Council of the European Union
General Secretariat

Interinstitutional files:
2022/0403 (COD)

Brussels, 29 June 2023

WK 8862/2023 INIT

LIMITE

EF
ECOFIN
SURE
CODEC

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

WORKING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services and the Banking Union (EMIR/CCP) Financial Services Attachés
Subject:	EMIR Review: Explanatory note accompanying SE PCY draft compromise text on EMIR supervisory framework and processes

Explanatory note accompanying SE PCY draft compromise text on EMIR supervisory framework and processes

Introduction

Attached you will find a draft compromise text encompassing the supervisory framework and processes of EMIR and is based on the COM proposal EMIR 3.0. The PCY draft proposal includes Articles 14, 15, 17, 17a, 17b, 18, 19, 23a, 23b, 24, 24a, 49 and new Articles 17c and 49a. The draft compromise text also includes recitals [19], 20, 21, 22, 23, 24, 25, 28, 31, 44, 47 and new recital 44a. Since several MS consider discussions on the Joint Monitoring Mechanism (Article 23c) to be dependent on the outcome of deliberations on the Active Account Requirement, this article is not included in this draft compromise text despite being related to the supervisory framework.

The sections regarding non-financial instruments, for example recital 19 and parts of Article 14 and 15, have been put in brackets since several MS have requested further information and clarity of the reasoning and consequences of the proposal by the COM.

The draft compromise is based on the views expressed by MS during the past CWP meetings as well as in written comments. Below you will find a description of those changes that to PCY's understanding have been of most interest for MS.

Text format description

- COM proposal to replace or amend current EMIR regulation
- **<u>SE PCY proposal</u>**
- **~~SE PCY proposal to delete text in the COM proposal~~**
- ~~COM proposal to delete text of the current EMIR regulation without replacement or amendments~~
- **[<u>SE PCY proposal for MS specific comments</u>/~~SE PCY proposal to delete in the COM proposal for MS specific comment~~]**
- **[**Discussion requested by MS/COM proposal for MS specific comments**]**

Article 14 Non-financial instruments

COM proposes to expand of the scope of EMIR to non-financial instruments. Some MS have stated that further discussions are warranted on this matter and many MS have especially requested clarity on how the EMIR framework shall be applied to those instruments if such expansion is made. The PCY has therefore left these parts of the proposal for the time being. This is reflected by the introduction of brackets in the respective article as well as in the recital.

Article 15 Extension of activities and services

Many MS have requested that the application for extension of authorisation should be proportionate to the type of extension sought by the CCP. The PCY has therefore clarified that the lists of required document and information to be drafted should be relevant and specific to the type of extension.

As Article 15 also includes a section regarding non-financial instruments, this part is put in brackets (see reasoning above).

Article 15(3) is amended to introduce an element of proportionality as regards applications for all type of extensions, both extensions that falls under the expedited procedure as well as extensions of authorisation according to Article 17, in line with MS requests.

Article 17 Procedure for granting and refusing an application for authorisation for an extension of authorisation

Most MS are in favour of keeping the current EMIR process but with set timelines. The PCY therefore suggests to replace the proposed parallel assessments with sequenced ones. As pointed out by a several MS, both ESMA and the college will still have the possibility to start their respective assessments from day one, since they will have access to the documentation sent in by the CCP directly. The PCY would in this context like to point out that the mandate for ESMA and the college is left unchanged in this draft, in comparison to the COM proposal. From the PCY analysis, MS have not expressed a wish to change what the opinion should assess. Therefore, the PCY proposes to keep the COM proposal. An opinion by ESMA and the college would thus always be required and should focus on EMIR compliance (in Article 23a(3) of current EMIR opinions should only be provided by ESMA "where necessary to promote a consistent and coherent application"). In addition, both ESMA and the college have according to the PCY proposal still the possibility to include any conditions or recommendations they consider necessary to mitigate any shortcomings in the CCP's risk management in their opinions, as in the initial proposal by COM (in Article 23a(4) of current EMIR, ESMA shall in certain cases issue guidelines or recommendations to promote the necessary consistency or coherence of EMIR pursuant to Article 16 of Regulation (EU) No 1095/2010). Following suggestions from certain MS, "in particular" is however deleted with respect to the ESMA opinion, meaning that it would only focus on identified cross-border risks or risks to the financial stability of the Union.

