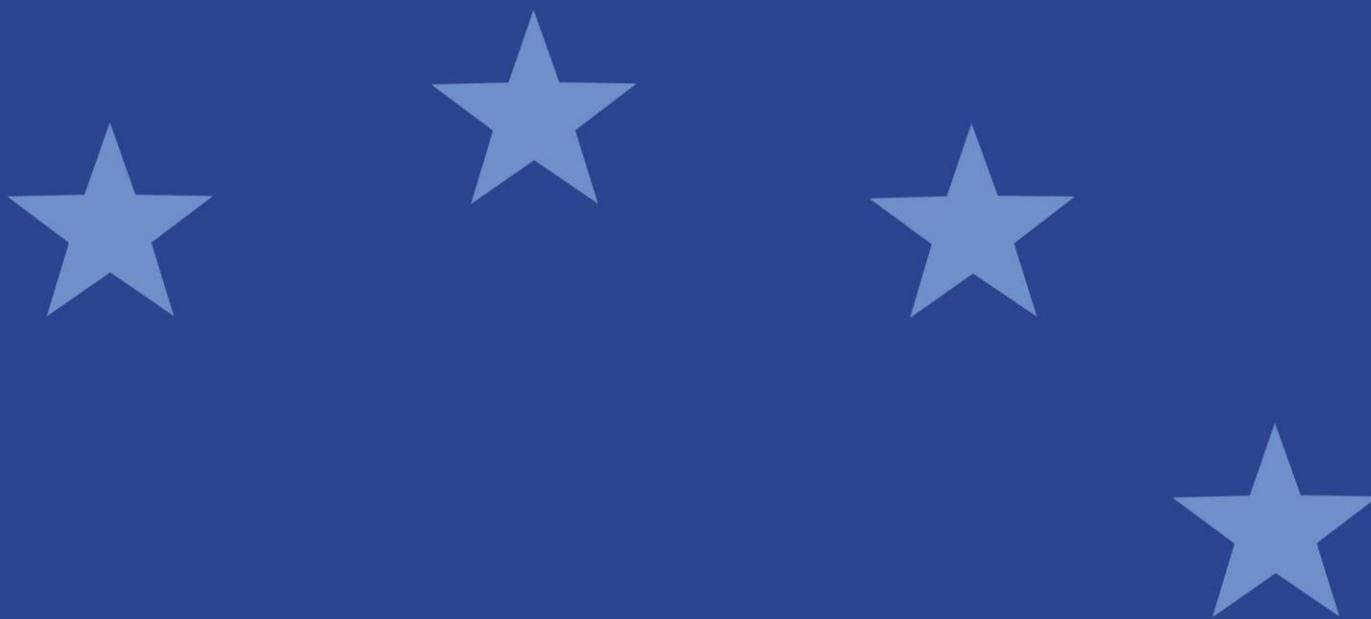


# Report

Guidelines and Recommendations regarding written agreements between members of CCP colleges



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## Acronyms Used

CCPs	Central Counterparties
Commission	European Commission
EMIR	European Market Infrastructures Regulation – Regulation (EU) 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories – also referred to as “the Regulation”.
ESMA	European Securities and Markets Authority
ESMA Regulation	Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
NCA	National Competent Authority
RTS	Regulatory Technical Standards

## **I. Executive Summary**

### **Reasons for publication**

This paper contains Guidelines and Recommendations as envisaged in the Opinion issued by ESMA on 14 March 2013 (ESMA/2013/312) on draft regulatory technical standards (RTS) on colleges for central counterparties (CCPs) and as envisaged in Recital 5 of those draft RTS.

Guidelines and Recommendations set out ESMA's view of how Union law should be applied in a particular area, or of appropriate supervisory practices within the European System of Financial Supervision. ESMA expects all relevant National Competent Authorities (NCAs) to comply with these Guidelines and Recommendations.

### **Contents**

This report discusses the rationale for issuing these Guidelines and Recommendations regarding written agreements between members of CCP colleges. It includes Guidelines and Recommendations regarding a standard written agreement for the establishment and functioning of CCP colleges and Guidelines and Recommendations for the swift adoption of such written agreements.

Given the need to ensure the swift establishment of colleges and the fact that the Guidelines and Recommendations are solely addressed to NCAs, with limited impact on market participants, ESMA has consulted only potential college members when drafting these Guidelines and Recommendations and has decided it not appropriate to conduct a public consultation.

### **Next steps**

These Guidelines and Recommendations will apply after their publication by ESMA on its website in the EU official languages.

NCAs should comply with the Guidelines and Recommendations. NCAs must notify ESMA whether they comply or intend to comply with these Guidelines and Recommendations, including with a justification of the reasons for any non-compliance, within two months of publication by ESMA on its website of the final Guidelines and Recommendations in all EU official languages. Financial market participants are not required to report to ESMA whether they comply with these Guidelines and Recommendations, as they are not addressed to them.

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## **II. Introduction**

1. Article 18 of EMIR imposes two constraints on the establishment of CCP colleges. Firstly, Article 18(1) of EMIR requires that an NCA establish a CCP college within 30 days of receiving a complete application for authorisation as a CCP under EMIR. Secondly, Article 18(5) of the Regulation provides that a CCP college cannot be established until the authorities eligible for participation in the CCP college have first agreed, in writing, the terms on which the CCP college will operate. Given that: 1) the competent authority for a CCP has 30 calendar days from the submission of a complete application to establish a college (Article 18 of EMIR); and 2) the competent authority shall duly consider the opinion of the college before granting the authorisation to a CCP; the competent authority might be liable for not respecting these provisions if a college member refuses to participate in a college and might be impeded from authorising a CCP if the college is not established.

