Opinion of the European Economic and Social Committee on the proposal for a regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365

(COM(2016) 856 final — 2016/0365 (COD))

(2017/C 209/05)

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1. Conclusions and recommendations

1.1. The European Economic and Social Committee (EESC) welcomes the proposed 'Framework for the recovery and resolution of central counterparties' ([1]), which aims to move towards a definitive and harmonised recovery and resolution process for central counterparty (CCP) clearing in the EU, and endorses both its objectives and the approach.

1.2. The EESC underscores that it is paramount to implement the existing decision by the G20 for global governance of CCPs as well as the specific recommendations by the Financial Stability Board Standing Committee on Supervisory and Regulatory Cooperation (FSB SRC), the FSB Resolution Steering Group (FSB ReSG), the Committee on Payments and Markets Infrastructures (CPMI), the International Organisation of Securities Commissions (IOSCO), and the Basel Committee on Banking Supervision (BCBS) into harmonised, binding legislation ensuring a sound and secure global level playing field.

1.3. The EESC would therefore welcome flexibility to adapt the proposed regulation to the future evolution of international consensus on CCP regulation, i.e. recommendations by the Financial Stability Board (FSB) ([2]).

1.4. In the EESC's view, the transformation of the current system of individual CCP solutions based on international recommendations and national supervisory authorities into a definitive recovery and resolution regulation that is clear, consistent, robust and comprehensive, as well as proportionate and future-proof in the context of other legislation such as the Bank Recovery and Resolution Directive (BRRD), is of paramount importance.

1.4.1. In this context, the EESC is of the opinion that a single CCP supervisory authority and a single resolution authority would put them in a better position to pool expertise and data as well as to ensure that the new regulation is implemented by the CCPs in a standardised way across Europe, eliminating the current patchwork of different national supervisors with slightly different supervisory criteria and tools.

([1]) COM(2016) 856 final.

([2]) Please also see as supporting example: 'EBA and ESMA call to clarify margin requirements between CRR and EMIR', 18.1.2017. The recommendations included in the report aim at avoiding duplication of requirements for derivative transactions and thereby avoid increased regulatory risk and increased costs for monitoring by competent authorities.

1.5. Given the central role of the European Central Bank (ECB) in the Single Supervisory Mechanism (SSM) for the banking sector, its existing competence to ensure efficient and sound clearing, payment and settlement systems ([3]) as well as its role in providing CCPs with access to central bank money, the EESC strongly recommends considering using or extending the ECB's remit to make it both the central European CCP supervisor under the umbrella of the SSM as well as the central resolution authority under the umbrella of the ECB/Eurosystem.

1.6. The EESC considers that additional monitoring tools should be prescribed for the supervisory authorities in this area, to allow for a comprehensive picture of the risk position of individual clearing members across multiple CCPs (including third-country CCPs) and of CCPs across markets, modelling potential domino effects on positions across CCPs. Supervisors or preferably a central supervisor should be empowered to conduct their own, holistic stress tests and understand the risk position and risk mitigating assets of the relevant CCPs on a quarterly, monthly or day-to-day basis, as required by the situation, this in addition to the annual CCP stress test performed by EMSA under the European Market Infrastructure Regulation (EMIR).

1.7. While the EESC assumes that there will be a natural sequence in first the resolution of one or several individual clearing members under BRRD and then — if required — the recovery and resolution of one or several CCPs, it should be clarified that there are scenarios where priority should be given to the recovery of one or several CCPs over the recovery of one or several banks, who are the major clearing members of these CCPs.

1.8. The EESC requests that CCP's recovery plans should specify tools and measures that will be considered to re-match the CCPs book, since this proposal neither determines which specific options recovery plans should contain or exclude.

1.9. In the Committee's opinion, close attention should be paid to how non-financial counterparties (NFC) and segregated client assets of indirect clearing participants, might be impacted, in case of the use of position and loss allocation tools, i.e. in case of termination of contracts and the reduction of the value of any gains payable by the CCP to non-defaulting clearing members. In the same vein, the Committee welcomes the fact that the current proposal does not include 'initial margin haircutting', as it would not be an appropriate recovery and resolution tool, nor 'variation margin gains haircutting', as hedged positions have to be expected.