With respect to questions to the CCP during the risk assessment period, most MS have supported for questions to be sourced via the CCP´s NCA.

Timelines for processes in Article 17 and 49

All MS have supported efficient and shortened processes for both Article 17 and 49. However, it has been underlined by several MS that the timelines still need to guarantee the NCA sufficient time to make a proper assessment. The timelines in the COM proposal were in many MS views too short and some MS also raised concerns that they therefore could lead to unnecessary rejections. The PCY proposes to extend the timelines as stated in table 1 for Article 17 and table 2 for Article 49. The proposed timelines provide a maximum ceiling in order to eliminate the risk of indefinite extensions as under the current EMIR framework.

MS have expressed a preference for the so-called acknowledgement period to constitute a material assessment in substance of the submitted documents and information. Since the timeline for the acknowledgement period for this reason is extended, the PCY proposes options for MS whether to insert a requirement for the NCA to confirm receipt of the application or not (which might be a function in the database). This is put in brackets for MS consideration.

The possibility for the NCA to extend the timelines has been requested by MS to cater for the risk of missing material information in the applications. The PCY therefore purpose to amend the articles to give the NCA as much flexibility as possible while sticking to the COM's aim to avoid significant and potentially indefinite delays. In the PCY proposed drafting, the NCA would be able to set the deadlines they see fit, including how many times to require missing documents/information. However, as stated in the article text, an extension can only be done with a certain number of days, in order to not lose the aim of increased certainty. If the application contains all documentation and information, the procedure would be swifter, thereby incentivizing the CCP to send in a high-quality application from the start. The proposed timelines by the PCY, based on MS written input, is maximum (including the possible extensions):

- Authorisation: 167 working days
- Extension of authorisation: 137 working days
- Significant change to models and parameters: 117 working days

Article 17a Expedited procedure for granting a request for extension of the existing authorisation

There has been overall support among MS to introduce a streamlined process for non-material extensions of activities or services.

A majority of MS do not favour CCPs being able to launch a service at the moment of requesting an extension in accordance with Article 17a. Several MS have also expressed their preference to require an authorisation decision from the NCA rather than an absence of objection. MS have also expressed that the proposed timelines are too short. On the basis of these comments, the PCY proposes to remove the possibility to launch services prior to the authorisation decision from the NCA. Consequently, the PCY proposes that the name of the article and the process is renamed to *Expedited Procedure*. The PCY also proposes to extend the timeline to a total of 25 working days and to specify how and when the NCA should inform the CCP about its decision.

Some MS have raised concerns that the new procedure risks increasing the burden in relation to the current framework, contrary to the objective. The PCY therefore suggests clarifying that applications for extensions that do not significantly increase the CCP's risk profile should be proportionate. In addition, the PCY suggests clarifying in recital (recital 21) that "business as usual" services or activities already covered by the existing authorisations are not subject to the procedure set out in either article 17 or 17a.

To cater for the concerns raised by some MS that the NCA should have flexibility when deciding if the expedited procedure should apply, the PCY has deleted the paragraph referring to "shall apply". Many MS have questioned the conditions proposed by COM for when an extension could be considered as non-material. Based on the input received, the PCY proposes an approach where some conditions are specified in the L1 text as well as a mandate for ESMA to further specify the conditions and cases where an expedited procedure could be applied in an RTS. The PCY has also amended the text to clarify that an application for extension according to Article 17a can be rejected and that, even if the expedited procedure is applied, the authorisation can be refused based on the CCP non-compliance of EMIR.

There were mixed views from MS as to whether the task for the JST in relation to Article 17a should be replaced by another body or not. The PCY has therefore put in brackets, for MS specific input, that the NCA should consider the input from ESMA.

