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# **EACH Response to the OECD consultation “Progress Report on Amount A of Pillar One”**

August 2022

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## Introduction

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The European Association of CCP Clearing Houses (EACH) represents the interests of Central Counterparties (CCPs) in Europe since 1992. CCPs are financial market infrastructures that significantly contribute to safer, more efficient and transparent global financial markets. EACH currently has 18 members from 14 different European countries. EACH is registered in the European Union Transparency Register with number 36897011311-96.

EACH appreciates the opportunity to provide feedback to the OECD Progress Report on Amount A of Pillar One (hereinafter "the Progress Report").

## Introduction

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EACH greatly appreciates that OECD has included a reference to the CCP's risk management activity of 'clearing' within the definition of Regulated Financial Services under section 20 of the progress report. We would still respectfully request the OECD colleagues to consider that this text does not yet fully address the exclusion of a company mainly doing clearing activities from the scope of the OECD taxation. We detail our reasoning below.

As already detailed in our response<sup>1</sup> to the OECD consultation "Pillar One – Amount A: Regulated Financial Services Exclusion"<sup>2</sup> EACH is firmly in favour of **including Markets Infrastructures**, in particular **central counterparties (CCPs), Central Securities Depositories (CSDs)** and **Trading Venues** to the **list of Regulated Financial Institutions**. As a general comment, we believe that it is important to ensure a level playing field across the financial sector as a whole.

Although EACH appreciates that the Progress Report includes references to e.g. clearing activities and trading activities under the definition of 'Investment Institution', we believe that having a **dedicated definition of Market Infrastructures in the list of Regulated Financial Services** under Section 20 would help providing further clarity and legal certainty. We also would like to reiterate that as it is the case with other financial institutions, Market Infrastructures are heavily regulated under EU and national laws as they need to hold a licence and are subject to risk-based capital adequacy requirements.

More specifically, a **definition of CCP** can be found both in paragraphs 1.8, 1.9 and 1.13 of the CPMI-IOSCO Principles for financial market infrastructures<sup>3</sup>, according to which a CCP "*interposes itself between counterparties to contracts traded in one or more financial markets, becoming the buyer to every seller and the seller to every buyer and thereby ensuring the performance of open contracts*". CCPs significantly **reduce risks to markets participants** (generally banks) through the multilateral netting of trades and by imposing robust – and, in Europe, **heavily regulated – risk management procedures**. CCPs indeed require participants

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<sup>1</sup> <https://eachccp.eu/wp-content/uploads/2022/05/EACH-response-OECD-consultation-Amount-A-Regulated-Financial-Services-Exclusion.pdf>

<sup>2</sup> <https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-regulated-financial-services-exclusion.pdf>

<sup>3</sup> <https://www.bis.org/cpmi/publ/d101a.pdf>

to provide collateral (in the form of initial margin and other financial resources) to cover current and potential future exposures, and may mutualise certain risks through devices such as default funds. The main goal of the CCP is therefore that of reducing risks not only to market participants, but they can also **reduce systemic risk in the markets they serve**.

## EACH proposals

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It is our opinion that Market Infrastructures satisfy the three elements indicated in the consultation document of **licensing requirement, regulatory capital requirement, and activities requirement**.

Concretely, **EACH believes that the best option would be to create a dedicated definition of Market Infrastructures in Section 20, as follows:**