1.10. In the EESC's opinion, any explicitly mentioned option of a bail-out of CCPs with tax-payers' money should be removed from the proposed legislation and especially excluded for third-country CCPs. The option of extraordinary public support should be proposed by the respective authorities when deemed appropriate and thereby remain extraordinary by nature. The currently included option of extraordinary public support under certain conditions might create a moral hazard situation. This would also make the implementation of a single supervisory authority and a single resolution authority politically more acceptable from a national perspective.

1.10.1. In this context, the EESC requests that going forward the same or similar binding standards are also required of CCPs authorised under European Market Infrastructure Regulation (EMIR) ([4]) under an 'equivalence' decision as third-country clearing organisations (third-country CCPs).

1.11. The EESC proposes that the resolution authority's power to terminate certain or all contracts in respect of the clearing services of a CCP should be used very restrictively where a CCP supports spot markets and is clearing cash products.

([3]) One of the Eurosystem's basic tasks is *to promote the smooth operation of payment systems* (Article 127(2) of the Treaty on the Functioning of the European Union and Article 3(1) of the Statute of the European System of Central Banks and of the European Central Bank). The legal basis for the Eurosystem's competence in the area of payment and settlement systems is contained in Article 127(2) of the Treaty on the Functioning of the European Union. According to Article 22 of the Statute of the European System of Central Banks and of the European Central Bank, '*the ECB and the national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries.*'

([4]) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

1.12. The EESC believes that the suspension of the clearing obligation in resolution of a single CCP needs to be applied taking into consideration potential impacts on other CCPs authorised to provide clearing services in the same asset class.

2. **Background**

2.1. Both the European Union's Bank Resolution and Recovery Directive (BRRD) and the United States' Dodd-Frank Act require systemically important banks to have in place 'living wills' to enable an orderly wind-down in a crisis event with limited contagion on the broader financial markets. With mandatory central clearing post-EMIR and Dodd-Frank, CCPs have become increasingly important for the overall safety and soundness of the financial system. Therefore, in addition to ensuring the resilience of CCPs, robust recovery and resolution planning is required to ensure that greater reliance on central clearing does not result in a new category of entity that is 'too big to fail'.

2.1.1. Although the failure of a CCP is statistically unlikely, due to its specific business model and focus on risk management, it could, due to its central role in the market as a systemically important financial institution (SIFI), cause widespread contagion within the financial system, creating a domino effect on clearing members and the markets it supports. It is a low-likelihood, high-impact event.

2.2. CCPs play a key role in the financial system by managing a complex network of counterparty risk relationships. They do this, in essence, by (i) interposing themselves between the parties to contracts traded in one or more financial markets (regulated or 'over the counter' (OTC)); and (ii) protecting themselves against defaults by their users by collecting adequate margins and collateral from both the buyer and the seller, and implementing loss-sharing arrangements (so-called default waterfalls to be used in extreme cases, where individual margins prove to be insufficient) ([5]).

2.3. A participant in a CCP enjoys reduced risks compared with bilateral clearing in that he or she benefits from multilateral netting, adequate collateralisation and mutualisation of losses. CCPs net participants' obligations (long and short positions) for single products, determining a single multilateral balance per product/participant, regardless of the identity of the counterparty before novation. Where products are significantly correlated, CCPs can determine participants' margins across products (portfolio margining), allowing them to offset risk by holding positions on correlated products.

2.4. In order to fully realise the benefits of CCPs, CCPs must (1) manage their risk effectively and have adequate financial resources available; and (2) be subject to strong regulatory oversight and supervisory requirements. First, CCPs must be sufficiently resilient in the sense that their financial resources (including margin requirements, pre-funded default funds and liquidity resources) allow them to withstand clearing member failures and other stress events to a very high probability. Second, CCPs must have recovery plans that allow them to allocate excess losses and generate additional liquidity without putting an excessive burden on clearing members and other financial institutions, many of whom are likely to be systemically important in their own right. Finally, there must be credible CCP resolution plans in place.

