



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from : Secretariat
to : Council

No. Cion prop.: 13917/10 EF 117 ECOFIN 543 CODEC 879

Subject : Proposal for a Regulation of the European Parliament and of the Council on OTC derivative transactions, central counterparties and trade repositories (EMIR)
= *Compromise text agreed on 24 January by Council (ECOFIN)*

Please find enclosed the compromise text for Article 13(2) and Article 15(3) as well as related recitals, on which agreement was reached by the Council (ECOFIN) at its 24 January meeting.

Proposed compromise on the authorisation procedure

Articles 13(2) and 15(3) & recitals 30a and 30b:

Article 13 paragraph 2:

"2. The competent authority of the Member State where the CCP is established shall only grant authorisation where it is fully satisfied that the applicant CCP complies with all the requirements set out in this Regulation and where the CCP is notified as a system pursuant to Directive 98/26/EC.

The competent authority of the Member State where the CCP is established shall duly consider the opinion of the college reached in accordance with Article 15. In case the competent authority of the Member State where the CCP is established does not agree with a positive opinion of the college, its decision shall state the full reasons and shall contain an explanation of any significant deviation from the opinion of the college.

The CCP shall not be authorised, only when all the members of the college, excluding the authorities of the Member State of establishment of the CCP, reach a joint opinion by mutual agreement that the CCP should not receive authorisation pursuant to article 15(1). This opinion should state in writing the full and detailed reasons why the college consider that the requirements of this Regulation or other parts of EU law are not met.

In case no joint opinion by mutual agreement that the CCP should not receive authorisation as referred to in the first subparagraph is reached, and where a majority of two thirds of the college have expressed a negative opinion, any of the competent authorities concerned, supported by a majority of two thirds of the college, may refer the matter to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010 within one month after the adoption of the negative opinion. That decision shall state in writing the full and detailed reasons why the concerned members of the college consider that the requirements of this Regulation or other parts of EU law are not met. In that case the competent authority of the Member State where the CCP is established shall defer its decision on the authorisation and await any decision that ESMA may take in accordance with Article 19(3) of Regulation (EU) No 1095/2010 on authorisation of that CCP, and shall take its decision in conformity with the decision of ESMA. The matter shall not be referred to ESMA after the end of the one month period.

Where all the members of the college, excluding the authorities of the Member State of establishment of the CCP, reach a joint opinion, by mutual agreement, that the CCP should not receive authorisation pursuant to Article 15(1), the competent authority of the Member State where the CCP is established may refer the matter to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010.

The competent authority of the Member State where the CCP is established shall transmit the decision to the other competent authorities concerned.

Rec. 30b (new)

The CCP should not be authorised, only when all the members of the college, excluding the authorities of the Member State of establishment of the CCP, reach a joint opinion by mutual agreement that the CCP should not receive authorisation.

If, however, a sufficient majority of the college have expressed a negative opinion and any of the competent authorities concerned, supported by a majority of two thirds of the college, have referred the matter to ESMA, the competent authority of the Member State where the CCP is established should defer its decision on the authorisation and await any decision that ESMA may take regarding conformity with Union law, and should take its decision in conformity with the decision of ESMA.

Where all the members of the college, excluding the authorities of the Member State of establishment of the CCP, reach a joint opinion why they consider that the requirements are not met, that the CCP should not receive authorisation, the competent authority of the Member State where the CCP is established may refer the matter to ESMA to decide on the conformity with Union law.

Article 15(3): Opinion of the College

3. The majority opinion of the college shall be adopted on the basis of a simple majority of its members. For colleges up to and including 12 members, a maximum of two college members belonging to the same Member State shall have a vote and each voting member shall have one vote. For colleges above that size, a maximum of three college members belonging to the same Member State shall have a vote and each voting member shall have one vote. ESMA shall have no voting rights on the joint opinions of the college.

Rec. 30a

(30a) In view of the role assigned to the colleges, it is important that all the relevant competent authorities as well as members of the ESCB are involved in performing its responsibilities. The college should consist of the competent authorities supervising not only the CCP, but also the entities which might be impacted by its operations, i.e. selected clearing members, venues of execution, interoperable CCPs and central securities depositories. As regards the members of the ESCB, the participation in the college should be enabled for those responsible for the oversight of the CCP and interoperable CCPs and as well as those responsible for issue of the currencies of the financial instruments cleared by the CCP. As the supervised or overseen entities would be established in a limited range of Member States in which the CCP operates, one competent authority or member of the ESCB might be responsible for supervision or oversight of a number of the aforementioned entities. In order to ensure smooth cooperation of all the members of the college, appropriate procedures and mechanisms should be put in place. Since the establishment and functioning of the college is assumed to be based on a written agreement between all its members, it is appropriate to confer the powers to determine the decision-making procedures upon them, given the sensitivity of the issue. Therefore the detailed rules on voting procedures should be bound by the written agreement concluded by all the members of the college. However, in order to balance the interests of all the relevant market participants and Member States appropriately, when making decisions the college should vote in accordance with the general principle where each member has one vote, irrespective of the number of functions it performs in accordance with the article specifying the composition of the college. For colleges up to and including 12 members, a maximum of two college members belonging to the same Member State shall have a vote and each voting member shall have one vote. For colleges above that size, a maximum of three college members belonging to the same Member State shall have a vote and each voting member shall have one vote. While performing their duties, no action taken by any member of the college should, directly or indirectly, discriminate against any Member State or group of Member States as a venue for clearing services in any currency.

This approach does not constitute a precedent for other legislation on the supervision and oversight of financial market infrastructures.