**Table 1:** EACH best option

Consultation text	EACH proposal
<p>Section 20: Definitions of Regulated Financial Services</p> <p>16. “Regulated Financial Institution” means a Depository Institution; Credit Institution; Investment Institution; Insurance Institution; Asset Manager; Mixed Financial Institution; RFI Service Entity <b>and Market Infrastructure</b>.</p>	<p>Section 20: Definitions of Regulated Financial Services</p> <p><b>27. Market Infrastructure means a group entity that:</b></p> <ul style="list-style-type: none"> <li><b>a. That is a Central Counterparty as defined in the CPMI-IOSCO Principles for financial market infrastructures, a Central Security Depository as defined in the, CPMI-IOSCO Principles for financial market infrastructures, or a trading venue defined as an exchange or other multilateral trading facilities.</b></li> <li><b>b. That is licensed to carry on the activities listed in paragraph (d) under the laws or regulations of the jurisdiction in which the Group Entity does that business or, in the case of a Group Entity that does such business in a European Economic Area (EEA) Member State, is licensed by a competent authority to carry on such business in an EEA Member State; and</b></li> <li><b>c. That is subject to capital adequacy requirements connected to the licences under paragraph (b), or to the licenced activities in paragraph</b></li> </ul>

	<p><b>(d), as promulgated by national or international regulators.</b></p> <p><b>d. For which the total gross income attributable to one of the following activities, or a combination of them, equals or exceeds [75] per cent of the Group Entity's total gross income during the Period:</b></p> <p style="padding-left: 20px;"><b>a. trading activities, clearing activities, settling activities and activities ancillary to these.</b></p>
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As an alternative **second-best option**, EACH would also support amending the definition of **"Investment Institution"** to explicitly mention that an Investment Institution is licensed to carry on, among the various businesses already listed in the Progress Report, also **central counterparty clearing (CCP), trading venue, or central security depository (CSD) businesses and activities ancillary to these.**

In addition, we would kindly suggest amending OECD point 14(c)(i) of Section 20 under the definition of Investment Institution specifying that the **activities listed under such point are not mutually exclusive** but if e.g. a Group Entity perform **both clearing and trading activities**, and their **combination equals or exceeds 75% of the Group Entity's Total Reported Income**, then this **Group Entity would qualify as Investment Institution**. The rationale behind this request is that a large majority of CCPs are part of broader groups that usually also include trading and settlement activities, none of which we understand are the target of the proposed OECD taxation regime. A failure to clarify that the activities included in point 14(c)(i) of Section 20 are not mutually exclusive could lead to a Group entity with e.g. clearing and trading activities income beyond 75% of the group total to be caught by the tax, while if the same entity only had clearing or trading activities' income beyond 75% would not.

**Table 2:** EACH second best option

Consultation text	EACH proposal
<p>14. "Investment Institution" means a Group Entity:</p> <p>a. that is licensed to carry on a broker dealer, custodial, investment firm or investment banking business or one or more of the activities listed in paragraph (c) under the laws or regulations of the jurisdiction in which the Group Entity does that business or, in the case of a Group Entity that does such business in one or more EEA Member States, is licensed by a competent authority to carry on such business in an EEA Member State; and</p>	<p>14. "Investment Institution" means a Group Entity:</p> <p>a. that is licensed to carry on a broker dealer, custodial, investment firm, <del>or</del> investment banking <b>central clearing counterparty (CCP), trading venue, or central security depository (CSD)</b> business or one or more of the activities listed in paragraph (c) under the laws or regulations of the jurisdiction in which the Group Entity does that business or, in the case of a Group Entity that does such business in one or more EEA Member States, is licensed by a competent authority to carry</p>

**b) that is subject to capital adequacy requirements that reflect the Core Principles for Effective Banking Supervision as provided by the Basel Committee on Banking Supervision or Objectives and Principles of Securities Regulation as adopted by the International Organisation of Securities Commissions (IOSCO) and the related implementing methodology; and**

c. For which the Total Reported Income attributable to one or more of the following activities equals or exceeds 75 per cent of the Group Entity's Total Reported Income during the Period:

- i. dealing, broking, clearing or trading in Financial Assets for own account or for account of customers; and / or  
[...]

on such business in an EEA Member State; and

b. that is subject to **either** capital adequacy requirements that reflect the Core Principles for Effective

Banking Supervision as provided by the Basel Committee on Banking Supervision or Objectives

and Principles of Securities Regulation as adopted by the International Organisation of Securities

Commissions (IOSCO) and the related implementing methodology; **or capital adequacy requirements connected to the licences under paragraph (a), or to the licenced activities in paragraph (c), as promulgated by national or international regulators.**

c. For which the Total Reported Income attributable to one or more of the following activities equals or exceeds 75 per cent of the Group Entity's Total Reported Income during the Period:

- i. dealing, broking, clearing, **settling and/or** trading in Financial Assets either for own account or for account of customers, or otherwise the activities referred to in paragraph (a), or activities ancillary to these; and / or  
[...]

