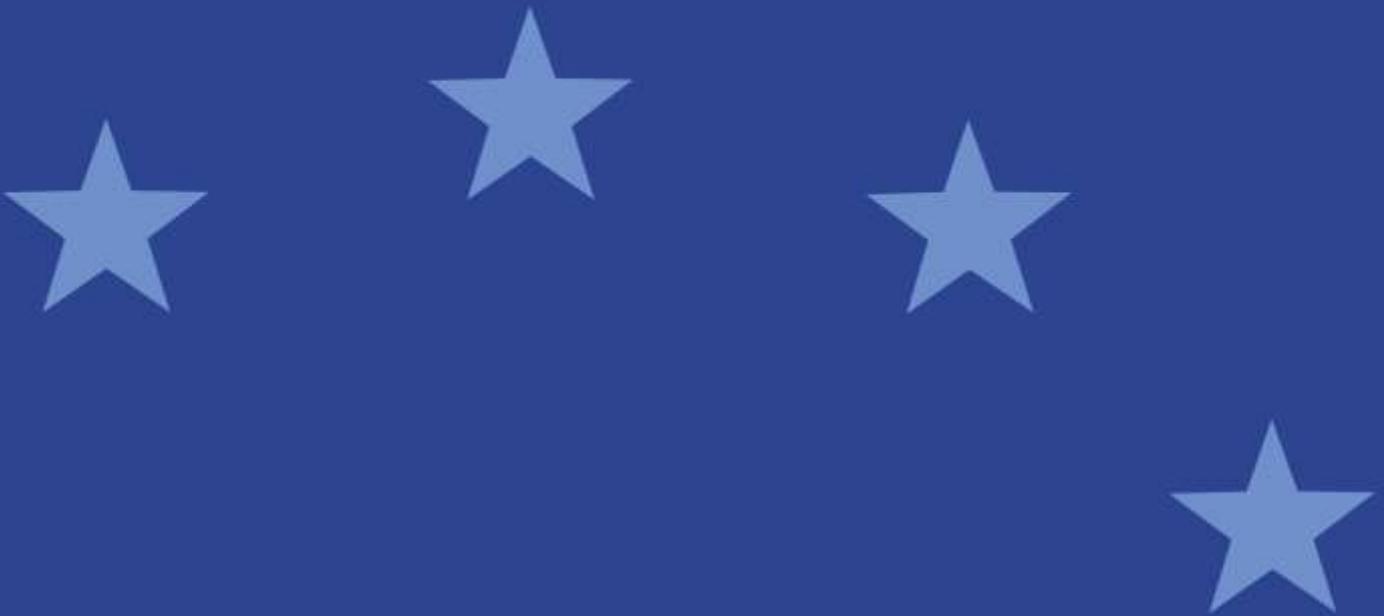




European Securities and  
Markets Authority

# Guidelines

on CCP conflict of interest management





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# 1 Acronyms

1. Unless otherwise specified, terms defined in the Regulation (EU) No 648/2012 have the same meaning in these guidelines. In addition, the following definitions and acronyms apply:

<i>CCP</i>	Central Counterparty authorised under Article 14 of EMIR
<i>CCP RTS</i>	Commission delegated regulation (EU) No 153/2013 of 19 December 2012 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
<i>EC</i>	European Commission
<i>EMIR</i>	European Market Infrastructures Regulation – Regulation (EU) 648/2012 of the European Parliament and Council of 4 July 2012 on OTC derivatives, central counterparties and trade
<i>ESMA</i>	European Securities and Markets Authority
<i>ESMAR</i>	ESMA Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority
<i>EU</i>	European Union
<i>NCA</i>	National Competent Authorities
<i>PFMIs</i>	CPSS-IOSCO Principles for financial market infrastructures, April 2012, by the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO)