2. When drafting its draft RTS on CCP colleges, ESMA was concerned that a NCA which is eligible for participation in a CCP college might elect not to agree to the terms for the operation of the CCP college, thus preventing the establishment of the CCP college and possibly the authorisation of the CCP.
3. ESMA considered that such a potential veto power over the authorisation of CCPs, on the part of individual NCAs, is not consistent with the extensive provisions governing the authorisation of a CCP as set out in Article 17 of the Regulation. In order to prevent individual NCAs from having a veto right over the authorisation of CCPs, ESMA therefore proposed in its draft RTS on CCP colleges that any authority which is eligible for participation in a CCP college, but which chose not to agree to the terms for the operation of the CCP college, would not block the operation of the college that could proceed with its function to the extent that the voting procedures established in EMIR could be implemented.
4. However, on 31 January 2013, the European Commission (Commission) informed ESMA that it had not endorsed ESMA's draft RTS on CCP colleges because it did not consider them compatible with the primary legislation (EMIR). In particular, the Commission considered that some of the provisions included in ESMA's draft RTS on CCP colleges exceeded the mandate given by the legislator to specify the details of the practical arrangements of the agreement for the establishment and functioning of CCP colleges.
5. The Commission interprets Article 18 of EMIR as imposing an obligation on NCAs to participate in any CCP college for which they are eligible. The Commission considers that, where an NCA chose not to agree to the terms for the operation of the CCP college, such failure would entail a breach of Union law. This means that an action could be brought under Article 258 of the Treaty on the Functioning of the European Union.
6. ESMA considers that although proceedings in the European Courts of Justice are a possible way to ensure a commitment by college members to join the college without delays, the timeframe required for the establishment of a CCP college under EMIR is not compatible with such proceedings. ESMA does, however, recognise that its mandate to specify the details of the practical arrangements of the agreement for the establishment and functioning of CCP colleges is not broad enough to appropriately address the veto right inadvertently introduced by the Regulation.
7. On 14 March 2013, ESMA adopted an opinion (ESMA/2013/312) in accordance with Article 10(1) of ESMA Regulation to amend the draft RTS on colleges originally submitted to the Commission on 27 September 2012. As explained in the opinion, in amending the draft RTS, ESMA took on board the suggestions provided by the Commission in its letter of 31 January 2013, to include references to proceedings in the European Courts of Justice on breaches of Union Law as a possible way to ensure a commitment by college members to join the CCP college without delay. However, in addition to this amendment, it introduced in Recital 5 of the draft RTS a provision such that ESMA will issue Guidelines and Recommendations to ensure the use of standard written agreements across CCP colleges and in order to facilitate the swift establishment of colleges within the timeframe established by EMIR.
8. ESMA considers that a standard written agreement adopted through ESMA Guidelines and Recommendations under Article 16 of the ESMA Regulation will help to facilitate the prompt establishment of colleges by requiring that an NCA is required to justify any departure from the standard written agreement. In addition, ESMA considers that a comply or explain mechanism with the written agreement for the establishment and functioning of the college to which NCAs would be bound, could work as an early mechanism to ensure the establishment of the college, before proceedings with the European Court of Justice are activated.

9. Pursuant to Article 16(2) of the ESMA Regulation, ESMA should, where appropriate, conduct open public consultations regarding Guidelines and Recommendations and analyse the related potential costs and benefits.
10. This report specifies why it was considered appropriate to issue these Guidelines and Recommendations without public consultation.
11. One essential element for the drafting of Guidelines and Recommendations is the analysis of the costs and benefits that the proposed measures might entail. This report includes an impact assessment in Annex I.
12. These Guidelines and Recommendations are issued under Article 16 of the ESMA Regulation. In accordance with Article 16(3) of the ESMA Regulation, NCAs must make every effort to comply with the Guidelines and Recommendations.

### **III. Reasons for issuing these Guidelines and Recommendations without public consultation**

13. Pursuant to Article 16(2) of the ESMA Regulation, ESMA should, where appropriate, conduct open public consultations regarding Guidelines and Recommendations and analyse the related potential costs and benefits.
14. As highlighted in the introductory section, the Commission wrote to ESMA on 31 January 2013, advising that pursuant to its interpretation of Article 18 of EMIR, NCAs have an obligation to participate in any CCP college for which they are eligible and advising that it had therefore not endorsed ESMA's proposed approach to addressing the existence of a potential veto power over the authorisation of CCPs, on the part of individual NCAs.
15. Pursuant to Article 10(1) of the ESMA Regulation, ESMA then had a period of six weeks to amend its draft regulatory technical standards on CCP colleges on the basis and resubmit them to the Commission in the form of a formal opinion.
16. ESMA adopted its formal opinion under Article 10(1) of the ESMA Regulation on 14 March 2013. On 15 March 2013, the Regulatory Technical Standards under Articles 16, 25, 26, 29, 34, 41, 42, 44, 45, 47 and 49 of EMIR entered into force. CCPs already authorised to provide clearing services in accordance with the national law of a Member State have six months from 15 March 2013 in which to apply for authorisation under EMIR. As previously referenced, Article 18(1) of EMIR requires that an NCA establish a CCP college within 30 days of receiving a complete application for such authorisation.
17. Following the submission of the formal opinion by ESMA under Article 10(1) of ESMA Regulation, the Commission adopted the revised draft RTS on 28 May 2013 and the European Parliament and the Council have 3 months, from this date, to object. This period can be extended at the discretion of the Parliament or the Council by an additional 3 months.
18. At the date of publishing this report on Guidelines and Recommendations on the standard written agreement, the period for the European Parliament and Council to review the draft RTS submitted by ESMA to the European Commission on 14 March 2013 (and approved by the European Commission on 28 May 2013) has not yet expired. However, EMIR has already entered into force and CCPs have already started applying for authorisation under EMIR. Given the timing of the EMIR provisions recalled above, and in light of Article 18(5) of EMIR which provides that a CCP college cannot be established until the authorities eligible for participation in the CCP college have first agreed, in writing, the terms on which the

CCP college will operate, it is imperative that ESMA issues its report on Guidelines and Recommendations concerning written agreements between members of CCP colleges as soon as possible so as to enable NCAs to use the standard written agreement for the CCP colleges that they are currently in the process of establishing.

19. While ESMA is publishing this report now, the Guidelines and Recommendations will have effect only after their publication by ESMA on its website in the official languages of the European Union which will be subsequent to the end of the non-objection period by the European Parliament and the Council and in any case without prejudice to any objection they might raise.
20. Additionally, these Guidelines and Recommendations only concern NCAs, who have inputted into their preparation and have been duly consulted. The Guidelines and Recommendations are not addressed to CCPs themselves or to other stakeholders. Furthermore, ESMA has undertaken an analysis of the costs and benefits that these proposed Guidelines and Recommendations might entail and has concluded that they will not have a direct impact upon CCPs. ESMA's impact assessment is set out at Annex I. ESMA also notes that previous public consultation on its Regulatory Technical Standards regarding CCP Colleges received only minimal industry response<sup>1</sup>.
21. Against this background, ESMA considers that it is appropriate not to hold an open public consultation on these Guidelines and Recommendations on the basis that (a) a delay in ESMA issuing the Guidelines and Recommendations might result in a situation whereby the authorities eligible for participation in the CCP college fail to agree the terms for the operation of a CCP college resulting in a situation where a CCP cannot be authorised and (b) given the limited impact of these Guidelines and Recommendations on financial market participants.

