

COMMERCIAL BANKS AND PUBLIC GUARANTEES AS COLLATERAL

ESMA'S CONSULTATION

AMAFI's answer

AMAFI is the trade association representing financial markets' participants of the sell-side industry located in France. It has a wide and diverse membership of more than 170 global and local institutions notably investment firms, credit institutions, broker-dealers, exchanges and private banks. They operate in all market segments, such as equities, bonds and derivatives including commodities derivatives. AMAFI represents and supports its members at national, European and international levels, from the drafting of the legislation to its implementation. Through our work, we seek to promote a regulatory framework that enables the development of sound, efficient and competitive capital markets for the benefit of investors, businesses and the economy in general.

I. GENERAL COMMENTS

Under EMIR 3, the acceptance of public guarantees, public bank guarantees and commercial bank guarantees as collateral for non-financial counterparties constitutes a positive development as this will alleviate the liquidity constraints that these entities can face. This will help avoiding or mitigating liquidity issues stemming from high margin calls, such as those observed during the 2022 energy crisis.

It is also likely to enhance the attractiveness of secured centrally cleared markets compared to OTC venues, a trend that is particularly desirable during periods of market stress, as the opposite can impair price formation and reduce overall market liquidity.

In this context, AMAFI welcomes ESMA's consultation for amending the EMIR RTS on requirements for central counterparties ([Delegated Regulation \(EU\) 153/2013](#)) aiming to specify the conditions under which public guarantees, public bank guarantees and commercial bank guarantees can be accepted as collateral, on a permanent basis and not on a temporary and targeted manner as in the current version of the RTS.

Before addressing the specific questions of the consultation, a few general comments are set hereafter.

- ▶ The effectiveness of the proposed framework will primarily depend on its operational usability, it should therefore not add extra burden on its interpretation and implementation, to make it easy to use. As such, a harmonised definition of public guarantees /public banks is welcome, as to avoid any divergent interpretations and potential competitive distortions across Member States. In addition, AMAFI would welcome a centralised register of entities defined as such in order to ease their identification, to the extent that clearing members or CCPs may not be sufficiently familiar with public institutions established in other jurisdictions.
- ▶ Asymmetries persist in the **treatment of guarantees along the clearing chain**. In particular, the diverging prudential and operational treatments of these guarantees between a CCP and its clearing members, as per the examples below, together with the excessive complexity of certain proposed regulatory requirements, could hinder the effective mobilisation of these instruments.
 - While **EMIR 3 allows for the recognition of such guarantees** as eligible collateral, it does not impose any obligation on CCPs to accept them¹. As detailed by AMAFI in a dedicated paper ([AMAFI / 23-52](#)), this is a critical limitation, as the measure will remain ineffective if not adopted by CCPs in their rulebooks.
 - **The CRR prudential framework** should be adjusted to make certain guarantees usable in practice. For example, Standby Letters of Credit (SBLCs) are currently accepted as collateral under EMIR but not treated the same under CRR, where they are considered "*unfunded credit protection*". While SBLCs can mitigate credit risk by substituting the risk weight of the debtor with that of the guarantor, they do not reduce the Exposure at Default (EAD), like cash collateral would. A review of the CRR treatment of SBLCs should be considered.

Addressing these points will enhance regulatory convergence, usability and ensure that the intended benefits of EMIR 3 can be effectively realised.

¹ « A CCP **may**, subject to the relevant conditions being met, accept public guarantees, public bank guarantees or commercial bank guarantees (...) »¹ ([Regulation \(EU\) N° 648/2012, Art. 46](#)).

II. ANSWERS TO THE QUESTIONS

A. COMMON CONDITIONS TO THE USE OF ALL GUARANTEES

1. Concentration limits

Q1. Do you agree that the existing provision on concentration limits should apply to guarantees and as such Article 42 should be amended to provide legal clarity on this?

AMAFI supports the application of concentration limits to guarantees for the sake of regulatory consistency with other instruments.

However, the uniform 10% cap of the collateral of a CCP that could be guaranteed by a single credit institution appears inappropriate for public guarantees, whose risk profile differs materially from that of commercial guarantees. Given their specific nature, public guarantees should benefit from a higher concentration threshold.

In addition, the mechanism allowing the limit of 10% to be increased to 25% in case of high concentration (when commercial or public bank guarantees exceed 50% of total collateral) appears counterintuitive and suboptimal from a prudential perspective.