## 2 Background and mandate

2. Under EMIR, CCPs shall act in the best interests of their clearing members and the clients. In that sense, CCPs shall have robust organisational arrangements and policies to prevent potential conflicts of interest and to solve them if the preventive measures are not sufficient. Article 26, 28 and most importantly Article 33 of EMIR and Articles 3, 5, 6 and 7 of the CCP RTS define organisational rules aiming to achieve those objectives.
3. Article 33 of EMIR specifies the requirements in terms of management of conflicts of interest by CCPs. In particular, CCPs are required to have written organisational and administrative arrangements to identify and manage any potential conflicts of interest between themselves and their clearing members or the clients known to them.
4. Where CCP's organisational or administrative arrangements to manage conflicts of interest are not sufficient to ensure that risks of damage to the interests of a clearing member or client are prevented, CCPs are required to clearly disclose the general nature, or sources of conflicts of interest to the clearing member or to the client before accepting new transactions from that clearing member.
5. Where a CCP is a parent undertaking or a subsidiary, any circumstance which may give rise to a conflict of interest as a result of the structure and business activities of another group entity has to be taken into account as long as the CCP is, or should be aware of this circumstance. The written arrangements shall include the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of one or more clearing members or clients, and the procedures to be followed and measures to be adopted in order to manage such a conflict.
6. Under Article 16 of ESMAR, ESMA is empowered to issue guidelines and recommendations to ensure a common, uniform and consistent application of Union law. ESMA considers that there is a need to specify further the above mentioned rules and procedures on conflicts of interest for CCPs.
7. The purpose of these guidelines is to ensure common, uniform and consistent application of the Articles 33 of EMIR and Article 3, 5, 6 and 7 of the CCP RTS. In order to elaborate these guidelines, ESMA has also reviewed regulations issued in respect of other market infrastructures, in particular CSDs, and actual rules published by CCPs.



### **3 Scope**

#### **Who?**

8. These guidelines will apply to NCAs supervising CCPs

#### **What?**

9. These guidelines apply in relation to the rules and procedures the CCPs shall set up to address conflicts of interest pursuant to Article 33 of EMIR.

#### **When?**

10. These guidelines apply from [*the date that is two months after their publication on the ESMA's website in all official languages of the EU*].



## 4 Compliance and reporting obligations

### 4.1 Status of the guidelines

11. This document contains guidelines issued in accordance with Article 16 of ESMAR. In accordance with Article 16(3) of the ESMAR competent authorities and financial market participants, CCPs in this instance, must make every effort to comply with guidelines.
12. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices and monitor whether CCPs comply with them.

### 4.2 Reporting requirements

13. NCAs to whom these guidelines are addressed must notify ESMA as to whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of their publication on the ESMA's website in all official languages of the EU to [eu-ccp@esma.europa.eu](mailto:eu-ccp@esma.europa.eu).
14. To this end, CCPs shall report to their NCA, in a clear and detailed way whether they comply with these guidelines.
15. In the absence of a response by this deadline, NCAs will be considered as non-compliant. A template for notifications is available from the ESMA website.

## 5 Guidelines

### 5.1 Clarification of the concept of conflicts of interest

16. A conflict of interest exists when a stakeholder's own interests interfere with a CCP's interests, a CCP's clearing members' interests or a clients' interests, when the client is known to the CCP, in its objectivity to make a decision or in the decision-making processes which it has to follow in the course of its professional obligations.
17. CCPs should consider potential conflicts of interest at least in the following relationships:
  - i. between the CCP and another group entity;
  - ii. between the CCP and any shareholder which at least owns a holding over the thresholds set out in Article 31 of EMIR;
  - iii. between the CCP and a company in which a board member or a committee member performs other functions;
  - iv. between the CCP and a clearing member's client, when known;
  - v. between the CCP, a data provider, a liquidity provider, a custodian bank, a settlement bank, a payment agent, a nostro agent or any other service providers to the CCP ;
  - vi. between the CCP and connected financial market infrastructure such as a trading venue, a payment system, a securities settlement system, a central securities depository, a trade repository;
  - vii. between the CCP and an interoperable CCP;
  - viii. between the CCP and a clearing member;
  - ix. between the CCP and a relevant person.
18. A person that should be considered as relevant includes:
  - i. the CCP staff (board members, directors, managers and employees), and persons with close relationship such as their family members i.e. relatives by blood or marriage up to the "second degree" and dependant persons or persons permanently sharing the same household and,
  - ii. any person who is not part of the staff or related (as described above) but who is involved in the CCP business, such as risk committee members, remuneration committee members, default management group members, any other committee members, consultants, external advisors, agent, contract staff or subcontractors.
19. CCPs should define a length of time during which the potential or real conflicts of interest are presumed to continue to have effects after the conflict ceased. Different timelines may be set-up by the CCPs depending on the envisaged type of conflict situation or concerned relevant person.



