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COVER NOTE

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 14 July 2020

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: COMMISSION DELEGATED REGULATION (EU) .../... of 14.7.2020
supplementing Regulation (EU) No 648/2012 of the European Parliament
and of the Council with regard to the minimum elements to be assessed by
ESMA when assessing third-country CCPs' requests for comparable
compliance and the modalities and conditions of that assessment

Delegations will find attached document C(2020) 4895 final.

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EUROPEAN
COMMISSION

Brussels, 14.7.2020
C(2020) 4895 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 14.7.2020

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the minimum elements to be assessed by ESMA when assessing third-country CCPs' requests for comparable compliance and the modalities and conditions of that assessment

(Text with EEA relevance)

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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 25a of Regulation (EU) No 648/2012 (the European Market Infrastructure Regulation or ‘EMIR’) provides that a third-country Central Counterparty (CCP) that is considered systemically important or likely to become systemically important for the financial stability of the Union or for one or more of its Member States (‘Tier 2’ CCP) may request the European Securities and Markets Authority (ESMA) to assess its ‘comparable compliance’, i.e. whether that CCP may be in compliance with EMIR through its compliance with its domestic law.

Article 25a(3) of EMIR empowers the Commission to adopt a delegated act specifying: (a) the minimum elements to be assessed by ESMA for the purpose of comparable compliance and; (b) the modalities and conditions for ESMA to carry out that assessment.

This delegated act is adopted in accordance with Article 82(2) of EMIR, which provides that the Commission shall endeavour to consult ESMA before adopting such an act.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Procedural aspects

In May 2019, the Commission asked ESMA for its views (‘technical advice’) on a Commission delegated act on comparable compliance specifying the minimum elements to be assessed by ESMA for the purpose of comparable compliance and the modalities and conditions for ESMA to carry out that assessment. ESMA conducted a public consultation on its draft technical advice on comparable compliance from 29 May 2019 to 29 July 2019. 11 respondents to the public consultation gave public feedback, others responded on a confidential basis. The non-confidential responses to the consultation are published on ESMA’s website. ESMA submitted its technical advice to the Commission on 11 November 2019. That advice is non-binding and does not prejudge the Commission’s final decision.

On 21 October 2019, the Commission consulted the Expert Group of the European Securities Committee (EGESC) on the provisional content of this delegated act. The EGESC comprises representatives of Member States, the European Central Bank (ECB), the Secretariat of the European Parliament’s Committee on Economic and Monetary Affairs, and ESMA.

In accordance with the Better Regulation Guidelines, the draft delegated act was published on the Better Regulation Portal for a four-week public feedback period, running between 11 June and 9 July 2020. 8 responses were received. The responses are available on the Better Regulation Portal¹. In addition to the feedback received via the Better Regulation Portal, the Commission received several confidential replies. ESMA also provided further technical feedback.

Stakeholders’ views

As a result of the abovementioned consultations as well as ad hoc contributions, the Commission received a wide range of views on the content of the delegated act. The views received referred mainly to the following aspects:

Need to highlight the benefits of comparable compliance

Many stakeholders questioned the benefits of comparable compliance for a Tier 2 CCP.

¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12023-Financial-market-regulation-compliance-of-non-EU-clearing-houses/feedback?p_id=8001699

First, a large number of stakeholders expressed concerns about assessing a third-country CCP's comparability with Article 16, Title IV and Title V of EMIR, including the relevant technical standards, on a requirement-by-requirement basis. Stakeholders indicated that such a granular approach, while potentially helpful in framing how ESMA conducts the assessment, amounted to a strict line-by-line assessment. They pointed out that this could result in a risk that the rules applied by a third-country CCP, while still achieving the same outcome as EMIR, could not be comparable enough to those of EMIR as they would be unlikely to be identical.

Second, stakeholders also expressed concerns about dividing EMIR requirements into 'core provisions', including related technical standards, or not, and establishing different benchmarks for comparable compliance accordingly. Stakeholders indicated that such an approach could:

- frame the assessment in a way that would make it difficult for ESMA to reach a positive finding of comparable compliance for any third-country CCP;
- provide for an inconsistent assessment of EMIR requirements, given the 'arbitrary' distinction between core and other provisions of EMIR;
- result in an overly complex and opaque compliance regime;
- introduce policy objectives that may not be aligned with EMIR;
- lead ESMA to apply EMIR to Tier 2 CCPs, submitting Tier 2 CCPs to overlapping regulators and leading them to comply with requirements that may be inappropriate or incompatible with their domestic legal regimes, potentially supplanting their local regulatory regimes and threatening financial stability;
- increase the risk of conflicts between the laws in the third country and the rules in EMIR;
- prevent alternative routes to compliance where compliance with the EMIR requirement would be legally impossible for a given Tier 2 CCP or expose it to legal risks; and
- contradict the G20's commitment that '*jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes; based on similar outcomes*'², thereby potentially fragmenting global markets.