2.5. In 2009, the G20 leaders committed to ensuring that all standardised OTC derivatives contracts are cleared through CCPs. Increased use of central clearing of derivatives is intended to enhance financial stability by:

— increasing multilateral netting,

— requiring derivatives market participants to post adequate amounts of variation and initial margin,

— helping to manage the default of large derivatives market participants,

([5]) European Systemic Risk Board, 'ESRB Report to the European Commission on the systemic risk implications of CCP interoperability arrangements', January 2016.

— increasing the transparency of the derivatives market and helping to simplify transactional networks ([6]).

2.6. At international level, the Committee on Payments and Market Infrastructures (CPMI) together with the International Organisation of Securities Commissions (IOSCO) and the Financial Stability Board (FSB) already issued guidance on the recovery and resolution of financial market infrastructures (FMIs), including CCPs, as early as 2014. Moreover, the recovery and resolution of CCPs are important priorities of the ongoing international work plans set out in 2015.

2.7. At EU level, the European Commission has issued a proposal ([7]) — based on the above-mentioned work carried out at international level — for a legislative regime on the resolution and recovery of CCPs, which is the focus of this opinion.

3. **Observations and comments**

3.1. ***The proposed regulation***

3.1.1. The EESC notes that regulatory requirements for CCPs are stronger today than before the crisis. The CPMI-IOSCO Principles for Financial Market Infrastructures (PFMI) provide a comprehensive framework for the resilience and recovery of CCPs.

3.1.2. The EESC commends the significant work the CPMI and IOSCO have undertaken to address the resilience and recovery of CCPs at international level.

3.1.3. The Committee would therefore like to see a mechanism in the proposed regulation to allow flexible adapting to the future evolution of international consensus on CCP regulation, i.e. recommendations by the Financial Stability Board (FSB).

3.1.4. Consequently, the Committee endorses the proposed regulation, in which international standards — currently implemented slightly differently by CCPs depending on the legal and regulatory environment — are incorporated into one standardised set of harmonised and heterogeneous obligations under EU law.

3.1.5. The EESC notes the importance of taking a holistic approach to amending other related legislation, i.e. the Bank Recovery and Resolution Directive (BRRD) and of ensuring that moratorium tools (Article 5 and Article 10 BRRD) and other mechanisms continue to exclude payment and delivery obligations to certain payment systems, CCPs, Central Securities Depositories (CSDs) and central banks in order not to unbalance portfolios and collateral held by or transferred to CCPs.

3.1.6. In this context, the EESC assumes that there will be a natural sequence in first the resolution of one or several individual clearing members under BRRD and then — if required — the recovery and resolution of one or several CCPs, of which these clearing members have been major clients. There could be scenarios where priority should be given to the recovery of one or several CCPs over the recovery of one or several banks, which are the major clearing members of these CCPs.

3.1.6.1. According to principles set out by the CPSS and IOSCO, default resources for systemically important CCPs should, at a minimum, be sized to withstand the default of the two clearing members that would potentially cause the largest aggregate credit exposure to the CCP in extreme but plausible conditions (so-called 'Cover 2'). If clearing members exceeding the exposure in the sense of Cover 2 vis-à-vis one or several CCPs were failing and processed according to BRRD, the implication for the CCPs and the other, none-defaulting clearing members needs to be considered in all decisions relating to the troubled general clearers under BRRD.

([6]) See Chairs of the FSB SRC, FSB RESG, BCBS, CPMI and IOSCO, '2015 CCP Workplan', April 2015.
([7]) COM(2016) 856 final.