## 5.2 Organisational arrangements

### 5.2.1 Need-to-know basis

20. CCPs should clearly implement organisational arrangements aimed at precluding the undue exchange or inappropriate use of confidential information within the CCP, for example:
  - i. CCPs should ensure that confidential information which, if known, would result in conflicts of interest is shared on a “need to know” basis;
  - ii. CCPs should put in place the necessary Chinese walls in the setting-up of its organogram to guarantee a clear separation of the work streams;
  - iii. The access to the IT system should be protected by the use of the appropriate security and confidentiality measures.
21. The staff who is entitled to receive the confidential information should be reminded that information must be kept internally and externally confidential and they should not use such information to their own or a third party’s advantage. In case confidential information is shared with subcontractors or consultants, the legal arrangements in place between the CCP and the corresponding entity or individual should ensure that they are subject to the same obligation, which they should be reminded of.
22. All stakeholders involved in the risk committee and in the default management groups having access to related confidential information should be subject to strict confidentiality obligations and should, if necessary, sign a specific confidentiality agreement.

### 5.2.2 Rules of conduct

23. CCPs should take the necessary measures for their staff and any person who whilst (s)he is not part of the staff but who is involved in the CCP business as described in paragraph 18.
24. To:
  - i. act with impartiality and good faith, in the CCP’s interest, in a transparent manner and in compliance with EMIR and any other applicable regulation.
  - ii. avoid where possible, and be aware (have an understanding) of potential areas of conflicts of interest; declare any situation in which they have or can have a direct or indirect interest that conflicts with the CCP’s interests; and comply with any appropriate mitigating actions which may be required by the CCP in the circumstances.
25. CCPs should ensure that they can take disciplinary actions against staff breaching the above requirements and other equivalent actions against the other entities or individual breaching them.



26. CCPs should:
- i. adopt rules related to the limitation of the number of contracts or mandates board members and executive directors may have and which are relevant with regards to conflicts of interest, in line with the applicable law ;
  - ii. not appoint external auditors that have any direct or indirect financial, business, employment or other relationship — including the provision of additional non-audit services — with the CCP from which an objective, reasonable and informed third party would conclude that the auditor's independence is compromised;
  - iii. require the staff to disclose to the chief compliance officer any personal interests and interests of close family members as described in paragraph 18(i) which conflict or may conflict with the CCP's interests upon taking up of duties, or when the situation changes and at least annually. The chief compliance officer should also be notified when the conflict of interest no longer exists;
  - iv. require any member of staff or person described in paragraph 18 (ii) which intends to perform, simultaneously to its activity within the CCP, any outside activity potentially conflicting with the responsibilities undertaken at the CCP to seek pre-approval from the person in charge or chief compliance officer in accordance with the internal rules of the CCP before accepting the new engagement for another entity.

### 5.2.3 Gifts

27. A CCP's policy should contain clear rules regarding the acceptance of gifts whatever their form, for example, presents, inducements, preferential treatments, entertainment, hospitality received by any relevant person from clearing members, clients, trading venue, central securities depositories, trade repositories, data providers, liquidity providers or any other service providers, subcontractors or any other person or entity who may have conflicting interests with the CCP.
28. CCPs should set up a reasonable threshold or framework to assess the value of gifts to determine if the beneficiary is allowed to accept or to keep the gift. In case of doubt on the value of the gift, the chief compliance officer should decide on the actual value.

### 5.2.4 Ownership of financial instruments

29. CCPs should adopt policies defining rules on the ownership of financial instruments by its staff such as shares, bonds or any other securities that grant the right to acquire such securities which may create conflicts of interest.
30. CCPs should adopt strict rules to limit or monitor investments by their staff. CCPs should request pre-approval and/or restrictions to invest and disinvest in financial instruments which might raise conflicts of interest such as those issued by competitors, clearing members, clients, financial institutions and services providers and CCPs may consider exclusion or restriction periods to engage in transactions involving the securities of entities in the CCP group, such as during the month of the publication of the financial results or on an ad hoc basis.



31. The CCP may adapt its rules depending on the type of person involved and the circumstances in order to ensure their accuracy and their effectiveness. For example, where investments are fully delegated to an investment company or are in UCITS or AIFM, they may be excluded from the CCP pre-approval and any restrictions, and from the disclosure obligation when the CCP deems it appropriate.
32. Direct investment carried out by any member of the staff should be disclosed to the chief compliance officer or any other relevant person or body for this purpose. The disclosure of the portfolio should be done at least at the hiring or nomination of any member of the staff and be updated annually. Any transactions on the concerned financial instruments executed should be reported to the chief compliance officer.