Consequently, stakeholders broadly called for the assessment of comparable compliance to focus on whether compliance with a third-country regime genuinely compares with compliance with certain provisions in EMIR. Members of the EGESC also called for ensuring that the assessment of comparable compliance ensures compliance with EMIR through compliance with the third-country rules. Some stakeholders also suggested following a holistic assessment, whereby a deviation from one of the requirements in EMIR could be offset by compliance with another provision corresponding to another EMIR requirement so that, on the whole, compliance with the applicable third-country framework would enable the Tier 2 CCP to achieve the same practical outcome on the relevant issue as compliance with EMIR. Other stakeholders suggested that the assessment should rely on the relevant elements of the Principles for Financial Markets Infrastructures (PFMIs) rather than EMIR provisions.

² G20 Leaders' declaration, Saint Petersbourg, 2013. Available at: <http://www.g20.utoronto.ca/2013/2013-0906-declaration.html>

Finally, some stakeholders also noted that, when conducting the comparable compliance assessment, ESMA should liaise with third-country regulators in order to ensure that ESMA has a comprehensive picture and understanding of the applicable third-country framework. In addition, stakeholders advocated for consulting the third-country authorities in the event that ESMA intends to reject a request for comparable compliance before coming to a finding.

Need to take into account the Commission's equivalence decision

A large number of stakeholders asked for the delegated act to clarify the relationship between on the one hand, the European Commission's assessment of the equivalence of the regulatory and supervisory regime of a third-country jurisdiction and on the other hand, ESMA's assessment of comparable compliance. Similarly, members of the EGESC also called for clarifying further the role of the Commission's equivalence decision in relation to comparable compliance.

In particular, stakeholders argued that assessing the requirements applicable to a third-country CCP for the purpose of comparable compliance would disregard the fact that the EU has already determined the regulatory and supervisory regime applicable to that CCP as 'equivalent'. Moreover, they stated that such an approach would not reflect the EMIR requirement that ESMA's assessment take into account equivalence decisions. Stakeholders indicated that, where the European Commission has already made an equivalence determination, a re-assessment of the relevant third-country rules could be duplicative and unnecessary, potentially rendering the European Commission's equivalence assessment null and void and superseding it with ESMA's own assessment.

Consequently, a majority of stakeholders strongly supported reflecting further the Commission's equivalence assessment in any comparable compliance assessment by ESMA, with some stakeholders urging ESMA to simply accept the findings of the Commission's equivalence decision.

Excessively burdensome process

Stakeholders highlighted that, should a line-by-line assessment be followed, the detail of the information to be provided by Tier 2 CCPs requesting comparable compliance is likely to place a significant cost and resource burden on each CCP. This may lead to some third-country CCPs withdrawing from the EU market, to the detriment of EU clients.

Most stakeholders also voiced concerns about Tier 2 CCPs including, in their request for comparable compliance, an opinion of the third-country supervisory authority on the accuracy of the representation of the requirements applying in the third country, a legal opinion confirming the accuracy of the mapping of corresponding requirements and, where necessary, a certified translation of relevant requirements in the third country. Stakeholders indicated that those opinions and their translation would impose significant compliance and cost burden on Tier 2 CCPs. In addition, with regard to the legal opinion, stakeholders also challenged whether a comparative legal analysis would be at all possible or relevant. Stakeholders suggested that ESMA should liaise with the relevant third-country authority to address any concerns. Stakeholders also called for time limits for ESMA to conduct the comparability assessment and for providing Tier 2 CCPs with a grace period during which a Tier 2 CCP may request a re-assessment of its non-comparability assessment.

3. IMPACT ASSESSMENT

According to Article 25a(3) of EMIR, the Commission must specify the minimum elements to be assessed by ESMA and the modalities and conditions of the assessment of comparable compliance.

Under paragraphs (1) and (2) of Article 25a, ESMA shall, where a Tier 2 CCP submits a reasoned request for comparable compliance, assess whether that CCP may satisfy compliance with Article 16, Title IV and Title V of EMIR by complying with the applicable third-country framework, taking into account the provisions of the related Commission's equivalence decision under Article 25(6) of EMIR. The Tier 2 CCP's request shall provide the factual basis for a finding of comparability and the reasons why compliance with the requirements applicable in the third country satisfies the relevant EMIR requirements.

