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**EACH feedback on the European  
Commission proposal for a regulation on  
'Further amendments to the European  
Market Infrastructure Regulation (EMIR)'**

30<sup>th</sup> October 2017

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## 1. Introduction

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The European Association of CCP Clearing Houses (EACH) represents 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 provide feedback to the European Commission proposal for a regulation on 'Further amendments to the European Market Infrastructure Regulation (EMIR)'<sup>1</sup>.

In the experience of EACH Members, the current system of supervision of EU CCPs through the EMIR college architecture functions generally quite well. It represents an innovative system of supervision that aims to match the benefits of regulatory convergence and local knowledge. While EACH agrees with the European Commission's impact assessment that the current system of colleges established by the EMIR legislation to supervise EU CCPs needs some improvements, as expressed in our previous responses to public consultations<sup>2</sup>, we believe these improvements can be achieved without a complete overhaul of the existing supervisory regime for EU CCPs in order to make it **sound, efficient, transparent, proportional and convergent**.

In the following sections of this response we describe to what extent we believe that the supervisory architecture suggested in the European Commission legislative proposal meets those criteria and what steps we believe should be taken in order to address a number of weaknesses perceived in the existing EU system of CCP supervision.

## 2. ESMA Executive Session

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EACH agrees with the objective of the European Commission to improve the current system of EMIR colleges. However, we do not believe that the proposed Executive Session actually represents an improvement and meets the criteria of a well-functioning CCP supervisory regime described in the previous section.

While the impact assessment details the reasons why the European Commission opted for the Executive Session, we note the following weaknesses in such an approach:

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<sup>1</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs

<sup>2</sup> <http://www.eachccp.eu/wp-content/uploads/2016/04/EACH-response-to-EC-public-consultation-on-CMU-20150520.pdf>  
<http://www.eachccp.eu/wp-content/uploads/2015/07/EACH-response-to-European-Commission-consultation-on-EMIR-review-August-2015.pdf>

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- **Efficiency** - The proposed Executive Session adds an additional layer in the decision-making process, which we think **increases the complexity** of the supervisory architecture that already includes several layers of authorities (Table 1). This increased complexity leads to the following:
  - **Decreased efficiency** - EACH Members have already experienced delays and bottlenecks in the current system of approval process. In the new proposed system, the complexity of approving new products and changes to CCPs' risk models under articles 15 and 49 of EMIR would increase even more. This would be unfortunate as the expectation of EACH members would be that an improved supervisory architecture at EU level would be more rather than less efficient.
  - **Increased duplication** – It is possible that the same authorities participate at the Executive Session, the college and in some cases participate in giving separate opinions as central bank of issue.

**Table 1 – Increased complexity of the approval process for new CCP products**

<b>Approval process</b>	
<b>Current system</b>	<b>Executive Session</b>
1. Assessment by the NCA 2. Opinion from the college 3. Opinion of ESMA	1. Draft decision by the NCA 2. Consent of ESMA CCP Executive session 3. Consent of the Central Bank of Issue 4. Opinion from the college

- **Transparency** – As proposed by the European Commission, we think that the status and composition of the ESMA Executive Session is unclear. The division of tasks and powers between the Executive Session and the supervisory colleges is not clearly articulated.
- **Responsibility** – We believe it is possible that the Executive Session structure would lead to a situation in which there would be a discrepancy between competences and responsibility. The major influence on decisions related to a CCP would be in the hands of the Executive Session whereas a fiscal responsibility in case that supervision does not work and the CCP is in trouble would rest at the national level
- **Financial burden** – The European Commission legislative proposal suggests the payment of fees by CCPs to finance the work of the Executive Session. For the majority of CCPs that already pay fees to their National Competent Authorities (NCAs), the Executive Session would likely result in an additional financial burden without any efficiencies, considering that the NCA would still keep some supervisory duties, and

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that the CCP would therefore have to pay fees to both the NCA and to the Executive Session.

EACH believes that an enhanced and more efficient system of the EU supervision should at least be cost neutral for CCPs or represent a cost decrease out of the savings of such a more efficient system.

Furthermore, it is not clear from the proposal how the fees are charged. We believe that fees should be proportionate to the activities, financial instruments cleared and size of the CCP and there should be a clear and transparent formula to calculate them.

### **3. An improved system of EU-CCP Supervision**

For the reasons stated above, we think that the Executive Session is not the right supervisory architecture for EU CCPs. Based on the experience of EACH members, gained through their authorisation processes, their experience of being supervised through the existing EMIR framework as well as the process to extend their services and scope of products and apply changes to improve their risk models, we believe that in order to achieve a greater degree of supervisory convergence, any supervisory architecture of EU CCPs, either the improved version of the current system of colleges or a regime of a single authority, should be based on the following principles:

- **Soundness** – The supervisory architecture of EU CCPs should be effective in ensuring a safe and sound CCP industry.
- **Efficiency** – The supervisory architecture should be efficient to ensure that markets requests can be addressed as diligently as possible and that it meets client momentum.
- **Transparency** – The supervisory architecture should ensure clear procedures, criteria, roles of authorities involved and clear timeline.
- **Proportionality and Fairness** – The supervisory architecture should be proportional to the activities, financial instruments cleared and size of the CCP being supervised. This proportionality element is of particular importance if the EU Supervisory architecture was to consider additional supervisory requirements to the ones included in EMIR.
- **Convergent** – The supervisory architecture should provide a level playing field ensuring the harmonisation of standards and rules for CCPs. In this way, inconsistencies and regulatory arbitrage would be removed.