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<sup>1</sup> Only 11 (out of 167) respondents to ESMA's June 2012 Consultation Paper commented on the proposed Regulatory Technical Standards regarding CCP Colleges.

## **ANNEX I – Cost-benefit analysis**

### **I. Introduction**

1. The objective of performing a cost-benefit analysis is to assess the costs and benefits of the various policy or technical options which were analysed during the process of drafting the Guidelines and Recommendations. The Guidelines and Recommendations regarding written agreements between members of CCP colleges are specific in that they do not aim to prescribe further requirements for market participants, neither do they aim to revise the authorisation process for CCPs. Therefore there should be no material additional compliance costs for market participants associated with them. The only costs should be for regulators. Although it is true that applications for authorisation from CCPs will be subject to the joint opinion of the CCP college, which will need to operate in line with the Guidelines and Recommendations, it should also be considered that the Guidelines and Recommendations will result in a more harmonised treatment of these applications between NCAs.
2. The requirement to establish CCP colleges, and their membership, is set out in EMIR and the policy choices involved in establishing these requirements were assessed by the Commission when presenting its proposal for EMIR<sup>2</sup>. In the impact assessment for its Regulatory Technical Standards of CCP colleges<sup>3</sup>, ESMA also evaluated policy choices regarding the practical arrangements for the functioning of CCP colleges, including detailed rules on voting procedures as referred to in Article 19(3) of EMIR and the conditions under which the Union currencies are to be considered as sufficiently relevant to the operation of a CCP.
3. The choices or options envisaged by ESMA while drafting these Guidelines and Recommendations were therefore limited to determining how detailed the Guidelines and Recommendations should be. On this basis, the following cost-benefit analysis is exclusively qualitative and presents general considerations rather than providing detailed tables of options and their relative advantages and disadvantages.

### **II. How detailed should the Guidelines and Recommendations be?**

4. When drafting the Guidelines and Recommendations, ESMA considered the level of granularity which they should entail. ESMA considered that if the Guidelines and Recommendations were to be defined in an overly broad manner it might leave room for different interpretations among NCAs in the course of their establishing CCP colleges.
5. This might introduce a risk that some jurisdictions could seek to constrain the role of the CCP college in a disproportionate manner. An indirect consequence of this would be a limited ability for interested NCAs to understand the risks associated with the CCP, to input into the decision-making processes of the CCP college, and to raise any concerns they have (or might otherwise have had) about aspects of the operations of the CCP. In extremis, a dysfunctional CCP college might limit the ability of NCAs from preventing or managing the insolvency of a CCP and the fiscal costs that such an insolvency might entail. EMIR has mandated the establishment of CCP colleges and assigned them an important role in the authorisation and on-going supervision of a CCP on the basis that a CCP's operations may affect entities established in different Member States or the functioning of the internal market.
6. An approach whereby the Guidelines and Recommendations contain only high-level principles might also prevent the swift establishment of CCP colleges, as college members might need to engage in extensive discussions on the detailed provisions of every written agreement. Such an outcome would be contrary to

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<sup>2</sup> [http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/20100915\\_impact\\_assessment\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20100915_impact_assessment_en.pdf)

<sup>3</sup> [http://www.esma.europa.eu/system/files/2012-600\\_annex\\_viii.pdf](http://www.esma.europa.eu/system/files/2012-600_annex_viii.pdf)

the intention set out in Recital 5 of the draft RTS on CCP colleges and the impact of such an outcome could be twofold: on the one hand any delay in the authorisation of a CCP will directly impact on the business of that CCP and, on a more long-term basis, it might impact on the proper functioning of the internal market, thus involving a cost for market participants.

7. This would go against the stated aim that there be no material additional costs for market participants or Member States associated with the Guidelines and Recommendations.
8. ESMA considers that sufficiently detailed Guidelines and Recommendations are necessary to ensure that NCAs eligible for participation in a CCP college are given an appropriate opportunity to participate in the operations of the CCP college, including understanding the risks associated with the CCP, inputting into the decision-making processes of the CCP college, and raising any concerns they have (or might otherwise have had) about aspects of the operations of the CCP.
9. ESMA does however recognise the need to ensure that the Guidelines and Recommendations are not overly prescriptive such that they restrict the efficient and effective functioning of the CCP college. In this regard, ESMA also recognises that there is a cost to NCAs of more detailed Guidelines and Recommendations, namely that there might be insufficient flexibility for the NCA establishing, managing and chairing the CCP college or for the other college members in terms of their participation in the College. Similar to the situation described above for Guidelines and Recommendations that are defined in an overly broad manner, too little flexibility might constrain the ability of NCAs to share information or understand the risks associated with the CCP, thus negatively constraining the operations of the college.
10. Against this background, ESMA has identified certain matters in respect of which it considers it necessary to prescribe detailed Guidelines and Recommendations regarding written agreements between members of CCP colleges and has prescribed such detailed Guidelines and Recommendations only in those areas.