#### 5.2.5 Training

33. CCPs should make sure that their staff is adequately trained on their obligations and on the applicable procedure concerning conflicts of interest management.
34. The training should clarify what constitutes a conflict of interest, the obligations of the staff and the corresponding sanctions, the declaration procedure and the resolution procedure of the conflict and more generally the applicable rules.
35. CCPs should keep their staff updated on a regular basis. CCPs should keep a record of the training undertaken and completed by the staff.
36. The staff should confirm that they are aware of the applicable rules.

#### 5.2.6 Oversight

37. In its responsibilities to oversee the compliance function, the CCPs' board should monitor the efficiency of the CCP's arrangements to prevent and manage conflicts of interest. The chief compliance officer should report to the board the material cases as defined by the CCP in a timely manner and the chief compliance officer's activities performed during the year.
38. The conflict of interest policy should be at least reviewed by the compliance officer and the board where relevant, on a yearly basis, or earlier if significant amendments are required.
39. The audit department should assess the effectiveness of the conflict of interest policy and of the overall CCP organisation linked to it on a regular basis.



## 5.3 Additional measures for CCPs belonging a group

### 5.3.1 At the level of the group

40. In the context of a group, the role of each board entity which is conflicted or potentially conflicted (such as the board of the mother company, the CCP's board, the board of the service provider) should be clearly defined and delineated to prevent overlapping competencies. Reserved matters dedicated to a CCP notably on the risk management matters should be prescribed.
41. Where necessary, at the level of the group, a procedure to resolve in a fairly, independent and efficient manner conflicts of interest between a CCP and other group entities should be adopted.

### 5.3.2 At the level of the CCP board or supervisory board

42. To guarantee a CCP's independence in accordance with Article 3 of the CCP RTS, where needed, supplementary independent board members compared to the regulatory requirements should be appointed by the CCP to counterbalance the number of representatives of the group entities.
43. To be qualified as an independent board member, their relevant relationship as described in paragraph 18(i) should not have business that raises a conflict of interest regarding a CCP or its controlling shareholders, its management or its clearing members.

### 5.3.3 At the level of the CCP senior management or the management board

44. Where the senior management (including the executive directors) is shared with another group entity, a CCP should compose its board or supervisory board of members in a way to ensure the independent management of the CCP activities.
45. The material decisions should be approved by the board. To do so, a list of matters and/or criteria to identify the materiality of the decision to be taken directly by the board should be defined.
46. The senior management's responsibilities should be clearly defined, the wages including the bonuses of the senior managers should be correctly balanced compared to the wages offered by the other company in order to avoid any biased decisions. A close monitoring of potential conflicts of interest should be performed by the chief compliance officer, the board or the independent board members.



#### 5.3.4 At the level of the staff

47. Where under the terms of an outsourcing arrangement the staff of a CCP perform task for several group entities, the following rules should be adopted by the CCPs:
  - i. the responsibilities, the distribution of working time and the hierarchical lines between the entities should be clearly defined. The CCPs should check that the worktime for performing the several functions within different group entities is not higher than a full time job;
  - ii. CCPs should take part in the entire recruitment process and should have an effective power of decision over the selection of the staff, over their career progression or over the termination of the relationships. CCPs should have clear organigrams identifying shared resources.
48. The remuneration should be set up by the CCP in accordance with Article 8 of the CCP RTS. In particular, the wage, including bonuses, of the concerned staff should be correctly balanced compared to the one attributed by the other company in order to avoid any partial decision or performance of tasks. The level of the bonuses or any other financial advantage rewarding the staff performance when executing their tasks should be assessed and ultimately decided by the CCPs.

