

Opinion of the European Banking Authority on Capital requirements for Central Counterparties under the EMIR.

Introduction and legal basis

1. Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties ('CCPs') and trade repositories¹ (known as 'EMIR') requires the EBA to draft regulatory technical standards (RTS) on the capital requirements for CCPs. In the course of the development of these draft RTS it became evident that while from a supervisory viewpoint it was imperative to include certain requirements in the draft RTS, from an EU law point of view this is not permissible, given the boundaries of the mandate for the development of the RTS contained in the EMIR. This point relates to the possibility for National Supervisory Authorities (NSAs) of applying additional capital requirements for risks not (fully) covered by the capital requirements in Art. 16(2) EMIR.
2. In addition, this opinion elaborates on the treatment of intra-day exposures and the treatment of interoperability arrangements for non-cash products. It is the EBA view that these points should be accommodated in some part of the EU rulebook on the capital for CCPs.
3. The EBA competence to deliver an opinion is based on Article 34(1) of Regulation No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC¹, as the capital requirements for central counterparties relates to the EBA's area of competence.
4. In accordance with Article 14(5) of the Rules of procedure of the EBA, the Board of Supervisors has adopted this opinion.

¹ eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:FULL:EN:PDF

Specific comments and proposals

1.1 Additional capital requirements

5. According to Article 21 of the EMIR, the relevant competent authority 'shall review the arrangements, strategies, processes and mechanisms implemented by the CCPs to comply with this Regulation and evaluate the risks to which the CCPs are, or might be exposed'. Given that the capital requirements set out in the Final Draft RTS complement the EMIR, the relevant competent authority shall also have to evaluate whether the risks to which the CCP is, or might be exposed are not addressed, or not fully addressed, by these capital requirements. Those risks include for example reputation, strategic or any other risk which may arise from the economic or business environment. The competent authority shall ensure that an appropriate capital charge is applied in such cases.
6. The EBA suggests that, as a result of the review and evaluation of such risks the competent authority should be given the discretion to apply, where necessary, additional capital requirements or to require the CCP to take the necessary actions or steps to address the situation at an early stage. Given the systemic importance of CCPs the EBA proposes the introduction, for CCPs, of an approach similar to the Pillar 2 for credit institutions which helps complementing and tailoring requirements under constrained discretion.

1.2 Intra-day exposures

7. Some CCPs are exposed to large intra-day exposures to commercial banks in the course of their arrangements for receiving and paying cash margin to members each day.
8. Timing differences in the receipt and payment of funds can result in CCPs holding large intra-day balances with commercial banks that provide account management and payment services to the CCP. EMIR Art 50(1) states that such settlement risks should be 'strictly limited'; and the ESMA draft technical standard on liquidity requires CCPs to assess the liquidity risk arising from these exposures; but there are no quantitative limits on these exposures.
9. The CRD capital framework does not apply capital charges to intra-day risks. The EBA considered the possibility of an approach that calculated the peak intra-day exposure over some period (e.g. each quarter) and applied the appropriate CRD capital weight to that exposure.
10. The capital requirement to cover the risks arising from those intra-day peaks is an issue that has never been addressed in any regulation. The EBA believes that current regulations do not offer the appropriate tools for addressing these kinds of extreme events which nevertheless should be envisaged and covered. The EBA recommends that more work should be done to assess the size of these intra-day exposures.
11. In addition, the EBA suggests that the principle of the coverage of these risks is properly set either within the EMIR framework or with the proposal of a special regulation by the EU-COM. The EBA would stand ready to prepare technical standards in cooperation with ESCB and ESMA.

1.3 Interoperability for non cash products.

12. It is important to notice that the EMIR is silent about interoperability arrangements other than for cash products. In respect of these cash instruments, interoperability arrangements are regulated under Title V of EMIR. In particular, Art. 52 requires CCPs to avoid that the default of a clearing member affects an interoperable CCPs. Further, Art. 53 EMIR requires that margins which are posted from one CCP to another are segregated, available to the receiving CCP only in case of default of the providing CCP and must be readily returned to the providing CCP in case of default of the receiving CCP. This suggests that default fund contributions are not allowed under Title V for inter-operating CCPs clearing cash products.

13. With respect to other types of interoperability, in the draft RTS on Capital Requirements for CCPs, the EBA opted to apply a 1250% risk weighting, that aims to disincentivise default fund contributions and thus avoid inter-CCP contagion.

14. The EBA suggests that the interoperability arrangements, other than for cash products, should be properly set out in the EMIR Level 1 framework.

This opinion will be published on the EBA's website.

Done at London, 26 September 2012.

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For the Board of Supervisors