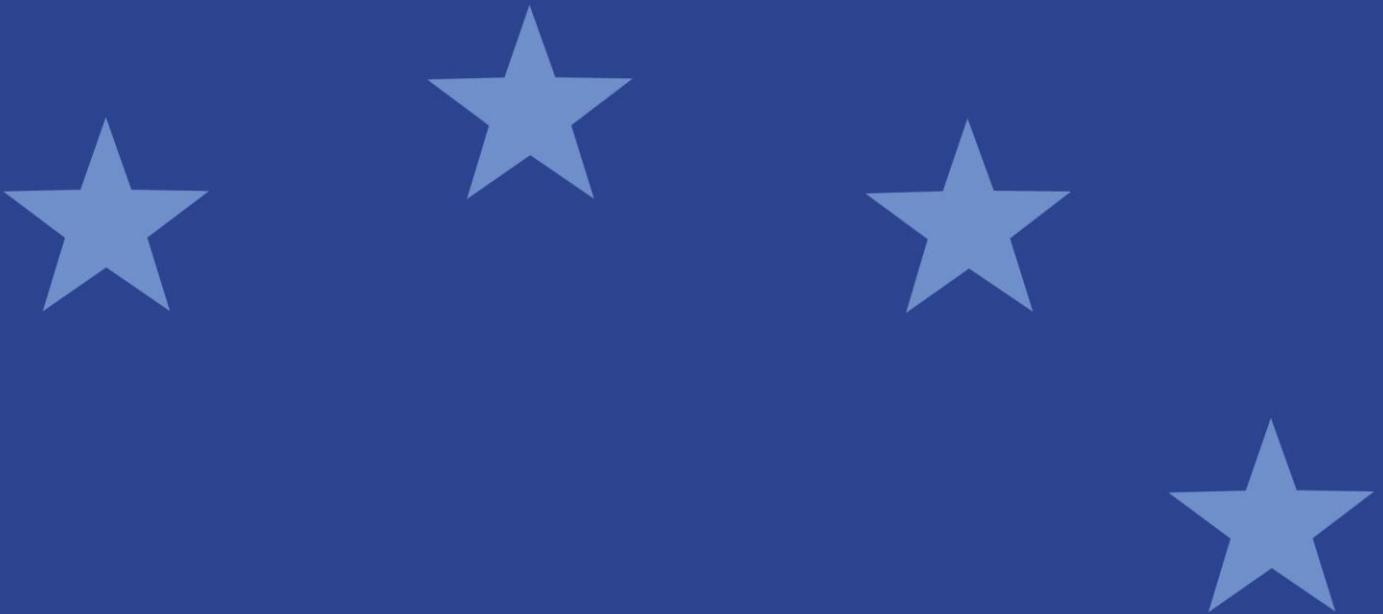


## **ANNEX II - Guidelines and Recommendations regarding written agreements between members of CCP colleges**



# Guidelines and Recommendations

Guidelines and Recommendations regarding written agreements between members of CCP colleges





Date: XX.XX 2013

ESMA/2013/XXX

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## **I. Scope**

### **Who?**

1. These Guidelines and Recommendations apply to national competent authorities (NCAs).

### **What?**

2. The Guidelines and Recommendations define the written agreement that a CCP's NCA should propose as part of its establishment of a college under Article 18 of EMIR (CCP colleges) to facilitate the exercise of the tasks referred to in Articles 15, 17, 49, 51 and 54 of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories (EMIR) and that the CCP college members should agree to ahead of their participation in such colleges.
3. The Guidelines and Recommendations do not introduce new requirements for CCPs in addition to the ones specified in EMIR or the relevant technical standards. Instead they specify requirements for NCAs in the establishment, management and chairing of CCP colleges under EMIR.

### **When?**

4. These Guidelines and Recommendations apply from [date to be included in the final version of this document following their publication by ESMA on its website in the official languages of the European Union].

## **II. Purpose**

5. As stated in the Opinion issued by ESMA on 14 March 2013 (ESMA/2013/312) and in line with Recital 5 of the draft RTS on CCP colleges, ESMA considers that a standard written agreement introduced through ESMA Guidelines and Recommendations under Article 16 of the ESMA Regulation will facilitate the establishment of colleges. In addition, ESMA considers that a comply-or-explain mechanism regarding the Guidelines and Recommendations could work as an early mechanism to ensure the establishment of the college, before proceedings with the European Court of Justice are activated.
6. Where an NCA elects not to agree with the provisions of the standard written agreement included in the Guidelines and Recommendations, which could affect the establishment of a college under Article 18(5) of EMIR and the authorisation of the CCP, that NCA should be required to justify such decision stating its reasons.

### **III. Compliance and reporting obligations**

#### **Status of the guidelines**

7. This document contains Guidelines and Recommendations issued under Article 16 of the ESMA Regulation<sup>4</sup>. In accordance with Article 16(3) of the ESMA Regulation NCAs must make every effort to comply with Guidelines and Recommendations.

#### **Reporting requirements**

8. NCAs to whom these Guidelines and Recommendations apply must notify ESMA whether they comply or intend to comply with the Guidelines and Recommendations, with reasons for non-compliance, within two months of the date of publication by ESMA to [post-trading@esma.europa.eu](mailto:post-trading@esma.europa.eu). In the absence of a response by this deadline, NCAs will be considered as non-compliant. A template for notifications is available from the ESMA website.

### **IV. Guidelines and Recommendations regarding written agreements between members of CCP colleges**

9. Considering the requirement in Article 18(5) of EMIR such that the establishment and functioning of a CCP college shall be based on a written agreement between all its members, and in line with Recital 5 of the draft RTS on CCP colleges, NCAs should propose a written agreement in accordance with the standard written agreement included in Guideline and Recommendation One of these Guidelines and Recommendations when establishing a CCP college under Article 18(5) of EMIR.
10. Similarly, members of a CCP college, when presented with a written agreement under Article 18(5) of EMIR should agree to such written agreement.

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<sup>4</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

## **GUIDELINE AND RECOMMENDATION ONE: STANDARD WRITTEN AGREEMENT**

(Article 18(5) of Regulation (EU) No 648/2012)

When establishing a CCP college under Article 18 of EMIR, a NCA should propose a written agreement in accordance with the standard written agreement included in Annex I.

## **GUIDELINE AND RECOMMENDATION TWO: ADOPTION OF WRITTEN AGREEMENT BY COLLEGE MEMBERS**

(Article 18(5) of Regulation (EU) No 648/2012)

When presented with a written agreement for the establishment and functioning of a CCP college that does not depart from the standard written agreement included in Annex I, 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.

For the purposes of this guideline, a proposal to entrust additional tasks on one or more members of the college relating to the specific circumstances of an individual CCP should not be considered as a departure from the standard written agreement.