We believe that certain improvements can be made to the current EU supervisory framework of CCPs that would contribute to better meeting those principles. Whatever form the EU supervisory framework takes, we believe that it should have the following characteristics:

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- **Clear role and accountability of regulators** - To clearly define the **role and accountability of each regulator** (national competent authorities, ESMA, etc.) in the supervisory process. Further clarity is needed with regard to the supervisory responsibilities of the institutions to ensure clear accountability. In addition, a clear coordination between authorities is also needed.
- **Clear procedure**
  - To enhance the **transparency around the schedule of College meetings** and increased their frequency (potentially once a month) with the publication of the dates (with the possibility of cancellation) so as to ensure there is both transparency and protections to avoid bottlenecks.
  - The application of a **single and clear procedure** equally across all CCPs and all jurisdictions in the EU for the approval of new products and improvements to risk models. Based on the experience of EACH members, the current process as laid out in article 15 and 49 of EMIR can in some circumstances lead to a CCP taking longer than one and a half years to get a new product approved from the point that the product is technically ready.
- **Clear criteria** - A detailed description of the **criteria** that authorities believe a new product or a change to a CCP's risk model should be assessed against in order to consider its approval. In this sense the ESMA Opinion 'ESMA/2016/1574'<sup>3</sup> addressed the following points:
  - A list of indicative criteria to determine whether a change is deemed 'significant'.
  - Disclosure of the factors considered when determining any material changes (Article 49) to a CCP's existing risk management framework
  - A clear timeframe for the responsible authority to decide on the qualification of the change.

However, we would request a clarification from ESMA on the following:

- Changes which are not deemed 'significant' should require an ex-post control by the national competent authority, rather than an ex-ante approval.
- A clear description of the validation process, including the order and timeframe in which the independent validation, the validation by the NCA and ESMA as well as the college opinion, should occur. In our opinion, the ESMA validation referred to under Article 49 should be an annual ex post check to confirm that the NCA has properly carried out its review and addressed all relevant issues with regard to the CCPs' models, rather than an ex-ante approval process.

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<sup>3</sup> 'Common indicators for new products and services under Article 15 and for significant changes under Article 49 of EMIR', November 2016, [https://www.esma.europa.eu/sites/default/files/library/2016-1574\\_-\\_opinion\\_on\\_significant\\_changes\\_for\\_ccps.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-1574_-_opinion_on_significant_changes_for_ccps.pdf)

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- **Proportionality**
  - **Supervision**
    - The Supervisory architecture should be proportional to the activities, financial instruments cleared and size of the CCP being supervised. This proportionality element is of particular importance if the EU Supervisory architecture was to consider additional supervisory requirements to the ones included in EMIR.
    - The treatment of members of the supervisory body (either CCPs colleges or single authority), should be equal (i.e. no authority should be given more than one vote).
    - EACH members believe that proportionality rules are needed in the structure of CCP colleges. We think that the competent authority should be part of the college structure only if clearing members have significant contributions to the CCPs default funds and they should not be part of the college in the case where the contributions of clearing members are minor or insignificant to the system.
  - **Responsibilities** - The supervisory architecture should also ensure that the fiscal responsibility is placed with those that take the supervisory decisions.
  - **Local markets** – In case of local markets, CCPs supervisors:
    - Know all the specifics of their market and national laws.
    - Have knowledge and experiences in the functioning of national CCPs.
    - Maintain proportionality in supervisory activities more effectively and efficiently.
  - **Costs** - As EU CCPs clear different products with different range of risk, we believe that these differences should be taken into consideration in relation to the supervision and the cost related to the supervision. We would propose that EU Supervision should be proportional to the activities, financial instruments cleared and size of the CCP.
- **Safeguards** - Further transparency is needed with regard to the decision-making process and procedure for CCPs to appeal authorities' decisions. Clear safeguards are needed against the disproportionate or wrongful exercise of the powers of authorities.
- **Clear data and documents** - A detailed description of the data and documents to be provided in the application.
- **Target reviews** - In case of a new service or activity, the assessments by the competent authorities should be targeted and specific to those elements of an additional service or activity which are new to that service or activity.
- **No overlapping assessment** – The assessments currently performed by some regulators lead to the repetition of assessment which may not be directly related to

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the improvement proposed and which had already been approved by authorities during the original article 17 authorisation (i.e. during the authorisation of the CCP). An improved supervisory architecture should ensure that this type of repetition does not happen.

- **Level playing field** - EACH members believe that the same process for the authorisation of new products and improvement of risk models should apply to all CCPs, rather than depending on the interpretation of NCAs. An unclear and lengthy approval process could particularly put the smallest CCPs at a disadvantage when trying to expand their activities.

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