



**EACH response to the ESMA consultative
paper on 'ESMA's Guidelines on CCP
conflicts of interest management'**

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1. Introduction

The European Association of CCP Clearing Houses (EACH) has represented the interests of Central Counterparties Clearing Houses (CCPs) in Europe since 1992. EACH currently has 20 members from 15 different European countries and is registered in the European Union Transparency Register with number 36897011311-96.

EACH welcomes the opportunity to respond to this ESMA consultation paper on ‘ESMA’s Guidelines on CCP conflicts of interest management’.

2. Governance

Q1: Do you agree with the definition and with the scope here above described?
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EACH agrees with the definition and scope of conflicts of interest to the extent that they are affecting the interests of the CCP and therefore are manageable by the CCP. We note that these are guidelines on Level 1 measures issued under ESMA’s general clarificatory powers, rather than specifically-empowered Level 2 or 3 guidelines. As such, the scope of application of these guidelines should be carefully and restrictively defined. In particular, **conflicts of interest that do not affect interests of the CCP should be excluded from the scope.**

In particular, the proposed guidelines include as a potential source of conflicts of interest the **relationship between clearing members, clients or between a clearing member and a client**, which should be considered by the CCP. We have **strong concerns about the requirement to address/consider potential conflicts of interest between these parties** in the CCPs conflicts of interest management, in particular as a CCP would not necessarily be aware of the identity of the clients of its clearing members. A CCP cannot therefore be aware of all conflicting interests within its customer base and, more importantly, has no legal basis for managing conflicts of interest within the customer base and/or enforcing mitigating measures at that level.

Clearing members and clients should retain responsibility to identify and manage their own conflicts of interests with other clearing members or clients. Therefore we request that **this requirement be deleted from paragraph 19.**

We appreciate that potential or real conflicts of interest can continue to have effects after the conflict ceased and understand that this should be taken into account when assessing the potential or real conflict of interest, as mentioned in paragraph 20.

However, we would be reluctant to pre-define a length of time during which potential conflicts of interest are presumed to continue to have effects after the conflict ceased. Each conflict of interest situation is different and unique. We would suggest clarifying in

paragraph 20 that such time period should only be determined in cases where a conflict of interest is actually occurring, and only in cases where this is relevant.

EACH has also strong concerns that the definition of ‘relevant persons’ for a CCP in the proposed guidelines is too extensive. In particular, the proposed guidelines include in the definition of a relevant person *‘staff and close family relationships as [...] relatives by blood or marriage up to the second degree, [...]’*, which should be considered by the CCP. By contrast, the requirements of Directive 2014/65 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU MiFID II), for example, are less restrictive. It appears also that the term ‘relevant person’ in Art 33 Commission Delegated Regulation 2017/565 concerning conflicts of interest potentially detrimental to a client is covering only family relationship up to the first degree. Therefore, we would propose to **replace in Article 12 the part of the definition of a relevant person by ‘staff and close family relationships as [...] relatives by blood or marriage up to the first degree, [...]’**.

Moreover, the definition of ‘staff’ should be aligned with Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMI), distinguishing between ‘board’, ‘senior management’, ‘chief officers’ and ‘employees’.

Q2: Do you think that the CCPs should implement such organisational arrangements to avoid an inappropriate use of confidential information?

Article 23 requires that a specific confidentiality agreement be signed by staff members and clearing members involved in the CCP’s risk committee and in the default management groups.

We agree that CCPs should have appropriate arrangements in place to safeguard confidential information from inappropriate use, and that there should be strict confidentiality obligations for these parties. The CCP should also ensure that these confidentiality obligations are known by and apply to all involved parties.

However, we think that the guidelines should allow a **more flexible approach** to fulfil this objective. Flexibility is required to account for the different sizes and set ups of the various CCPs. The choice of the approach for implementing these arrangements should be left to the respective CCP.

In general, a CCP already has existing provisions covering all relevant confidentiality obligations. For instance, a committee’s terms of reference or the CCP’s employment contracts may already include sufficient confidentiality provisions. In that case, **we do not see the need to sign additional (specific) confidentiality agreements**, as it would not add any additional benefits, and it would be duplicative and unnecessary burdens for compliance staff, and could create confusion in the cases where a person obtains confidential information but (wrongly) assumes that the confidentiality requirements do not apply to him because he has not (yet) been asked to sign a confidentiality agreement.

The requirement under paragraph 23 to sign specific confidentiality agreements should only be considered in the cases where no other confidentiality arrangements are in place. We suggest amending the guidelines to allow for this more flexible approach.

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

We consider the proposed rules of conduct to be generally appropriate, but suggest considering existing requirements.