Q2. Do you agree with the inclusion of the level of collateralisation of the guarantee as a criterion for the CCP to consider when establishing concentration limits?

The level of collateralisation of the guarantee should be precisely defined, as an unclear definition would introduce complexity and lead to heterogeneous implementation. The key consideration for its definition should remain the ability of the guarantee to be mobilised quickly and effectively exercised.

Q3. Do you agree with the inclusion of the new criteria (e) in paragraph 3 of Article 42, so that the CCP can consider the activity of the non-financial client when setting concentration limits?

AMAFI does not support the inclusion of “the underlying activity of the non-financial client” as a new criterion for the determination of concentration limits.

The activity of NFCs is already adequately captured through the due diligence and controls performed by clearing members on their clients. Introducing this criterion at CCP level would create unnecessary duplication and add complexity without delivering clear benefits. It could also lead to unjustified differentiated treatments, depending on the individual assessments made by the CCPs.

Q4. Shall there be specific concentration limits established for guarantees provided by non-clearing members, given these exposures are not considered in the Stress Test?

All accepted guarantees should be included in the stress testing, regardless of the nature of the guarantor. Excluding them would create a blind spot in risk assessment and would be inconsistent with their recognition as eligible collateral. If such guarantees are used in practice, they should be fully incorporated into the prudential framework.

2. Use of guarantees by non-financial clients

Q5. Is ESMA's understanding correct? Are there other essential features of the guarantees that should be highlighted?

The extension of public and commercial bank guarantees, currently limited to clearing members, to non-financial counterparties (NFCs) is a positive development, as it facilitates NFCs' access to the market by broadening the range of eligible collateral to the one they can provide as NFCs. However, its effectiveness remains conditional on their acceptance by CCPs, which is still not mandatory ("A CCP may, subject to the relevant conditions being met, accept public guarantees, public bank guarantees or commercial bank guarantees (...)»²). In this context, AMAFI considers that the proposed modification of the RTS, aiming to specify the conditions under which public guarantees, public bank guarantees and commercial bank guarantees can be accepted as collateral on a permanent basis, provides a clear framework to make their usage mandatory rather than leaving it to the discretions of CCPs.

In addition, and as proposed in the RTS, it is appropriate that the CCP be exposed to the clearing member rather than to the end client to remain consistent with the existing CCP clearing model.

Q6. Do you agree with the conditions proposed by ESMA? Please provide your views specifically for each condition (a), (b), (c) and (d).

The proposed conditions applicable to guarantees where the applicant is a NFC, client of a clearing member, are broadly consistent from a risk management perspective. However, it remains important, for operational reasons and to avoid any additional burden, that these controls remain performed by the clearing member rather than duplicated at the CCP level.

While the proposed prohibition of intra-group guarantees is understandable from a prudential standpoint, it may unduly constrain certain business models, in particular for mutual or cooperative groups where entities granting guarantees to non-financial clients may have distinct financial structures and risk profiles than their parent company, acting as their clearing members. As such, particular attention should therefore be given to ensuring proportionality while maintaining a comprehensive risk management framework.

² Regulation (EU) n° 648/2012, art. 46 §1.

Q7. *In relation to condition (c), do you agree with ESMA proposal? If not, is it in your opinion legally and practically feasible that guarantees are posted to an omnibus account?*

The proposed segregation of guarantees at client level is justified, as it prevents netting effects between positions of different clients. It contributes to enhanced transparency and improved risk management. The use of omnibus accounts, which would remove the link between the guarantees and the positions of the client, does not appear appropriate for efficient risk management.

Q8. *Is there any other condition you consider would be necessary in relation to the extension of the use of guarantees to guarantee non-financial clients? E.g. should it be mandated that CCPs have in place a mechanism to identify the default of a non-financial client?*

It would be useful to clarify the interaction between a client' default and its clearing member. As such, a mechanism enabling the rapid identification of a client' default would be beneficial for risk management purposes.

B. SPECIFIC CONDITIONS FOR THE USE OF PUBLIC GUARANTEES

Q9. *Do you agree with ESMA's proposal to require that there are a credit rating and reliable financial data on the guarantor available for the CCP to use in its internal assessment?*

AMAFI has reservations regarding this proposal, as the credit quality of NFC clients is already assessed by clearing members as part of their due diligence on their clients for risk management purposes.