Article 17b Procedure for seeking the opinion from ESMA and the college

Similarly to Article 17, MS have raised concerns about the idea of parallel risk assessments by the NCA, ESMA and the college. In the context of Article 17b, it has also been pointed out that without the NCA's report and draft decision, ESMA and the college wouldn't have any basis for forming their opinions. The difference in this regard is that Article 17b is introduced in order to clarify the scope and processes in cases where the CCP does <u>not</u> submit an application. It also seems that several articles mentioned in Article 17b (for example Article 29) entail supervision on an ongoing basis rather than relating to a procedure as in Article 17. Consequently, it appears to the PCY that the timeframe for the "assessment period" in this procedure is not of essence in the same way as in Article 17, since the CCP (or any other person) is not awaiting any confirmation or decision from the NCA (except in some cases where it is specifically stated, for example in Article 31). For some other articles mentioned in Article 17b, there are however similar procedures as in Article 17 (in the sense that a procedure starts with a notification/application and entails fixed timelines), for example Articles 31–32 and 49. Based on this reasoning and views expressed by MS, the PCY has redrafted the article specifying that the basis for requests should be when the NCA intends to adopt a decision, report or other measures. The word "other measures" is included to provide the NCA with flexibility since there might be cases where a supervisory action neither result in a decision nor a report.

It has also been raised by several MS that the opinion from ESMA and the college should not be needed with respect to withdrawal of authorisation if a decision by the NCA is required urgently. The PCY has specified this in the article text.

The PCY has also tried to align Article 17b with Article 17 where possible.

Publication of non-compliance (article 17 and 17b)

The vast majority of MS has objected to the suggested possibility for ESMA to publish non-compliance with ESMA and college opinions. Some MS have, in order to reach a compromise on this issue, proposed to introduce a tool for internal communication in the event of non-compliance with ESMA opinions. The PCY therefore proposes that ESMA, i.e. the Supervisory Committee, should inform the Board of Supervisors in such cases.

New Article 17c Central database

On the suggestion of one MS, paragraph 7 of Article 17, regarding the function of the database, has been moved to a new, separate article (Art 17c) since it applies to all processes. In addition, minor amendments to the text are proposed by the PCY to align this article with the information relating to the central database in other parts of the text. Some MS have requested that the need for the central database and the cost for implementing it has to be further discussed.

Article 18 College and Article 19 Opinion of the College

With regard to the chairing of the colleges, a large majority of MS supports keeping the current rule. Many MS are also against providing ESMA a voting right in the college. The PCY therefore proposes to delete these amendments in the COM proposal and thus revert back to current EMIR.

Article 23a Supervisory cooperation between competent authorities and ESMA with regards to authorised CCPs

Technical amendments based on the changes to Article 17b and lingustic change in order to align the wording with current EMIR. In addition, some MS have requested that ESMA's opinions should be limited to only cross-border risks or risks to the financial stability of the Union. The PCY has therefore made amendments to reflect this.

Article 23b Joint Supervisory Teams

Most MS have expressed concerns regarding the introduction of a new body in the supervisory structure, questioning the added value in relation to possible added administrative burden. Some MS pointed out that this function could already be carried out within the existing college structures, while highlighting the need for voluntary participation. Based on these observations the PCY proposes to delete Article 23b.

Article 24 Emergency Situations

Most MS supported or did not object to the PCY presented compromise draft on emergency situations. The text is in this draft is therefore generally unchanged from the one distributed in May. When it comes to the enhanced information sharing for the college members, a number of MS have however requested that it should be made clear that the information transferred remains under the same confidentiality protection. An amendment is therefore proposed in Article 24(1) to make it clear that the transferred information will be covered by Article 83 on professional secrecy once received by the relevant public body. Some MS have also requested that the college member who originally shared the information first must authorise the disclosure or at least get information about the transfer. It is the understanding of the SE PCY that the existing rules of EMIR already cover the possibility to transmit confidential information in accordance with EMIR, with the consent of the competent authority etc. that communicated the information (Article 83(4)[1]). No change is therefore proposed in this regard in this draft.

The draft also includes minor editorial changes compared to the one distributed in May.

Article 24a CCP Supervisory Committee

Technical amendments due to the new Article 49a in order to reflect the role of CCP Supervisory Committee (CCP SC) in determining whether a model or parameter change is non-significant.