## ANNEX I – Standard written agreement

# Written agreement for the establishment and functioning of the college of *CCP A*

## 1. Introduction

- 1.1. In accordance with Article 18(5) 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 (“the Regulation” or “EMIR” ), Commission Delegated Regulation (EC) No xx/2013 of [Date] supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for colleges for central counterparties (“the draft RTS on CCP colleges”) and Commission Delegated Regulation (EC) No 153/2013 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties (“the CCP Requirements RTS”), (collectively “the RTS”), this agreement (“the Written Agreement”) between the members of the college for *CCP A* is intended to establish the practical arrangements for the establishment and functioning of the college for *CCP A* (the “College”) and to facilitate the effective operation of the College in accordance with EMIR and the RTS.
- 1.2. This Written Agreement does not create any additional legally binding obligations on the College Members which are not specified in EMIR or the RTS. The function of colleges is to facilitate the exercise of the tasks specified in EMIR and the tasks assigned to College Members as well as the composition, establishment and management of colleges have been articulated by the legislator in EMIR as legal obligations and, therefore, are binding and directly applicable to all College Members. Practical arrangements laid down in the RTS form part of this Written Agreement.
- 1.3. This Written Agreement is intended to be consistent with EMIR and the RTS. If, however, there is any conflict between a provision of EMIR (or the RTS) and this Written Agreement, the provisions of EMIR (or the RTS) will take precedence.
- 1.4. This Written Agreement does not supersede or prevent a College Member from organising or participating in any other bilateral or multilateral arrangements for regulatory, supervisory or oversight purposes with regard to *CCP A*.

## 2. Defined Terms

- 2.1. *Chairing Authority*, for the purpose of this Written Agreement, is the Competent Authority designated by the Member State of establishment of *CCP A* to establish, manage and chair the college for *CCP A*, pursuant to Article 18(1) of EMIR.
- 2.2. College Member for the purpose of this Written Agreement is an authority that qualifies for membership of the College in accordance with Article 18(2) of EMIR.

### 3. Formation of the College

- 3.1. In accordance with Article 18(1) of EMIR, *Chairing Authority* must establish a college within 30 calendar days of the submission of a complete application by *CCP A* for authorisation as a CCP under EMIR.
- 3.2. In accordance with Article 18(5) of EMIR, the establishment and functioning of the College will be based on this Written Agreement between all of the College Members.
- 3.3. In order to ensure that the deadline for the establishment of the College is met, the steps that will be taken by the *Chairing Authority* in establishing the College, and the relevant timeframes, are as follows:
  - 3.3.1. Within 5 calendar days of receipt of a complete application for authorisation under EMIR, *Chairing Authority* will determine which authorities are College Members in accordance with Article 18(2) of EMIR. *Chairing Authority* will provide ESMA with a copy of the analysis on which it has based its determination.
  - 3.3.2. Within 7 calendar days of receipt of a complete application for authorisation under EMIR, *Chairing Authority* will provide the College Members with:
    - 3.3.2.1. a copy of this Written Agreement for their review and approval;
    - 3.3.2.2. a full list of College Members, including the categories in points (b) to (h) of Article 18(2) in which they qualify;
    - 3.3.2.3. a fully reasoned explanation of any circumstances where the provisions of this Written Agreement depart from ESMA's Guidelines and Recommendations regarding written agreements between members of CCP colleges (the Guidelines and Recommendations), highlighting the differences between this written agreement and the standard written agreement included in the Guidelines and Recommendations on written agreements between college members.
  - 3.3.3. *Chairing Authority* may commence the steps required to establish the College ahead of its determination of the completeness of CCP A's application.
  - 3.3.4. Within 12 calendar days of receipt of a copy of this Written Agreement for their review and approval, College Members will return a signed copy of this Written Agreement to *Chairing Authority* and will also provide *Chairing Authority* with the name, telephone number, email address and any other relevant contact details for the members of staff at the College Member that will act as the primary and secondary representatives for that College Member at the College (the "contact details").
  - 3.3.5. Where a College Member does not return a signed copy of this Written Agreement to *Chairing Authority* within 12 calendar days, that College Member must provide the *Chairing Authority* with a fully reasoned explanation of why it has not signed the Written Agreement within the envisaged timeframe. Where the written agreement does not depart from the standard written agreement included in the Guidelines and Recommendations on written agreements between college members, that College Member must justify to ESMA such non-compliance with the Guidelines and Recommendations (pursuant to Article 16(3) of the ESMA Regulation in the case of

College Members to which the ESMA Regulation applies). The failure of a College Member to sign the Written Agreement may result in infringement proceedings in accordance with Article 258 of the TFEU, as well as the actions provided for in Articles 265 and 271(d) of the TFEU.

- 3.3.6. The College will be considered to be established once a signed copy of this Written Agreement has been received from all College Members. Within 5 calendar days of the College being established, *Chairing Authority* will confirm to College Members the fact that the College has been established and the contact details of all College Members.
- 3.4. Every year, at least 30 calendar days before the anniversary of the date of establishment of the College, *Chairing Authority* will determine which authorities are College Members in accordance with Article 18(2) of EMIR. *Chairing Authority* will provide ESMA with a copy of the analysis on which it has based its determination. *Chairing Authority* will inform College Members of their eligibility to continue to participate (including the categories in points (b) to (h) of Article 18(2) in which they qualify) in the College at least 25 calendar days before the anniversary of the date of establishment of the College.
- 3.5. Each College Member will notify *Chairing Authority* promptly of any changes in its statutory tasks that impact on its eligibility to participate in a college. Following this notification, the *Chairing Authority* shall update the college composition within 30 calendar days from the date of receipt of the notification.
- 3.6. Each College Member will notify *Chairing Authority* promptly of any changes to its contact details. *Chairing Authority* will circulate a copy of such changes to all College Members.
- 3.7. Subject to the agreement of all College Members, additional authorities may be invited by *Chairing Authority* to attend specific meetings of the College as non-voting observers. For the avoidance of doubt, such an invited authority may be an EEA authority or a Non-EEA Authority and non-voting observers are not expected to attend meetings of the College on a permanent basis

#### **4. Working language of the College**

- 4.1. The working language of the College, including the language in which *Chairing Authority* will communicate with College Members, produce its risk assessment report (under Article 19(1) of EMIR), produce its model validation reports (under Articles 41(2) and 49(1) of EMIR), and the language in which the College will operate and reach any joint opinion (under Article 19(1) of EMIR) will be English.
- 4.2. Where CCP A applies:
  - 4.2.1. for authorisation pursuant to Article 17 of EMIR (CCP A's application for authorisation);
  - 4.2.2. for an extension of its business to additional services or activities not covered by its initial authorisation pursuant to Article 15 of EMIR (CCP A's application for extension);
  - 4.2.3. to adopt models and parameters in setting its margin requirements pursuant to Article 41(2) of EMIR (CCP A's application to adopt models and parameters);

4.2.4. to amend its models and parameters in setting its margin requirements pursuant to Article 49(1) of EMIR (CCP A's application to amend its models and parameters); or

4.2.5. to enter into an interoperability arrangement pursuant to Article 54(1) of EMIR (CCP A's application for an interoperability arrangement),

in an official language of the European Union that is not English, then *Chairing Authority* will provide College Members with an English translation of all relevant documentation necessary for the College to form an opinion. Where such English translation is provided by the relevant CCP, the *Chairing Authority* has no responsibility for the translation.