As the European Association of CCP Clearing Houses, we would like to **focus our feedback** on the reasons why we believe that **CCPs should be explicitly included in the definition of Regulated Financial Institution**. For what concerns CSDs and Trading Tenues, we would kindly invite the OECD to refer to the relevant individual Associations' responses.

### **Why should CCPs be included in the definition of Regulated Financial Institution?**

As mentioned above, CCPs meet the necessary requirements to be explicitly included in the list of Regulated Financial Institutions.

#### **Licensing & regulatory requirements**

Paragraph 4.1.3 of the CPMI-IOSCO Principles for financial market infrastructures specifies that *"FMIs that have been identified using these criteria should be regulated, supervised, and overseen by a central bank, market regulator, or other relevant authority. [...]. For example, one*

*or more authorities may have regulatory, supervisory, or oversight responsibility for an FMI registered, chartered, licensed, or designated as an entity that falls within a specific legislative mandate."* In **Europe**, the procedures for the **authorisation of a European CCP** are strictly **regulated via the EMIR Legislation**<sup>4</sup>, specifically in **Articles 14 to 21**. More, in detail, such Articles define the following:

- Article 14 – Conditions and procedures for the authorisation of a CCP
- Article 15 – Extension of activities and services
- Article 16 – Capital requirements
- Article 17 – Procedure for granting and refusing authorisation
- Article 18 – College
- Article 19 – Opinion of the college
- Article 20 – Withdrawal of the authorisation
- Article 21 – Review and evaluation

A legal person established in the EU that intends to provide clearing services as a CCP has to **submit an application for authorisation to the national competent authority (NCA)** of the Member State where it is established which, in turns, immediately transmits all the information received from the applicant CCP to European Securities and Markets Authority (ESMA) and the college<sup>5</sup>. Such authorisation is granted **only upon unanimity of the members of the college** and **only for activities linked to clearing** and specifies the **services or activities which the CCP is authorised to provide** or perform including the classes of financial instruments covered by such authorisation. Furthermore, should the CCP wish to **extend its business** to additional services or activities not covered by the initial authorisation, a **specific request** must be submitted to the NCA.

In addition, the EMIR Legislation also regulates the **supervision of CCPs**, via Article 22.

### **Regulatory capital requirement**

European CCPs are subject, via Article 16 of EMIR, to have a **permanent and available initial capital of at least EUR 7,5 million**. Further detail concerning the capital requirements for CCPs (e.g. Capital requirements for winding down or restructuring, for operational and legal risk, etc.) can be found in the **Commission Delegated Regulation (EU) No 152/2013**<sup>6</sup>

In light of this explanation, EACH understands that including CCPs in the definition of Regulated Financial Services Institutions is in line with the OECD's intention of including into such definition those entities satisfying the three requirements of licensing, capital and activities.

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<sup>4</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=EN>

<sup>5</sup> The college is composed by ESMA; the CCP's NCA; the competent authorities responsible for the supervision of the clearing members of the CCP; the competent authorities responsible for the supervision of trading venues served by the CCP; the competent authorities supervising CCPs with which interoperability arrangements have been established; the competent authorities supervising CSDs to which the CCP is linked; the relevant members of the ESCB responsible for the oversight of the CCP and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established; the central banks of issue of the most relevant Union currencies of the financial instruments cleared.

<sup>6</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0152&from=EN>

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