Technical amendment in brackets depending on if MS would prefer to replace the input from JST by ESMA (in the form of CCP SC) in the expedited procedure for extension of services.

---

[1] Also, see ESMA Guidelines on written agreements between members of CCP colleges: esma70-151-3431_guidelines_on_written_agreements_between_members_of_ccp_colleges.pdf (europa.eu)

Article 49 Review of models, stress testing and back testing

To the PCY's understanding, it has been overall support from MS to provide clear procedures with shortened timelines for how and when a CCP shall apply for validation in accordance with Article 49. However, many MS have expressed concerns with respect to the criteria proposed by the COM and the fact that the proposal introduces a process for changes that today are not subject to any validation at all. This is because the COM's proposal entails subjecting all changes to either the standard or shortened process. MS have pointed out that this would entail a large amount of "business as usual" calibrations falling under the non-objection procedure, raising questions as to the objective of decreasing administrative burden and increasing the attractiveness for EU CCPs. The PCY draft therefore clarifies that "business as usual" is not to be considered a change to models and parameters according to neither Article 49 nor Article 49a.

MS have expressed support for providing clarity with respect to which model changes are to be considered significant. However, there are split views on how these criteria should be defined. Therefore, the PCY proposes to set out the conditions in L2 due to the technical nature of this task. The PCY also proposes a new paragraph 49(7) regarding what ESMA should take into account when drafting the RTS, in order to underline the aim of simplifying the procedures.

As noted by several MS, the word parameter was left out from the COM proposal, this is now re-inserted in the PCY draft. Minor amendments are also introduced by the PCY in order to clarify that a validation is needed from both ESMA and the NCA. The PCY has also made a technical amendment with respect to provisional adoptions of significant changes.

New Article 49a Expedited procedure for non-significant changes to the CCP´s models and parameters

In their written comments, MS were overall supportive of introducing an expedited procedure for non-significant changes. Some MS however argued that the introduction of a non-objection procedure, contrary to its objective, risked adding administrative burden for CCPs and NCAs. This is because the scope of changes subject to the procedure in some cases do not require any approval at all today. The PCY therefore propose a new recital (recital 44a) that describes the expedited procedure and the reason for introducing it. The PCY has put a part of the proposed recital within brackets for MS specific input.

Some MS have raised concerns with respect to the possibility for CCPs to adopt new risk models prior to receiving a validation. MS have also supported the PCY proposal to separate the procedure for non-significant changes in a separate article, as is the case for extension of services.

In the draft compromise, the PCY has therefore created a new article for non-significant changes to models and parameters, Article 49a, and renamed it to *Expedited Procedure* since a validation is needed before the CCP is allowed to adopt a new change.

In order to keep the aim of a sped-up procedure, the PCY has also clarified that the documents and information needed should be proportionate to the model or parameter change it relates to and suggests clarifying when and how the NCA should inform the CCP about its conclusions.

Some MS have argued that it is important that both the NCA and ESMA determine whether the change is non-significant or not even though the decision to validate a non-significant change is up to the NCA. The PCY has therefore tweaked the wording to make it clear that the expedited procedure should only apply in cases where the CCP so requests **and** where the NCA and ESMA each conclude that the change is not significant. Some MS have questioned what the NCA approves under the expedited procedure (the application of the procedure itself or a validation). The PCY has amended the text to clarify that it is both: an application for the expedited procedure according to Article 49a can be rejected by both ESMA and the NCA, and the validation can be refused by the NCA based on the CCP non-compliance of EMIR.

In relation to mitigate the risk raised by some MS that the short timelines might increase the rejection rates or increase the risk at the CCP, the PCY proposes that the expedited procedure should have a maximum timeline of 25 working days.

The PCY has also made a technical amendment to allow for a provisional adoption also of non-significant changes. In the PCY’s view, there could be situations where a change is needed urgently even though it might be defined as non-significant.