## 5. Applications received from CCP A

- 5.1. Where CCP A submits to *Chairing Authority* an application of a type listed in paragraph 4.2 of this Written Agreement (CCP A's application), *Chairing Authority* will provide each College Member with an electronic ('soft') copy of the complete application, and any documentation provided by CCP A in support of such application (in both cases in the official language of the European Union in which the application and supporting documentation was submitted to *Chairing Authority*), within 7 calendar days of the application having been determined by *Chairing Authority* to be complete (except in the case of CCP A's application for authorisation which will be provided to College Members within 7 calendar days of the College having been established, pursuant to paragraph 3.3.6 of this Written Agreement).
- 5.2. Where CCP A's application was submitted to *Chairing Authority* in an official language of the European Union that is not English then *Chairing Authority* will provide College Members with the English translation of the documentation referred to in paragraph 4.2 of this Written Agreement sufficiently in advance of any vote of the College on a joint opinion in accordance with the second subparagraph of Article 19(1) of EMIR).
- 5.3. *Chairing Authority* will indicate to College Members the timeframe within which they should raise any points of interest or concern they have with regards to the application. *Chairing Authority* will, to the extent possible, endeavor to take these views into account during the preparation of its risk assessment and in any event will provide feedback to the relevant College Member on how these views have been taken on board. *Chairing Authority* will endeavour to provide such feedback sufficiently in advance of any vote of the College on a joint opinion in accordance with the second subparagraph of Article 19(1) of EMIR.
- 5.4. *Chairing Authority* will schedule a meeting of the College to consider the risk assessment of CCP A produced by *Chairing Authority* under the second subparagraph of Article 19(1) of EMIR, any validation by *Chairing Authority* of the models and parameters used by CCP A pursuant to Articles 41(2) or 49(1) of EMIR, any validation by ESMA of the models and parameters used by CCP A pursuant to Article 49(1) of EMIR, *Chairing Authority's* recommendation on whether to approve CCP A's application and to reach a joint opinion under the second subparagraph of Article 19(1) of EMIR. College Members will be provided with at least 14 calendar days to review and consider the risk assessment of CCP A and recommendation, prior to the meeting of the College. College Members should strive to submit any comments, or issues, for discussion by the College at least 7 calendar days in advance of the College meeting.

5.5. Without prejudice to the fourth subparagraph of Article 17(4) of EMIR, and if no joint opinion of the College is reached, at the meeting held under paragraph 5.4 of this Written Agreement, then *Chairing Authority* will schedule another meeting to be held within a sufficient timeframe as to enable the College to adopt a majority opinion within 30 calendar days of the College's receipt of the risk assessment of CCP A as is required pursuant to the second subparagraph of Article 19(1) of EMIR.

5.6. *Chairing Authority* will communicate for review and comment, its draft written response to CCP A's application, to all College Members no fewer than 3 calendar days before such response is provided to CCP A.

## 6. Meetings of the College

6.1. The College will meet in person at least annually and, if deemed necessary by *Chairing Authority*, each time that the College is required to reach a joint opinion under the second subparagraph of Article 19(1) of EMIR. Where *Chairing Authority* calls for other meetings of the College these may be held as in person meetings or as teleconference or videoconference calls. College Members should endeavor to participate in person at any such meeting of the College. Where it is not feasible for a College Member to physically attend an in person meeting, they might participate by teleconference or videoconference call with such participation counting towards the quorum of the meeting.

6.2. The representative attending a College meeting on behalf of a College Member should have sufficient delegated authority to vote at the College meeting on behalf of the College Member they represent.

6.3. College Members may request that a meeting of the College be held by informing *Chairing Authority* of such request. The requesting College Member should outline in its request those matters that it proposes that the College needs to discuss. *Chairing Authority* will respond to such requests within 14 calendar days and where the request is accepted will schedule a meeting to be held within 30 calendar days. Where *Chairing Authority* does not consider that a meeting of the College is necessary, *Chairing Authority* will respond to the requesting College Member with an explanation of *Chairing Authority's* reason for not considering that a meeting of the College is necessary, including an explanation of how *Chairing Authority* proposes to address the concerns raised by the College Member that requested the additional meeting.

6.4. *Chairing Authority* will chair all meetings of the College.

6.5. *Chairing Authority* will distribute a draft agenda for each meeting of the College, other than for meetings to distribute the information in emergency situations as described in paragraph 11.1 of this Written Agreement, at least 14 calendar days before each meeting. Wherever practical, the Agenda for a College meeting will be finalised at least 7 calendar days before the date of a meeting of the College.

6.6. The following agenda points will be tabled for discussion by the College at least annually:

6.6.1. Adoption of the minutes of the previous College meeting.

- 6.6.2. A report of *Chairing Authority's* supervisory activities with regard to *CCP A* since the previous meeting of the College.
- 6.6.3. A report of *Chairing Authority's* planned supervisory strategy and engagement plan with regard to *CCP A* for the period until the next scheduled meeting of the College.
- 6.6.4. An update on *Chairing Authority's* evaluation of the significant risks that *CCP A* is exposed to and which *CCP A* poses, including specific consideration of any risks posed by any interoperability arrangement to which *CCP A* is a party.
- 6.6.5. An update on the operational performance, functional and organizational set-up and strategic plans of *CCP A*.
- 6.7. College Members, including *Chairing Authority*, will endeavour to distribute any written material to be considered at a meeting of the College not less than 7 calendar days before the meeting.
- 6.8. Pursuant to Article 4 of the draft RTS on CCP College, the quorum for meetings of the College is two-thirds of the College Members.
- 6.9. Where a decision is tabled for a vote by the College, including any vote of the College on a joint opinion in accordance with the second subparagraph of Article 19(1) of EMIR, and the quorum requirements are not met (either where *Chairing Authority* ascertains that this will be the case in advance of the meeting or at the time of the meeting) then *Chairing Authority* shall organise a subsequent in person meeting as soon as is practically possible and, in any case on such a timeframe as is necessary to meet the various deadlines provided for in EMIR. *Chairing Authority* will give as much notice of such subsequent meeting as is practically possible and will, to the extent practical, endeavour to distribute the information specified in paragraphs 6.5 and 6.7.
- 6.10. Any votes taken at a meeting of the College will be held by an open show of hands or explicit expression of vote in case of a meeting held by teleconference or videoconference call. Once cast, a vote cannot be withdrawn or amended by a College Member. Prior to the vote being taken, College Members from each Member State will inform *Chairing Authority* which authorities from their Member State will be eligible to cast a vote, in particular where the voting caps set out in Article 19(3) of EMIR apply. The outcome of any vote (including records of individual votes) will be clearly recorded in the minutes of the meeting.
- 6.11. Where considered appropriate by *Chairing Authority*, or where requested by a College Member, a vote may be taken by written procedure, on a proposal from *Chairing Authority* circulated to the College:
  - (a) stating the time and date by which votes must be cast;
  - (b) where, exceptionally, the period for casting votes is less than 10 calendar days, giving the reason for the short period;
  - (c) justifying the use of written procedure as opposed to a vote taken at a meeting of the College; and
  - (d) providing any other material considered necessary for making the decision that has not previously been provided to the College.
- 6.11.1 Votes on decisions being taken by written procedure shall be in written form and a failure to vote shall be considered a vote for the proposal.