Limitation of number of contacts or mandates for board members and executive directors

Regarding the limitation of the number of contracts or mandates **board members and executive directors** may have, **we would suggest clarifying the rules by including specific limitations.**

EACH recommends that the limitation remains proportionate. It is in the interest of a CCP to have board members that allow representation on a group board level or in other subsidiaries, taking rules of conduct into account. As CCPs are often part of a bigger corporate group, group mandates are common and have proven to work effectively, including with possible conflicts of interest being appropriately managed. A very strict and quantitative limitation would impair the ability of a CCP to attract highly-qualified and experienced managers and board members from group level. This could be problematic, taking into account that some CCPs are active in niche markets where specific expertise and deep knowledge is highly necessary. In addition, there may be instances where a representation at the level of the group board is helpful for steering a service provider. In the event of a possible conflict of interest, the respective board member or employee would be excluded or refused from negotiations or decision-making or voting processes in accordance with accepted market practices and general conflicts of interests laws.

EACH would also suggest to reproduce MIFiD II approach which sets at Article 45 paragraph 2: 'Executive or non-executive directorships held within the same group or undertakings where the market operator owns a qualifying holding shall be considered to be one single directorship'.

External auditors

Potential conflicts of interests with **external auditors** are **already sufficiently covered by requirements in Regulation (EU) No 537/2014** and additional national law measures. These requirements specify certain activities that are prohibited in situations where they would conflict with their activities as the external auditor of a firm. In order to prevent misinterpretations of the term '*external audits having a link with or receiving benefit from*

the CCP we would suggest adding a reference to the existing rules or deleting this specific requirement.

Disclosure of personal interests of staff and its close family relationship

As already stated in point Q1, EACH has strong concerns if the disclosure of every relative up to the second degree by every staff member is proportionate, reasonable and feasible. From our point of view, this requirement seems not workable in practice.

EACH also considers that the term ‘personal interests’ is too imprecise. It makes a great difference whether, for example, a staff member has the pure (private) interest in the financial market or the active participation in an association having connections to the financial sector. While the former does not necessarily imply a potential conflict of interest, the latter does. For this reason, **we would recommend replacing the term ‘personal interests’ by ‘paid or unpaid secondary employment or association membership’ or completely delete this requirement from Article 26.**

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

EACH supports the requirements for CCPs policy to contain clear rules concerning the acceptance of gifts. However, we believe that the reference to the notions of ‘threshold’ and ‘value’ may be too prescriptive, and that it may be more appropriate to require CCPs to set up a ‘framework’ for the acceptance of gifts, which would allow to cover a broader range of acceptability criteria.

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

We welcome the approach to define clear rules on the ownership of the financial instruments.

Nevertheless, these rules should firstly focus on specific dangers of conflicts of interest and secondly respect the right towards data protection. We would therefore suggest a less prescriptive approach, based on risk assessment and focusing on dealing rather than ownership of financial instruments. This especially affects the rules regarding the **pre-approval process** and the **portfolio disclosures**.

Pre-approval process

A CCP should be able to determine on a risk based approach, for which department or staff a pre-approval request for specific financial instruments appears necessary. This means that only areas with a potential vulnerability for these kinds of conflicts should be considered in the approach. For most employees, there are no specific threats of conflicts of interest arising based on their ownership of financial instruments (CCPs are active in a post trade

environment and we see limited room for potential conflicts of interest or insider trading). Furthermore, restrictions for specific financial instruments in certain situations (e.g. during an ongoing acquisition) are more effective and efficient than a pre-approval process. In addition, a pre-approval process will require the compliance officer to respond in a timely manner to the staff member concerned, in order to limit the chances of any negative impact due to the increase in the time to market. This will be very burdensome for CCPs, especially those that are not part of a larger group and which may not have the required resources. Thus, **the pre-approval process should only be one option rather than a mandatory approach.**

We would like also to highlight that the need for a pre-approval when performing any outside activity is more linked to the CCPs labour policies than to the management of conflicts of interest. Therefore, the need for a pre-approval should be left to the decision of the CCPs.

Portfolio disclosure

A disclosure of the financial instruments portfolio for staff is a strong intrusion into their privacy and should be considered with great care. In our experience, only selected persons or groups face risks for potential conflicts of interest based on their portfolio. **Thus, a portfolio disclosure requirement for all staff members appears not proportionate.** Furthermore, Article 26 already requires to disclose all (potential) conflicts of interest and thus already allows the CCP to take measures to avoid situations where a conflict of interests might arise. In addition, the detection of actual conflicts of interest can be reached through a transaction based monitoring process.

In our opinion, it is more important to ensure that all staff members are aware of potential areas that could lead to a conflict of interest. Therefore, we would recommend **excluding the portfolio disclosure requirement from Article 31 or allowing the CCP to limit the disclosure to specific financial instruments, specific persons or determined thresholds** of financial instruments on a risk based approach. In particular, we believe that the request of disclosure the portfolio at the hiring of a staff member and its annually updated seems disproportionate, and may be overly burdensome both for the staff members and the CCP.