3.1.6.2. Potentially the CCP needs to be stabilised and supported under this proposed legislation, before the BRRD process can be applied to these troubled clearing members. Also there could be scenarios were non-defaulting clearing members might be put into default through the application of tools defined in the proposed legislation and then become subject to BRRD. If this, however, helped to stabilise the CCP, servicing multiple clearing members, the stabilisation of the CCP should take priority over the stabilisation of the individual clearing member.

3.2. ***Extraordinary measures in the public interest need to be proportionate and avoid recourse to public funds***

3.2.1. The Committee points out that the proposed regulation is aimed at market situations that are extreme and exceptional; however, it is paramount that the recovery and resolution regime should allow for the continuity of CCPs' critical services without recourse to public funds or any form of public solvency support or any other form of government financial stabilisation, public equity support or temporary public ownership. The currently explicitly included option of extraordinary public financial support under certain conditions should be removed to avoid creating a moral hazard situation, by wrongly incentivising clearing participants not to contribute to recovery and resolution of a CCP at an early stage, and to wait and see if and how far extraordinary public support is provided, thereby willingly accepting or even provoking the spill over into the public sphere.

3.2.2. As the specific scenarios in which the recovery and resolution regime is applied cannot be precisely predicted, CCPs should retain flexibility in designing and implementing recovery tools in order to be able to manage different default situations. Too much prescriptiveness could lead to inefficient rigidity. As a first step, CCPs should therefore be allowed to process the default management process and eventually implement their recovery plan before resolution authorities intervene, unless there is evidence that the recovery plan is likely to fail or compromise financial stability.

3.3. ***Different treatment of non-financial counterparties (NFCs) and segregated client accounts***

3.3.1. The European Market Infrastructure Regulation (EMIR) sets obligations and requirements applicable to both financial (FC) and non-financial counterparties (NFCs) that enter into derivative contracts. FCs comprise banks, insurers, investment managers, pension funds, Undertakings for the Collective Investment of Transferable Securities (UCITS) and AIFs while NFCs include NFC+ (entities with rolling 30-day gross notional derivative positions of at least EUR 1 billion for credit and equity derivatives and/or EUR 3 billion for interest rate swaps, currency, commodity and other instruments) and NFC-. In addition there are third-country entities (TCE) that may be subject indirectly to EMIR when they enter into transactions with EU counterparties.

3.3.1.1. The EMIR clearing obligation will apply if the OTC derivative contract is between two FCs, an FC and an NFC+, or two NFC+s, or an FC/NFC+ and a TCE that would be subject to clearing if it were established in the EU. Exemptions to the requirements will end throughout 2017.

3.3.2. After all exemptions have expired, NFCs of a certain size as direct or indirect participants of a CCP will be affected by the Recovery and Resolution Regulation due to the obligation to centrally clear certain classes of OTC derivative contracts ([8]). Thereby NFCs and clients of pension funds could be drawn into unintended liabilities due to the combination of this regulation and the clearing obligation, creating an even closer linkage between the real economy/asset managers and systemically important financial institutions (SIFIs).

3.3.3. The EESC therefore asks the Commission to consider a different approach for dealing with NFCs — especially those producing companies hedging physical exposure in the real economy — within the proposed recovery and resolution framework in cases where public authorities are forced to take extraordinary measures in the public interest, potentially overriding normal property rights and allocating loss to specific stakeholders, and withholding payments of gains from the CCP to NFCs as a measure of last resort.

([8]) In accordance with Articles 5 and 6 of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

3.3.4. (Pension) funds and other entities managing money for small investors and investing in capital markets will have to hold positions in CCPs directly or indirectly through clearing members. These entities are subject to national oversight and strict restrictions for their investments to ensure they do not expose end clients to undue risks. In addition national regulators or fiduciary obligations make them hold client positions indirectly in client accounts and should be segregated. Through EMIR the option for especially protecting assets of indirect clearing participants has been created with the introduction of client asset segregation and portability.