ESMA's technical advice

In its technical advice, ESMA proposed specifying minimum elements for each EMIR provision, according to a requirement-by-requirement approach. ESMA divided the minimum elements into: (i) '*core provisions*', which were satisfied by '*equal or at least as strict or conservative corresponding requirements*' in the third country; and (ii) '*other EMIR provisions*', which could be satisfied by similar corresponding third-country requirements substantially achieving the respective objectives. The assessment would have been based on information in a CCP's request for comparable compliance, and could have been accompanied by more documentation, including an opinion by the third-country authority on the accuracy of the representation of the third-country rules, a certified translation of the third-country rules and a legal opinion on specific elements of the third-country rules.

The Commission has fully considered all representations received, including the technical advice provided by ESMA and the responses to ESMA's public consultation, the feedback received from the EGESC, as well as other input provided to the Commission by stakeholders. On this basis, the Commission is proposing the adoption under Article 25a(3) of EMIR of this delegated act specifying the minimum elements to be assessed by ESMA and the modalities and conditions of the assessment of comparable compliance.

This delegated act nevertheless deviates from ESMA's technical advice in order to ensure: that the assessment of comparable compliance focuses on whether compliance with a third-country framework may satisfy compliance with EMIR; that equivalence decisions are taken into account; and that Tier 2 CCPs do not face unnecessary burden. These aspects are explored in more detail below.

ESMA's technical advice is accompanied by an impact assessment. Against this background and taking into account that the Commission's deviations are intended to reduce further the administrative burden and costs for third-country CCPs compared to ESMA's technical advice, the Commission has not prepared a separate impact assessment. Nevertheless, Section 3 below assesses the positive and negative impacts of the changes introduced by the Commission and analyses the costs and benefits of the measures proposed.

Quantitative data reflected in the costs and benefits section is however limited for several reasons. First, the majority of the data available to the Commission is confidential and cannot be reproduced. Second, ESMA asked for quantitative data as part of its public consultation but received very limited feedback. Third, the differences in third-country CCPs are such that the costs (and benefits) of the changes will vary considerably, e.g. depending on how much information is already publically available or has already been provided to ESMA or depending on the size and complexity of a third-country CCP.

On the basis of the views brought to the attention of the Commission, the following policy options can be identified:

Policy option 1	To assess comparable compliance by conducting a <i>requirement-by-requirement analysis of the third-country rules that correspond to</i>
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	<i>those EMIR requirements</i> that apply to Tier 2 CCPs, including those that have been already assessed by the Commission for the purpose of the relevant equivalence decision.
Policy option 2	To assess comparable compliance by analysing <i>whether compliance with the third-country rules may satisfy compliance with those EMIR requirements</i> that apply to Tier 2 CCPs, <i>taking into account the pre-existing Commission's assessment</i> of some of those requirements for the purpose of the relevant equivalence decision.
Policy option 3	To assess comparable compliance <i>against the Principles for Financial Market Infrastructures (PFMIs)</i> , automatically accepting the findings of the Commission's equivalence decision for those EMIR requirements that are subject to an equivalence decision.

It is important that this delegated act ensures a level-playing field between EU CCPs and Tier 2 CCPs that provide services to EU firms, and a level of resilience of the Tier 2 CCPs in accordance with the EMIR requirements. Nevertheless, the Commission seeks to address the concerns about imposing EMIR requirements as floor and potentially superseding the domestic third-country regime, and the need to take into account the Commission's assessment of equivalence.

In that sense, the Commission favours Option 2, according to which the assessment of comparable compliance can focus on whether compliance with EMIR may be satisfied through compliance with third-country rules, taking into account the equivalence assessment and limiting the burden on Tier 2 CCPs, without pre-empting ESMA's assessment or putting the stability of the EU's financial system at risk.

Option 3 was favoured by some stakeholders, who advocated for an automatic granting of comparable compliance for those provisions of EMIR that have been assessed equivalent or deemed compliant with the Principles for Financial Market Infrastructures. This would however ignore the requirements under EMIR whereby the assessment of compliance with domestic rules: (i) is compared against compliance with certain EMIR requirements and (ii) applies to EMIR provisions that are also assessed by the Commission for the purpose of equivalence.