Moreover, we disagree to set up rules to limit or monitor staff investments concerning entities, which are not controlled or even known by the CCP; such as clients or financial institutions (see Article 30).

Q6: Do you consider that the CPP staff should be trained on the applicable law and policies concerning the conflicts of interest as above described?

We think that CCP staff should be properly informed of the applicable rules and the relevant procedures in relation to conflicts of interests. Furthermore, CCP staff should acknowledge

they are aware of these rules and procedures. CCPs should retain the ability to determine how CCP staff is informed and trained.

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

We would suggest a more comprehensive approach. In its responsibilities to oversee the compliance function, the CCP’s board should monitor the effectiveness, rather than the efficiency, of the CCP’s arrangements to prevent and manage the conflicts of interest. The efficiency of the mechanisms introduced to prevent and manage conflicts of interest could be one of several indicators used to assess the effectiveness of the process, but should not be the only aspect under consideration.

Q8: Do you agree on the above specific organisational arrangements a CCP pertaining to a group should adopt to avoid and mitigate the risk of conflicts of interest?

We agree with most of the organisational arrangements relating to a CCP itself, but we firmly disagree with the rules affecting entities which are not controlled by the CCP.

CCP representation at board of parent company

In order to avoid duplicative or potentially conflicting requirements, we would recommend to **appropriately consider the governance models mandated under the national company law in Europe, and ensure that the provisions in the guidelines are compatible with the legal framework in the various member states**. This affects in particular the requirements outlined in Articles 39 and 40. For example, the requirement that a CCP should be well-represented and in a **balanced manner at the level of board of the parent company, conflicts with the German Stock Corporation Act (AktG). The AktG determines that only the Supervisory Board of a company can appoint the Executive Board**. Therefore, a subsidiary has no legal basis to influence decisions regarding the board of the parent company. This also applies for the rules outlined in Article 40. A subsidiary cannot influence the definition of roles for the board of the parent company or other companies it does not control. **We suggest limiting requirements for organisational arrangements to the level of the CCP itself.**

Proposed counterbalancing of board members

We fully share ESMA’s objective to guarantee the CCP independence. In accordance with article 27.2 of EMIR, at least one third, but no less than two, of the members of the CCP’s board shall be independent. We support this requirement which is appropriately calibrated to ensure a balance of interests. However, we have strong concerns with regard to additional requirements to counterbalance group members at the level of the CCP board or the supervisory board. In light of the limited availability of people with appropriate skills and experience, it may become increasingly difficult for CCPs to find appropriate additional board members, in particular for CCPs active in niche markets.

We believe that Articles 46, 47 and 48 address several labour issues that should not be included in this paper, such as wages, bonuses or recruitment processes.

Proposed penalties in outsourcing arrangements

EACH recommends excluding the requirement to define penalties for outsourcing agreements within the same group as outlined in Article 49. Fixed penalties could weaken the environment for the prevention of conflicts of interest through additional pressure. The need to fulfil outsourcing agreements is sufficiently covered by existing determined reporting requirements, along with appropriate escalation and enforcement mechanisms.

Q9: Do you think that the above-described procedure is appropriate to investigate, to solve, to monitor and to record the conflicts of interest?

We believe this is a too prescriptive list of requirements. EACH fully shares the view that CCPs should have appropriate policies and procedures to manage, monitor and administer potential and actual conflicts of interest. However, these should be defined depending on the size of the CCP involved.

Concerning paragraph 52, as it will not be required to evidence any potential conflicts of interest, we think it would be prudent to include that the Chief Compliance Officer shall investigate where there are reasonable grounds to do so (to prevent frivolous/false claims).

We would like also to have further clarification of the following terms:

- Referring to paragraph 55, the term ‘sufficient independence’ in the context of the decision making process is not specified. In general, we would consider all persons not directly involved in the conflict of interest as sufficiently independent. Therefore, we would suggest to clarify the term ‘sufficient independence’ in that manner. Further, it should be complemented that in case of doubt, a joint decision by different persons or bodies may be considered necessary to reach an objective decision making process for the conflict of interest.
- Referring to paragraph 56, it should be made clear that not all of the listed measures to remedy probable or existing conflicts of interest are mandatory. The measures taken should be based on a risk based approach.
- Referring to paragraph 59, the term ‘material breaches’ should be specified to reach a consistent approach for the reporting requirements to the competent authority. Furthermore, the described timeline to report material breaches to the national competent authority should only start after the breach has been recognised and analysed to a reasonable extend.

- Referring to paragraph 60, the conflict of interest register should be aligned with current market standards for credit institutions. This affects especially the need to track and record trainings performed by the staff and received gifts, which is required in paragraph 60 but not in line with current market standards for credit institutions in our experience.

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