

CCP Austria Abwicklungsstelle
für Börsengeschäfte GmbH

Strauchgasse 1-3, 1010 Vienna
Phone: +43 1 533 22 44
Telefax +43 1 533 22 44 -5880
www.ccpa.at
Transparency Register N°:
376478149390-21

CCP.A's Position Paper on EMIR 3

Vienna, 16/03/23

Subject: Position paper of CCP.A on the Commission Proposal for a Regulation amending EMIR, CRR and the Proposal for a Directive amending UCITS, CRD, IFD

Dear Sir or Madam,

with this Position Paper, CCP Austria Abwicklungsstelle für Börsengeschäfte GmbH ("CCP.A") would like to present its position on the targeted EMIR review. CCP.A is a small limited liability company pursuant to § 221 Austrian Commercial Code (UGB) with its registered office in Vienna. CCP.A is a CCP authorized under EMIR, which currently acts as a central counterparty for all trades concluded on the Vienna Stock Exchange as a securities exchange and EXAA on behalf of the Vienna Stock Exchange as a general commodities exchange for day-ahead Energy Spot Market Transactions. For EXAA, CCP.A also handles the financial settlement of the obligations arising from European market coupling. Therefore, EMIR and the targeted EMIR Review (COM(2022) 697) (the "**Proposal**") are fully applicable for CCP.A.

First of all, we would like to say at the outset that we welcome the idea of an EMIR Review in principle. At this point, we would like to emphasize in particular a non-objection procedure as well as the possibility for CCPs to accept non fully collateralized bank guarantees even if not all questions have been finally clarified here. Especially with regard to the non-objection procedure it should be clarified that there are non-material (business as usual) changes that require neither an extension request nor passing through a non-objection procedure. Nonetheless, there is one important change in the Proposal, which is the reason for this Position Paper. This relates to the incorporation of Electricity Spot Market Transactions in the scope of EMIR:

1. Incorporation of non-financial instruments in EMIR

- a) A major change in the Proposal is the **inclusion of clearing of non-financial instruments in the scope of EMIR**. According to Art 14 para. 3 of the Proposal, a CCP shall include in its application the classes of non-financial instruments that a CCP intends to clear. According to Art 14 para. 3 and Art 15 of the Proposal, an extension application must be submitted if a CCP intends to clear non-financial instruments. According to Art 17, the application has to be granted if it is ensured that a CCP complies with all the requirements laid down in EMIR "*including, where applicable, for the provision of clearing services or activities for non-financial instruments*". Non-financial instruments are understood broadly and include e.g. Electricity Spot Market Transactions. Rec 19 of the Proposal clarifies that when a CCP clears non-financial instruments, in addition to financial instruments, the CCP's competent authority should be able to ensure that the CCP complies with all requirements of EMIR for all services it offers.
- b) This would lead to the result that **all EMIR-provisions** and all provisions derived from EMIR, like the Commission Delegated Regulation (EU) 153/2013 with regard to regulatory technical standards on requirements for central counterparties, **shall be applicable** not only to the clearing of financial instruments but also to the **clearing of non-financial instruments such as Electricity Spot Market Transactions**. A restriction of the applicability of EMIR requirements to financial instruments or derivatives cannot be inferred from the text of the Proposal.
- c) Since CCP.A only clears Electricity Spot Market Transactions and no derivatives in which the underlying asset is an energy product or other commodities, in this Position Paper we use the example of Electricity Spot Market Transactions to demonstrate why it is problematic to include them in the scope of EMIR. The assessment of the appropriateness of including other commodities in the scope of EMIR shall be done on one-by-one basis.

2. Clearing of Electricity Spot Market Transactions

- a) Therefore, all provisions of EMIR would be applicable to the clearing of Electricity Spot Market Transactions as non-financial instruments as long as a CCP is authorised under EMIR. This would be a break from the previous legal regime: The relevant regulations for the clearing of Electricity Spot Market Transactions are the CACM Regulation (CACMR)¹ and REMIT², not EMIR. Therefore, currently all clearing of Electricity Spot Market Transactions is executed according to these regulations, in especially according to Art 68 CACMR.

¹ Regulation (EU) 2015/1222 on establishing a guideline on capacity allocation and congestion management.

² Regulation (EU) 1227/2011 on wholesale energy market integrity and transparency.

- b) Those regulations are based on Art 194 Treaty on the Functioning of the European Union ("TFEU") and are therefore not the same legal basis as for EMIR. EMIR is based on Art 114 TFEU for the functioning of the European Internal Market for financial services. The inclusion of Electricity Spot Market Transactions into the scope of EMIR is therefore an amalgamation of two areas of European law that are factually decoupled from each other. Furthermore, since the CACMR is not reviewed, a possibly contradictory legal situation arises.
- c) The different treatment of the electricity market compared to the securities market is also evident with regard to the integrity of the market: For the securities market, there is the MAR (Market Abuse Regulation), which prohibits conduct that endangers the integrity and functionality of the market. This regulation is not applicable to non-financial instruments. The integrity of the electricity market, in turn, is protected by REMIT, which contains provisions adapted to the electricity market. This is also appropriate because the markets function differently; this difference should continue to be taken into account in clearing.
- d) The undifferentiated inclusion of Electricity Spot Market Transactions in EMIR would thus mix competences in one regulation and break with the otherwise separate treatment in the legal acts. Furthermore, only clearing houses authorised under EMIR for financial instruments would have to comply with these rules, while non-EMIR authorised clearing houses would continue to clear under CACMR.