6.11.2 The result of a written procedure shall be notified without delay to the College.

6.11.3 College Members may request to *Chairing Authority* that any aspect of an issue that has been the subject of written procedure be discussed at the next meeting of the College. Such a request shall not affect the use or the result of a written procedure.

6.12. Minutes of meetings of the College will be distributed to College Members by *Chairing Authority* no more than 21 calendar days following a meeting of the College. Such minutes will be subject to comment by College Members for a period of at least 7 calendar days but no more than 21 calendar days and will be tabled for adoption at a subsequent meeting of the College. Alternatively such minutes can be adopted by written procedure.

6.13. *Chairing Authority* will provide College Members with the following information as and when such information is available:

- The information specified in Article 5 of the draft RTS on CCP colleges;
- Details of any change to the models or parameters applied by the CCP;
- [Specific information to be defined by the College];

6.14. The transmission of information between College Members will be done by e-mail or another secure means of communication, as agreed from time to time by the College. College Members will always be informed on an equal basis.

## 7. Qualifying Holdings

7.1. Where *Chairing Authority*, upon completion of its assessment in accordance with Article 31(5) of EMIR, decides to oppose a proposed direct or indirect acquisition of a qualifying holding in *CCP A*, *Chairing Authority* will notify the College within 3 calendar days of this decision.

## 8. On-going Risk Review

8.1. Without prejudice to Article 21 of EMIR, where *Chairing Authority* intends to review the arrangements, strategies, processes and mechanisms implemented by *CCP A* to comply with EMIR or to evaluate the risks to which *CCP A* is, or might be, exposed, it shall consult and be informed by the views of College Members.

8.2 Where *Chairing Authority* performs a review or evaluation of *CCP A* under Article 21 of EMIR, it will provide detailed results of the findings of the review or evaluation to College Members within 30 calendar days of the finalisation of such review or evaluation or by 14 calendar days prior to the next meeting of the College, whichever is earlier. *Chairing Authority's* report will include details of any actions arising for *CCP A*, *Chairing Authority* or any third party as a result of the review or evaluation and any penalties to be imposed on *CCP A*.

8.3 A College Member will be entitled to raise any points of interest or concern it has with regard to the *Chairing Authority's* review or evaluation. *Chairing Authority* will endeavor to take into account these views during the finalisation of its review and evaluation to the extent possible and provide feedback to the relevant College Member on how its views have been taken on board.

## 9. Organisation and Coordination of Activities between College Members

9.1. For operational efficiency the College may wish, in accordance with Article 18(4)(c) of EMIR, to entrust one of more College Members with tasks relevant for the College's role with regard to *CCP A*.

9.2. Any entrustment of tasks, for instance via the establishment of dedicated task forces, will be voluntarily entered into by the College Members in question and should be structured in such a way as to not impact on the operation of this Written Agreement or on the ability of other College Members to participate fully and effectively in the College. Any entrustment of tasks shall not result in a change in the allocation of voting rights between College Members.

9.3. *Chairing Authority* will be responsible for meeting any requests for information made to the College from authorities other than College Members. *Chairing Authority* may request the assistance of a College Member with regard to such requests.

## 10. Information Requests to *CCP A*

10.1. Should a College Member (the 'requesting College Member') require specific information or data with regards to *CCP A*, it should inform *Chairing Authority*. The requesting College Member should copy the request to all College Members to ensure that *Chairing Authority* does not receive more than one request for such information or data. Such request should include an explanation of why such information is required for the purposes of enabling that College Member to carry out its duties in the context of Article 84(1) of EMIR.

10.2. If *Chairing Authority* considers that the request is not for the purposes of enabling the requesting College Member to carry out its duties in the context of Article 84(1) of EMIR, then *Chairing Authority* will provide the requesting College Member with feedback on why it considers this to be the case. *Chairing Authority* will copy such response to all College Members.

## 11. Emergency Situation

11.1 Pursuant to Article 24 of EMIR, *Chairing Authority* and all College Members, are responsible for assessing whether *CCP A* is facing an emergency situation. For guidance, any situation on which there is (or is a serious threat of) a major disruption to the functioning of *CCP A*, or there is significant evidence to indicate that there is a high risk of a default of a

major participant of *CCP A*, or such a default has occurred will typically be considered an emergency situation.

11.2. In the event of an emergency situation, as described in paragraph 11.1, *Chairing Authority* (or where relevant another College Member) will share with College Members the following information, where possible and without undue delay:

11.2.1. Details of the emergency situation;

11.2.2. Actions likely to be taken by *Chairing Authority* or, where relevant, by another authority;

11.2.3. Actions being taken by *CCP A*, including under its default rules, recovery or emergency procedures;

11.2.4. If applicable, details of any default protections exercised and/or recovery powers deployed by *CCP A*; and,

11.2.5. If applicable, details of failure-to-settle procedures used (by currency if relevant);

11.2.6. Details on the prospective implications of disruptions to *CCP A*'s performance and for the full and timely provision of its services to its clearing members and interoperable infrastructures; and

11.2.7. Any other available information that would be of particular relevance to other College Members.

11.3. For the avoidance of doubt, nothing in this Written Agreement should constrain the ability of *Chairing Authority* or any other College Member to take timely action during an emergency situation.

