



one clear connection

EUROPEAN COMMODITY CLEARING RESPONSE  
TO THE CONSULTATION PAPER ON ESMA`S  
GUIDELINES ON CCP CONFLICT OF INTEREST  
MANAGEMENT

Datum / Date **23.08.2017**

Ort / Place **Leipzig**

Dokumentversion / Document Release

## Preliminary Remark

European Commodity Clearing (ECC) AG welcomes the opportunity to advise on conflicts of interest management. Through robust organisational arrangements, potential conflicts can be prevented, which is in the best interests of its clearing members and clients. ECC is also in favour of an exchange of best practices and a consistent implementation and harmonisation creating a level playing field between the different central counterparties (CCPs).

Nevertheless it is of high importance to find practical and suitable solutions for CCPs taking into account also their special business situation. Especially possible restrictions to the management or the supervisory board have to be seen critical. ECC opposes a limitation to the number of contracts or mandates a board member or executive director can have, as it limits the potential for representation of the CCP and makes it difficult to attract highly-qualified and experienced managers in these boards. ECC is also critical of strict rules such as counterbalancing group members at the level of the CCP board. Particularly CCPs active in niche markets are likely to have difficulties to find appropriate members. ECC is convinced that the requirements on independent members within the supervisory board set out by EMIR, are sufficient.

With respect to the ownership of the financial instruments ECC believes that the principle of proportionality is violated. A register for every transaction of every employee is opposed.

## Response to questions

Q 1) *Do you agree with the definition and with the scope here above described?*

We share the definition that a conflict of interest arises when a stakeholder's own interest interferes with the CCP's interest or the CCP's clients' interest in its objectivity to make a decision.

The scope of conflicts of interest proposed in the consultation should be limited to the extent that they are affecting the interests of the CCP and therefore are manageable by the CCP. Conflicts of interest that do not affect interests of the CCP should be excluded from the scope, e.g. between clearing members, clients or between a clearing member and a client.

Q 2) *Do you think that the CCPs should implement such organisational arrangements to avoid an inappropriate use of confidential information?*

CCPs are always acting according to the principles of confidence, integrity and equal treatment as laid out in EMIR. For ECC, it goes without saying that information is kept internally and will be in no case used for own benefit. Signing a specific confidentiality agreement would simply be a confirmation of what already exists in practice.

ECC already implemented internal guidelines precluding the undue exchange or inappropriate use of confidential information within the CCP. Regarding data security, ECC follows strict principles and executes adequate and dedicated IT security measures.

It needs to be observed that implemented and effective national and European regulations go hand in hand without any conflicts.

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

ECC always acts in a transparent manner and in compliance with existing regulations like EMIR. Also disciplinary actions against staff members in case of breaching the requirements are already implemented within ECC.

ECC strongly opposes a limitation of the number of contracts or mandates board members and executive directors can have. It is in the interest of a CCP to have board members that allow for the representation on a group board level or in other subsidiaries, taking rules of conduct into account. As CCPs are often part of a bigger exchange group, group mandates are common and have proven to work effectively, also with respect to possible conflicts of interest. Moreover, limiting the amount of mandates would limit the ability to attract highly-qualified and experienced managers and board members from group level. Such a limit would be even more problematic for CCPs active in niche markets where profound expertise and knowledge of the exchange side is highly necessary. Also for steering the internal service provider at the level of the group board a representation is indispensable. In the unlikely event of a possible conflict of interest the respec-

tive board member or employee could be excluded from negotiations or decision-making or voting processes.

Appointing an external auditor having a link or receiving benefit from the CCP is seen as impossible, as it would encounter the independent audit.

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

Yes. ECC already applied a guideline regarding the acceptance of gifts limiting the value of the gift to 50 EUR. Any deviation needs to be notified to the Compliance function.

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

Monitoring the ownership of financial instruments in view of detecting possible insider trading, already exists within ECC as being part of Deutsche Börse Group. New rules in addition to MAR are not deemed necessary at this point. All employees within Deutsche Börse group companies have to follow rules for private investments and need to adhere to restricted lists or watch lists for their private investments, e.g. not selling or buying any shares in specific times like within merger discussions.

A deeper CCP monitoring with a pre-approval and/or restrictions to invest or disinvest in competitors, clearing members, clients, financial institutions and service providers would create a considerable administrative effort and disproportionately limit the possibility for private investments.

The principle of proportionality is considerably violated as, for example, the staff of a small clearing house such as ECC which is active in a variety of commodities, would be limited in investments in financial companies, companies from the energy sector or IT companies being the service provider for them. At least thresholds for the value of the investments or limits for certain hierarchy areas or departments seem absolutely necessary.

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?*

Yes. We fully support respective trainings on conflicts of interest for CCP staff on the applicable law and policies.

Q7) *Do you agree on the above-proposed rules? (concerning oversight)*

Yes. An annual report on compliance is already addressed to the Executive Board of ECC. The policy on conflicts of interest is reviewed on a regular basis and would be changed if significant amendments are required.

Like all implemented policies also the policy on conflicts of interest is part of the internal and external audit.

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?*

CCPs should be well-represented and in a balanced manner at the level of the management board of the mother company. However, also the mother company should be represented as the main shareholder within the governance of the CCP, always being one of the most important and relevant subsidiaries. In case of any possible conflict of interest at the level of the group, they will be resolved in a fairly, independent and efficient manner.

As an EMIR-licensed CCP, ECC already adopted the introduction of independent supervisory board members with three independent out of six members. Nevertheless, a strict rule like counterbalancing group members at the level of the CCP board is opposed, as it limits the choice of people. Especially CCPs active in niche markets might have difficulties to find appropriate members.

ECC AG, being incorporated as joint-stock company (German: Aktiengesellschaft), has a management board and a supervisory board. According to the German Stock Corporation Act (Aktiengesetz), a list of tasks is dedicated to the supervisory board. ECC also has implemented a certain catalogue of material decisions that need to be approved by the supervisory board. Like for the supervisory board, also for the management board, a list of responsibilities is defined within ECC.

Outsourcing activities within ECC are clearly defined in a dedicated outsourcing guideline stating clear procedures. All major outsourcing activities are also decided by the CCP's supervisory board. With ECC's IT department being outsourced, already today clear rules of prioritisation of the IT projects and change requests exist. Any change requests or projects necessary to the CCP to comply with the regulation or any request from the competent authority are always implemented by the subcontractor in a timely manner and with the highest priority.

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

ECC is in favour of avoiding or mitigating potential or actual conflicts of interest before they might happen and has a wide list of control measures at its disposal.

Nevertheless, the proposed 48 hour time limit for breaching the conflict of interest policy seems inappropriate, as the reporting line within the company and between the company and the national competent authority is expected to take longer for a prudential and reasonable assessment of the actual situation. In case of reporting, the term "material breaches" should be specified to achieve a consistent way of reporting.

Furthermore, ECC is critical of the Conflicts of Interest register which should track and record the investments in financial instruments owned by the staff and any transactions related to it. It would create a considerable administrative effort on the level of smaller CCPs and infringe the principle of proportionality.

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