3.3.5. Given that extensive regulation, investors in such (pension) funds are under the impression that there is special protection of their assets by both national and European legislation. The proposed legislation would, however, make it possible to override normal property rights and allocate loss to specific stakeholders as well as to withhold the payment of gains from the CCP, also impacting client and segregated client accounts. The EESC calls on the Commission to ensure that the possibility of overriding normal property rights (termination of contracts/loss allocation/withholding of gains) does not apply to (segregated) client accounts.

3.4. ***Transition and third country equivalence***

3.4.1. The EESC urges the Commission to ensure that the transition to a harmonised system is properly overseen and synchronised with the requirements for third-country CCPs, to avoid the potential for regulatory arbitrage and a competitive disadvantage for EU CCPs by allowing third-country CCPs to offer services on a less secure basis and thereby at lower costs.

3.4.2. For all countries where the European Commission plans to adopt an 'equivalence' decision, clear rules and regulations on recovery and resolution must be an important factor to be considered. For all countries where the European Commission has already adopted an 'equivalence' decision ([9]) this decision has to be revisited in the light of the rules and regulations on recovery and resolution in third countries, to ensure that equivalent CCP recovery and resolution regimes are in place for third-country CCPs offering services within the EU single market and that decisions taken by European resolution colleges are enforceable in the legal environment of the third country. As a minimum requirement information exchange agreements regarding systemic risk with the regulator of the third country CCP and the CCP supervisor(s) and resolution authority within the EU and the participation of such regulators in so-called 'Crisis Management Groups' should be required.

3.4.3. Under the EMIR, the European Commission may request the European Securities and Markets Authority (ESMA) to provide technical advice as to the equivalence of some non-EU jurisdictions which host major derivatives markets or CCPs, which have applied for recognition ([10]).

3.4.4. Going forward, the EESC calls for the key points to be assessed by the ESMA to include the recovery and resolution legislation of such third countries, in order to ensure a level playing field and to avoid regulatory arbitrage leading to undue risks for participants in the EU single market and, potentially, for EU taxpayers due to services provided by third-country CCPs. It is crucial to have an international level playing field and limit the exposure of EU taxpayers to risks manageable within the EU.

3.5. ***Single European supervisor and single European resolution authority***

3.5.1. In the EESC's view, the EU and the individual Member States need to strengthen the capacity of their supervisory bodies to understand CCP risks and risk management at all levels, in terms of human, financial and technical resources. The EESC feels that supervisors today depend too much on the expertise within supranational organisations and the CCPs themselves. This dependency on expertise could be particularly risky if supervisors need to take control of a troubled CCP at short notice, i.e. if the senior management or board of a CCP were removed and subsequently replaced or if resolution powers were exercised.

([9]) For a complete and current list, see: https://www.esma.europa.eu/regulation/post-trading/central-counterparties-ccps

([10]) The Commission is expected to use the ESMA's technical advice to prepare possible implementing acts under Articles 25(6), 13(2) and 75(1) of the EMIR concerning the equivalence between the legal and supervisory framework of the third countries (non-EU countries).

3.5.2. The EESC is of the opinion that a single CCPS supervisor and resolution authority would put them in a better position to pool expertise and data as well as to ensure that the new regulation is implemented by the CCPs in a standardised way across Europe, such that a risk of regulatory evasion or arbitrage can be eliminated. In addition, the current patchwork of CCP oversight would be replaced. Today the regulation follows the national supervision approach as set out by EMIR, creating colleges around national regulators to supervise CCPs. The EESC believes, however, that in an extreme stress scenario, where one or multiple CCPs are in danger of failing, a centralised approach would provide maximum efficiency, as decisions have to be taken holistically considering multiple CCPs, clearing members, etc.

3.5.2.1. The EESC feels that the CCP regulation chosen in 2012 under EMIR led to a patchwork solution for CCP supervision ([11]), where central banks, national banking regulators or exchange supervisors were tasked with overseeing CCPs in different countries. This view has been reaffirmed by the ESMA Peer Review under EMIR Article 21 'Supervisory activities on CCPs' Margin and collateral requirements' published on 22 December 2016, where ESMA clearly states that there is a need to enhance supervisory convergence between national supervisors.