Introducing a duplicative assessment by CCPs would unnecessarily increase complexity and could disincentivise the use of public guarantees. A more proportionate approach would be preferable, reflecting the fact that the CCP's direct exposure remains to the clearing member rather than to the end client.

Q10. *Do you consider that the direct access of a public guarantor to real-time gross settlement systems such as T2 should be a requirement for public guarantors? Please provide evidence or reasoning to support your response. 22*

Direct access to payment systems such as TARGET2 should not be required, as it would introduce an unnecessary and potentially exclusionary constraint. The key criterion should instead be the immediate enforceability of the guarantee.

Another important point is that a client' default can be identified rapidly (as per our answer to question 8) and that the guarantee can be mobilised rapidly, regardless of the technical channel through which enforceability is achieved.

Q11. Do you agree that public guarantees should be accompanied by a legal opinion confirming the effective representation of the guarantor, the validity of the guarantee and its enforceability?

AMAFI does not support the systematic requirement for a legal opinion on public guarantees. Such an obligation appears disproportionate, particularly for guarantees issued by Member States or well-identified public entities, whose legal validity is not in question.

The core issue lies upstream, in the absence of a harmonised definition of public guarantees at EU level. In this context, a more effective approach would be to clarify the scope of eligible public guarantees (for example through a list or common criteria), which would render most legal opinions unnecessary.

The use of legal opinions should therefore remain exceptional and be left to the discretion of clearing members or CCPs, limited to cases where specific legal uncertainty arises.

C. CONDITIONS FOR THE USE OF BANK GUARANTEES

Q12. Do you agree that the conditions for commercial bank guarantees should explicitly foresee that the guarantor is a credit institution as defined in CRR?

AMAFI supports this clarification, as it strengthens legal certainty. In particular, specifying that the guarantor of commercial bank guarantees must be a credit institution within the meaning of the CRR provides useful legal clarity regarding the nature of eligible guarantors.

Q13. Do you agree that the possibility for CCP to accept uncollateralised bank guarantees should be specified in Section two of Annex I of RTS 153/2013?

AMAFI supports the explicit clarification in the RTS that CCPs may accept uncollateralised guarantees, in line with EMIR 3. Such guarantees are crucial for certain market participants that are not financial counterparties, with limited access to liquid assets.

Still, this should not translate into additional requests from the CCP, as the assessment of the credit risk of both the client and the guarantor is already performed by clearing members, as part of their risk management controls on their clients.

Q14. Do you agree with ESMA that the conditions applicable to commercial bank guarantees should also be applicable to public bank guarantees? Please specify in your answer whether any additional condition should be considered.

We support the alignment, when possible, of key principles (irrevocability, unconditionality, enforceability and timely availability of funds within the liquidation period) between commercial and public bank guarantees, and the proposal to introduce specific conditions for public bank guarantees

based on those applicable to commercial bank guarantees. This approach ensures consistency in risk management standards and preserves the robustness of the collateral framework.

However, an overly strict application may fail to adequately reflect the legal and operational specificities of certain public guarantees, which do not always meet the traditional criteria of irrevocability, unconditionality and payment on first demand. For instance, instruments such as letters of credit or standby letters of credit (SBLCs), although widely used, do not always meet all the criteria applicable to traditional bank guarantees.

A degree of flexibility therefore appears necessary to preserve the effective usability of these instruments, based on a case-by-case assessment taking into account the specific characteristics of the different types of guarantees that may be provided.

Q15. Do you agree with the proposed way to address the lack of definition of “public bank”?

The absence of a clear definition of public banks constitutes a major source of uncertainty. A harmonised clarification at EU level is therefore necessary, either through precise criteria or a list of recognised entities.

In the absence of such a definition, CCPs are required to conduct case-by-case assessments, which creates operational frictions and acts as a barrier to the effective acceptance of these guarantees.

D. INVESTMENT POLICY (ARTICLE 47 OF EMIR)

Q16. Do you agree with the proposed change concerning the conditions under which debt instruments can be considered highly liquid, bearing minimal credit and market risk (and hence considered as eligible financial instruments for the purpose of CCP investment policy)?

N/A

Q17. Do you agree with the proposed change concerning the highly secure arrangements for the deposit of financial instruments posted as margins or as default fund contributions?

N/A, as this type of collateral is not currently used by AMAFI members.

