CCP, such authority should continue to be a member of the college under to Article 18(2)(c).
15. Where, following the taking over by the ECB of the direct prudential supervision, a national competent authority which is currently a member of the college pursuant to Article 18(2)(c) of EMIR has no supervisory responsibility on any of the clearing members established in the three Member States with the largest contributions to the default fund of the CCP, such authority has no longer the right to participate in the college under Article 18(2)(c) of EMIR.

Voting rights

16. When the ECB becomes a CCP College member pursuant article 18(2)(c) of EMIR, it has one vote irrespective of whether the national competent authorities which are currently members of the college pursuant to Article 18(2)(c) continue to be a member of the college.
17. Where the ECB is also appointed, in accordance with Article 3(3) of Commission Delegated Regulation No 876/213, as the single representative of the Eurosystem as central bank of the issue in a CCP college under Article 18(2)(h) of EMIR, the ECB should have one single vote. The ECB may nominate an additional participant who shall have no voting right.
18. Where in the same CCP college the ECB becomes a college member pursuant Article 18(2)(c) of EMIR and a National Central Bank is appointed, in accordance with Article 3(3) of Commission Delegated Regulation No 876/213, as the single representative of the Eurosystem as central bank of the issue under Article 18(2)(h) of EMIR, that National Central Bank cannot cast a separate vote under Article 18(2)(h) of EMIR.