Table 1 Timeline Article 17			
Action Art 17	**Current timeline under EMIR**	**Commission proposal**	**PCY proposal**
Acknowledgement of receipt	----------------------	**2 WD** (stating to the CCP whether the application contain all documents required "checking boxes")	**(2 WD/~~2 WD)~~** Depending on MS input whether a confirmation is needed
Assessment of completeness/sent in documents and information "initial assessment"	**30 WD** from receipt of application the NCA shall assess whether the application is complete.	---------------------------------	Authorisation: **30 WD** from [acknowledgement of receipt/receipt of application] Extension: **20 WD** from [acknowledgement of receipt/receipt of application]
Possible extension	**Indefinitely**	----------------------------------	**15 WD**
Risk assessment period (NCA report)/draft decision by NCA	**4 months** from submission of complete application, also including: - - Adoption of final decision.	**40 WD** from acknowledgment of receipt	Authorisation: **80 WD** from end of "initial assessment" Extension: **60 WD** from end of "initial assessment"
Possible extension	--------------------------	**10 WD**	**10 WD**
Opinions by ESMA / college	ESMA opinion: **20 calendar days** from NCA draft decision. College opinion: **30 calendar days** from NCA report.	**40 WD** from acknowledgment of receipt	ESMA: **15 WD** from NCA draft decision and report. College: **20 WD** from NCA draft decision and report.
Adoption of final decision by NCA	Within **6 months** from submission of complete application, including notification to the CCP	Within **10 WD** of receipt of both ESMA/college opinions	Within **10 WD** of receipt of both ESMA/college opinions, including notification to the CCP
Notification to the CCP	------------------------ (see above)	-----------------------	----------------------------- (see above)
Total <u>without</u> extensions	Approx. **180 calender days** (30 calender days + 6 months)	**52 WD** (2 WD + 40 WD + 10 WD)	<u>Authorisation:</u> **142 WD** ([2 WD] + 30 WD + 80 WD + 20 WD + 10 WD) <u>Extension</u>: **112 WD** ([2 WD] + 20 WD + 60 WD + 20 WD + 10 WD)
Total <u>with</u> extensions	**Indefinitely**	**62 WD** (2 WD + 40 WD + 10 WD + 10 WD)	<u>Authorisation:</u> **167 WD** ([2 WD] + 30 WD + 15 WD + 80 WD + 20 WD + 10 WD +10 WD) <u>Extension</u>: **137 WD** ([2 WD] + 20 WD + 15 WD + 60 WD + 20 WD + 10 WD + 10 WD)

Table 2
Timeline Article 49

Action Art 49	Current timeline under EMIR	Commission proposal	PCY proposal
Acknowledgement of receipt	-----------------------	**2 WD** (stating to the CCP whether the application contain all documents required "checking boxes")	**(2 WD/~~2 WD)~~** Depending on MS input whether a confirmation is needed
Assessment of completeness/sent in documents and information "initial assessment"	------------------------ (starts at completion status of the application, i.e. this part is not defined and could thus go on indefinitely)	-------------------------------	**20 WD** from [acknowledgement of receipt/receipt of application]
Possible extension		-----------------------------------	**15 WD**
Risk assessment period (NCA and ESMA report)	NCA and ESMA: **50 WD** from receipt of the complete application.	**30 WD** from acknowledgment of receipt.	**50 WD** from end of "initial assessment"
Possible extension	---------------------------	-------------------------------------	------------------------------------
Opinions by the college	**30 WD** from NCA and ESMA report.	**30 WD** from receipt of the request of an opinion from the NCA	**15 WD** from NCA and ESMA report.
Adoption of final decision by NCA	Within **90 WD** of receipt of complete application, including notification to the CCP	Within **10 WD** of receipt of both ESMA/college opinions	Within **15 WD** of receipt of both ESMA/college opinions, including notification to the CCP
Notification to the CCP	------------------------- (see above)	**5 WD**	------------------------------ (see above)
Total <u>without</u> extension	**No maximum timeline since period for completion status is not defined** (90 WD from completion status)	**47 WD** (2 WD + 30 WD (however not clear when the NCA shall request the opinion) + 10 WD + 5 WD)	**102 WD** ([2 WD] + 20 WD + 50 WD + 15 WD + 15 WD)
Total <u>with</u> extension	**No maximum timeline since period for completion status is not defined**	--	**117 WD** ([2 WD] + 20 WD + 15 WD+ 50 WD + 15 WD + 15 WD)