11.4. *Chairing Authority*, or the relevant College Member, may choose to distribute the information specified in Paragraph 11.2 by email or by means of a conference call or in-person meeting, as is considered appropriate at the time.

11.5. College Members shall cooperate closely, wherever necessary and according to national law, with other relevant authorities (including central banks, finance ministries and resolution authorities) with regard to an emergency situation in respect of *CCP A*.

11.6. In order to facilitate effective cooperation in an emergency situation, *Chairing Authority* will coordinate the preparation of a protocol regarding the operation of the College in an emergency situation. This protocol will indicate the type of information that *Chairing Authority* and College Members are expected to share in an emergency situation, how such information will be communicated and the timeframes in which communication would likely occur, in various different crisis scenarios. Such protocol will be regularly tested in coordination with the emergency situation testing of *CCP A* itself.

11.7. *Chairing Authority* will coordinate the emergency management activities of the College. *Chairing Authority* will take account of the views of other College Members with regard to the management of such emergency situations, except where a decision is required urgently in line with Article 20(3) of EMIR.

## 12. Withdrawal of Authorisation

- 12.1. Where *Chairing Authority* considers that one of the circumstances set out in Article 20(1) of EMIR for the withdrawal of CCP A's authorization applies, then *Chairing Authority* will inform the College before it commences its review of whether to withdraw the authorisation of CCP A as provided for in Article 20(2) of EMIR. However pursuant to Article 20(3) of EMIR, in situations in which a decision on the withdrawal of authorisation is urgently required, then the provisions of paragraph 12.6 and 12.7 will apply.
- 12.2. Should a College Member request that *Chairing Authority* perform a review of whether CCP A remains in compliance with the conditions under which authorisation was granted (under Article 20(4) of EMIR), *Chairing Authority* will notify all College Members of this request and will formally respond to the request within 14 calendar days. All College Members will be notified of *Chairing Authority's* response. If *Chairing Authority* decides not to undertake a requested review then it will provide the requesting authority and College Members with feedback on the reasons for not doing so.
- 12.3. *Chairing Authority* may, at its discretion, request the assistance or the views of any College Member with regards to the reviews specified in paragraphs 12.1 and 12.2. College Members will endeavour to fulfill such requests.
- 12.4. *Chairing Authority* will inform College Members in writing of the results of its review. College Members wishing to express a view on the results of the review should do so in writing to *Chairing Authority*. *Chairing Authority* will consider any such responses received and will respond in writing to the College Members concerned.
- 12.5. *Chairing Authority* may organise a meeting (by conference call or in-person as is considered appropriate at the time) of the College to consult College Members on the results of the review.
- 12.6. In situations in which *Chairing Authority* determines that an urgent decision on whether to withdraw the authorisation of CCP A is required, *Chairing Authority* will inform the College as soon as possible of:
- 12.6.1. The grounds for *Chairing Authority's* assessment that an urgent decision is required (an 'emergency review').
- 12.6.2. The timescale for *Chairing Authority's* emergency review.
- 12.7. *Chairing Authority* will, to the extent practical in the circumstances, take into account any views, comments or concerns expressed by College Members with regard to an emergency review. *Chairing Authority* will notify the College Members of the results of the emergency review and any action taken no later than CCP A is informed of *Chairing Authority's* decision. *Chairing Authority* will organise a meeting (either by conference call or in-person, as is considered appropriate at the time) of the College to discuss any issues and actions arising from *Chairing Authority's* emergency review as soon as is practical following the taking of any action resulting from the emergency review.

## 13. Dispute Resolution

- 13.1. The College Members will endeavour to resolve any disputes in the operation of the College or during the adoption of opinions of the College through informal discussion between the College Members. Such discussion may be bilateral or multilateral. *Chairing Authority* shall always be informed of any dispute.
- 13.2. Should informal discussions not resolve a dispute; the College Members involved in the dispute will appropriately escalate the issue internally within their organisations.
- 13.3. Should discussions between the College Members not resolve the dispute within 30 calendar days of the issue being escalated pursuant to paragraph 13.2, then the dispute will be referred to ESMA in accordance with Article 19(3) of the ESMA Regulation and Article 17(3) of EMIR.

#### **14. Confidentiality**

- 14.1. Pursuant to the professional secrecy requirements provided for in Article 83 of EMIR, and any other similar legal obligations such as those resulting from other European or national laws, College Members confirm that any confidential information received by virtue of their participation in the College shall only be used, and further transmitted relevant to the performance of their respective duties and in circumstances permitted under law.
- 14.2. Where further transmission of information received by virtue of participation in the College is permitted or required under law, then the relevant College Member shall not, to the extent possible under law, disclose such information without first obtaining the prior consent of the *Chairing Authority* or College Member that provided the information concerned.
- 14.3. Where the law to which a College Member is subject may prevent that College Member from obtaining prior consent for further disclosure in particular circumstances, then it shall inform *Chairing Authority* at the time of agreeing with this written agreement, specifying those circumstances.
- 14.4. Before a Non-EEA Authority can attend particular college meetings (or part of college meetings) pursuant to the provisions of paragraph 3.7, that Non-EEA Authority will be required to demonstrate to *Chairing Authority* that it is subject to equivalent professional secrecy obligations as those contained in Article 83 of EMIR and provide confirmation of such in writing.

#### **15. Entry into force of this Written Agreement**

- 15.1. This Written Agreement will enter into force upon formation of the College in accordance with paragraph 3.3.6 of this Written Agreement.

#### **16. Amendment of this Written Agreement**

- 16.1. Any College Member is eligible to propose an amendment of this Written Agreement.

16.2. Any amendment shall be proposed in writing and shall be distributed by email to all College Members. The proposing College Member shall include a description of the rationale for the proposed change and the proposed new text of the Written Agreement in its notification to the other College Members.

16.3. Acceptance of the proposed amendment will be subject to the agreement of all College Members pursuant to Article 18(5) of EMIR.

## **17. Termination of this Written Agreement**

17.1. This Written Agreement will remain in effect without an end date unless and until either:

17.1.1. *CCPA* ceases to be authorised under EMIR; or,

17.1.2. There is no longer a statutory basis for the operation of the College.

at which time the College will be terminated with immediate effect, following prior notice to college members.