3.5.2.2. The report — in its limited scope — already identified a number of areas where supervisory approaches differ between national supervisors and includes recommendations to improve consistency in supervisory practices. Around each national regulator, colleges — with a high overlap of participants for the key CCPs — have been created that would need to work in parallel in the case of the potential failing of multiple CCPs. Given the developments over the last few years, in 2017 with the listed and OTC derivatives markets increasingly coming together in CCPs a new centralised approach should be considered.

3.5.3. Given the central role of the ECB in the Single Supervisory Mechanism (SSM), the EESC proposes considering extending ECB's remit to make it the central European CCP supervisor under the SSM framework. To avoid an internal conflict of interest the ECB/Eurosystem itself should take over the role of central resolution authority. This would be feasible either under its existing remit or with a reasonable extension. One of the ECB's key tasks is 'to promote the smooth operation of payment systems' ([12]). Most European CCPs are registered as payment systems to achieve settlement finality ([13]). In addition, some major euro-area CCPs (i.e. LCH SA and Eurex Clearing) are licensed and regulated as a credit institution.

3.5.4. According to Article 22 of the Statute of the European System of Central Banks and of the European Central Bank, the ECB may make regulations, to ensure efficient and **sound clearing** and payment systems within the Union and with other countries. Thereby a regulatory role regarding the soundness of clearing systems is already given. The alternative would be to establish a new central European CCP supervisor, which is seen as more time consuming and costly.

3.5.5. A central supervisor for both banks and CCPs under the SSM framework would also honour the fact that most of the systemic relevant banks are members of a large number of CCPs (e.g. JPMorgan, which is a member of 70 CCPs around the world ([14])) and, hence, the default of one of those big members would trigger simultaneous default auctions in the CCPs of which the defaulting bank is a member.

3.5.6. One political prerequisite for the implementation of a single supervisor and resolution authority from a national perspective is the already requested removal of any bail-out of CCPs with tax-payers' money in form of extraordinary public financial support under certain conditions.

([11]) For list of CCPs and regulators, please see: https://www.esma.europa.eu/sites/default/files/library/ccps_authorised_under_emir.pdf

([12]) See Article 127(2) of the Treaty on the Functioning of the European Union and Article 3.1 of the Statute of the European System of Central Banks and of the European Central Bank.

([13]) For a list of payment systems, please see: https://www.esma.europa.eu/sites/default/files/library/designated_payment_and_securities_settlement_systems.pdf

([14]) See: Financial Times, JPMorgan tells clearers to build bigger buffers, 11 September 2014 by: Sam Fleming and Philip Stafford.

3.6. ***Optional suspension of the clearing obligation in resolution***

3.6.1. The resolution authority of the CCP or the competent authority of a clearing member of the CCP in resolution may request the Commission to temporarily suspend the clearing obligation laid down in Article 4(1) of the proposed regulation for specific classes of OTC derivatives where certain conditions are met.

3.6.2. However it is hard to conceive how, in very stressed market situations, smaller clearing members in particular would be able to manage positions again in a bilateral process at short notice. In addition the clearing obligation is based on specific classes of OTC derivatives across all CCPs and not limited to one CCP. Consequently the suspension of the clearing obligation will potentially impact other CCPs, authorised to provide clearing services in the same products. It has to be ensured that for other CCPs the suspension of the clearing obligation is optional. In addition these CCPs might have cross margining arrangements for these and other classes of derivatives in place, so that the return to a bilateral market has unintended knock-on effects.

3.6.3. The EESC therefore believes that the suspension of the clearing obligation in resolution is a resolution tool to be used without impacting other CCPs authorised to provide clearing services in the same asset class.

3.6.4. Finally the request of the national regulator could potentially have a European wide impact, which therefore, in the Committee's view, provides another argument for a pan-European, single CCP supervisor and a single resolution authority.

Brussels, 29 March 2017.

The President
of the European Economic and Social Committee
Georges DASSIS