#### 5.3.5 In case of outsourcing to another group entity

49. Where the service provider is part of the CCP's group, the following supplementary measures should be taken by the CCP as a minimum:
  - i. the outsourcing of major activities to a group entity should be decided by the CCP board after, if relevant, seeking advice from the risk committee;
  - ii. the board should define the requirements of the services outsourced to other group entities;
  - iii. the CCP should check if the subcontractor has appropriate control arrangements in place to avoid conflicts of interest from their side in particular where the subcontractors provide a range of services to the CCP;
  - iv. the outsourcing arrangement should be performed under normal market conditions and should include provisions in respect of escalation and exit management;
  - v. key performance indicators should be clearly defined and escalation and enforcement mechanism such as penalties in line with the standard market practices should be fixed and enforced if necessary. The subcontractor performance should be reported to the board;
  - vi. where the IT is outsourced, clear rules of prioritisation of the IT projects and change requests should be defined. Any change requests or project necessary to the CCP to comply with the regulation or any request from the NCA should be implemented by the subcontractor in a timely manner.



## 5.4 Conflict of interest management procedure

### 5.4.1 Resolution procedure

50. Where an identified or possible conflict of interest appears during the course of the business relationship, it should be immediately and directly disclosed to the chief compliance officer and any other relevant person or body by the conflicted member of the staff or any other member of the staff aware of it as soon as reasonably possible.
51. CCPs should not require evidence of the conflicts of interest to be disclosed before starting taking action. In case it is not certain whether a situation constitutes a potential or a current conflict of interest, the chief compliance officer should be in charge to clarify it.
52. A whistle-blower should not be blamed in any circumstance if it raises an actual or potential conflict of interest, if possible under the applicable law.
53. Where investigations are required, the chief compliance officer should be empowered to perform them. The conflicted person should be heard during the process. If the chief compliance officer is not in charge to solve the issue, the chief compliance officer should provide to the decision maker a report with their analysis of the actual or potential conflicts of interest and, if it is considered as established, with recommendations to solve it.
54. CCPs should clearly define who is responsible for the decision-making on the existence of the actual or potential conflict of interest and on the measures to be taken, if different. The decisions should be made by a person or a body which has sufficient independence and authority to enforce its decision. Several persons or bodies may be defined for that purpose depending on their responsibilities such as the chief compliance officer, the line manager, the executive directors, the board, the independent board members or the chairman of the board or committees. In that sense, the chairperson and/or independent board members should be in charge where the conflict of interest concerns a senior manager or any other board member.
55. An escalation procedure should be implemented by CCPs in case of disagreement on the taken decision. The procedure should ensure that the case is dealt with at short notice. At the latest stage, the independent board members might take the final decision.



#### 5.4.2 Resolution measures

56. As a minimum, the following range of measures to remedy potential or existing conflicts of interest should be envisaged by CCPs:
- i. the monitoring of the conflict by the relevant body or a member of the staff such as the board or the line manager;
  - ii. the disclosure to the affected party such as clearing member(s) or client(s) in a timely manner in compliance with Article 33(2) of EMIR;
  - iii. the exclusion of the conflicted member of the staff from the sensitive information;
  - iv. restriction to participate in the discussions, negotiations, decisions or votes which may be subject to a conflict of interest;
  - v. exemption of duties and assignment to another member of the staff member;
  - vi. temporary or definitive exclusion of the conflicted member of the staff to the relevant board, committee, meeting, etc.;
  - vii. the disclosure to the NCA.
57. The termination of the contract of the conflicted member of the staff could be envisaged if possible under the applicable law.

#### 5.4.3 Following-up

58. The chief compliance officer, or the person or body defined pursuant to paragraph 54, should verify on a regular basis the status of the conflict (i.e. potential/existing conflict of interest) and that the mitigation measures are enforced. Such person should review if the measures are still necessary or need to be adapted. The frequency of the review should be adapted to the specificities of the cases.
59. The chief compliance officer, or the person or body defined pursuant to paragraph 54, should report to the board the conflicts of interest that have occurred and any mitigating measures which have been decided on an annual basis.
60. In case of breach of the conflict of interest policy, CCPs should report any material breach to the NCA after the breach has been escalated and notified to the CCPs senior management / board and within 48 hours.

#### 5.4.4 Conflict of interest register

61. CCPs should implement processes and procedures to track and record:
- i. the interests which potentially or concretely conflict with the CCP's' interests;
  - ii. the investments in financial instruments owned by the staff and any transactions related to it;
  - iii. the gifts above the threshold received by the staff and the decision related to it;
  - iv. the different steps of the resolution procedure;
  - v. the resolution measures taken by the CCPs;



- vi. the reviews of the status of the conflicts of interest and the monitoring of the implementation of the resolution measures;
- vii. the training performed by the staff.

62. The register should remain strictly confidential.