3. Unobjective differentiation between NEMOs and CCPs

- a) In addition to the rules of competence mentioned in point 2. of this Position Paper, legal acts of the European Union must also comply with the principle of objectivity and equal treatment as guaranteed by fundamental rights in the European Union. This is based on Art 14 EMRK in connection with Art 1 12. ZP-EMRK as well as in Art 12 EGV. The principle of equality as such has been recognized in the case law of the European Court of Justice as part of the constitutional traditions common to the Member States and a fundamental principle of Community law, according to which comparable situations may not be treated differently unless a differentiation is objectively justified.³
- b) In case of the inclusion of clearing of non-financial instruments in the scope of EMIR when a clearing house is authorised under EMIR, this would lead to an **unobjective differentiation between** the clearing of Electricity Spot Market Transactions by a **clearing**

³ ECJ Ruckdeschel und Ströh Rn 7, furthermore case n° 283/83, Racke, Slg 1984, 3791; case n° C-85/97, SFI, Slg 1998 I-7447.

house authorized under EMIR and other clearing houses. And this despite the fact that the same product is cleared with the same risks.

- c) This would be a **significant, not objectively justified competitive disadvantage for CCPs authorized under EMIR** because they would have to comply with significantly more regulations and provisions than other clearing houses. The only factual justification of a differentiated treatment is that CCPs authorized under EMIR, when clearing Electricity Spot Market Transactions, have to properly manage the risks on the CCP itself in order to ensure proper business operations on the securities market. However, the clearing itself should continue to be subject to the regulations specifically enacted for the electricity market, i.e. the CACMR.
- d) In the Proposal, there would also be a violation of the clarity requirement because a CCP authorized under EMIR would be confronted with different, mutually inconsistent requirements concerning the clearing of non-financial instruments.

4. Practical applicability of EMIR and its delegated acts to the electricity market

- a) EMIR is clearly and unambiguously focused on the clearing of financial instruments and in particular derivatives; the entire logic of the regulation is therefore based on the securities and derivatives market. This leads to the fact that many provisions, in particular provisions concerning risk management and the clearing process, are nevertheless very fundamentally different from the logic of a market with non-financial instruments.
- b) Particularly noteworthy in this regard are the RTS 153/2013⁴ especially with regard to the provisions on risk management. The following examples can be given as an illustration:

Transaction records (Art 13), Position records (Art 14)	Accordingly, CCPs have to record all transactions with mentioned details, e.g. the "instrument identification", furthermore, non-financial instruments cannot be held as "position" within in the meaning of Art 14
Margins (Art 24 and following)	These requirements are designed only for the financial market, for example, the confidence intervals, which are mandatory to calculate. These relate to derivatives, financial instruments as well as risk characteristics that financial instruments exhibit
Time horizons for the liquidation period (Art 26)	Liquidation in the prescribed form does not work for Electricity Spot Market Transactions, because electricity cannot be liquidated (the same way as financial instruments)

⁴ Commission Delegated Regulation (EU) 153/2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties.

Portfolio margining (Art 27)	This provision cannot be executed for Electricity Spot Market Transactions as there is no such thing as an "Electricity Portfolio"
Assessment of liquidity risk (Art 32)	The liquidity plan has to consider only institutions which are active in securities trading (e.g. securities settlement systems)
Stress tests und back-tests	Here, too, the provisions are designed exclusively for the securities market, the best example being Art 52 (risk factors in stress tests), which deals with interest rate-related, exchange rate-related or equity-related contracts, credit-related contracts, etc.

- c) This would create significant legal uncertainty for CCPs and pose a particular legal risk because it would not be clear how the rules would apply to non-financial instruments as Electricity Spot Market Transactions.

In summary, we therefore **strongly recommend not to incorporate the clearing of non-financial instruments** in EMIR. Rather, we advocate a separate regulation that is tailored to the needs of energy spot market products and that also standardizes and regulates settlement and risk management among NEMOs. But what can and should be mandated in EMIR is that the inclusion of commodity clearing activities must be notified to the NCA with evidence that the risk situation of the CCP and clearing participants in the financial market will not be negatively impacted as a result. The provision of such evidence by the CCP would be appropriate and would equally protect the integrity of the financial market.

At this point we would also like to **highlight the importance of a National Competent Authority (NCA)** for CCPs and strongly recommend not to make the decision-making process for supervisory authorities in EMIR less efficient and more complicated compared to the status quo. Especially the addition of a further supervisory level, for example as provided for in Art 15 para. 2 and Art 23b of the Proposal with the joint supervisory team, makes processes less effective and efficient and is therefore not in line with the aim of the Proposal. In some cases, the current duplication of supervisory practices is already inefficient and ineffective because ESMA and NCAs may have different/contradictory conclusions and recommendations from time to time. In addition, an NCA is much closer to the business models of the respective regional CCP, therefore better knows the peculiarities of the CCPs. CCP.A for example only clears Spot Market Products but no derivatives. Therefore, the business model is different to larger CCPs in the European Union clearing energy derivatives and the underlying spot market products. An NCA can address these regional differences better and in a more risk-oriented way than a uniform European supervisory practice.

We remain with kind regards,

CCP Austria Abwicklungsstelle für Börsengeschäfte GmbH

Kalina Jarova Müller

Member of General Management

Wolfgang Aubrunner

Member of General Management