Ensuring compliance with EMIR through compliance with third-country rules

The Commission specifies in this delegated act the requirement of Article 25a(3) of EMIR that a Tier 2 CCP's compliance with its domestic framework should effectively satisfy compliance with the requirements set out in Article 16, Title IV and Title V of EMIR in order to be granted comparable compliance. As such, the Commission proposes to indicate clearly the minimum elements to be verified in order to ensure compliance with EMIR through compliance with the third-country rules.

This approach highlights the benefits of comparable compliance for Tier 2 CCPs, in response to concerns voiced by stakeholders, by clarifying that where comparable compliance is found, a Tier 2 CCP will be considered to comply with EMIR to access the EU's single market by continuing complying with its domestic rules. This approach also clarifies that comparable compliance is not about assessing the rules of a third country, and focuses ESMA's assessment on how a Tier 2 CCP's compliance with those rules can effectively satisfy compliance with the requirements set out in Article 16, Title IV and Title V of EMIR.

In addition, the Commission proposes to target the assessment on those EMIR CCP requirements that are critical to ensuring the resilience of Tier 2 CCPs accessing the single market and a level-playing field between them and EU CCPs, in line with internationally agreed principles. EMIR requirements that apply to competent authorities and that are specific to the EU market and supervisory architecture are therefore outside the scope of comparable compliance.

This approach provides further flexibility to cater for situations where a Tier 2 CCP's compliance with a given EMIR requirement may contradict or impede compliance with applicable domestic law. In cases where a Tier 2 CCP's compliance with its domestic rules satisfies compliance with EMIR, comparable compliance should be granted. This fully reflects the EU's current deference practices, in line with G20 international commitments, while maintaining a level playing field between EU and Tier 2 CCPs and the necessary stability of the EU's financial system, in line with EMIR's main objective. This balance addresses concerns voiced by certain third-country regulators about potentially overlapping supervisory requirements.

Finally, the delegated act does not request Tier 2 CCPs to apply an EMIR requirement as a minimum or 'floor' where the corresponding requirement in the third country is not identical to allow comparable compliance with respect to that requirement. This approach addresses concerns about the perceived risk that achieving comparable compliance could potentially result in supplanting a Tier 2 CCP's local regulatory regime and require Tier 2 CCPs to 'disapply' domestic rules, thereby threatening financial stability.

Consideration of equivalence decision

The Commission clarifies in this delegated act the requirement under Article 25a(1) of EMIR that ESMA should take into account the respective equivalence decision in its assessment of comparable compliance for Title IV of EMIR (organisational requirements, conduct of business rules, prudential requirements) given that an assessment of all those requirements has already been made for the purposes of the Commission's equivalence decisions.

Indeed, while equivalence applies to a jurisdiction (and to the respective Tier 1 and Tier 2 CCPs alike) and covers, in particular, Title IV of EMIR, comparable compliance applies to a given Tier 2 CCP and can be found for Title IV, as well as Article 16 (capital requirements) and Title V (interoperability requirements) of EMIR.

For this reason, in order to ensure that the assessment of comparable compliance considers the findings of the relevant Commission equivalence decision, the delegated act introduces specific modalities for ESMA's assessment of Title IV of EMIR. First, the delegated act sets out in an annex the minimum elements that ESMA should verify to determine whether a CCP's compliance with the applicable third-country framework is comparable to the compliance with Title IV of EMIR, focused on aspects that are critical to ensure a level-playing field amongst operators. Second, if an equivalence decision includes conditions, ESMA should verify that the Tier 2 CCP effectively fulfils those specific conditions. Third, ESMA should consult the relevant third-country authorities in order to confirm its understanding of the outcome of a Tier 2 CCP's compliance with its domestic law. Fourth, given that equivalence decisions are adopted by the Commission, ESMA should also inform the Commission where it intends to reject a request for comparable compliance as this may have implications for the equivalence assessment for which the Commission is responsible.

The benefit of that approach is that, by providing for the interplay between the assessments of equivalence and comparable compliance, the overall consistency of the EMIR third-country

regime is preserved and streamlined to the benefit of cooperation with third-country authorities and financial stability.

Limited burden on Tier 2 CCPs

This delegated act ensures that comparable compliance provides significant administrative and regulatory relief to Tier 2 CCPs. Comparably compliant Tier 2 CCPs will be able to access the EU's single market through compliance with their domestic rules, to the benefit of EU firms that are serviced by those CCPs.

The indication of the elements to assess comparable compliance brings *ex ante* clarity to Tier 2 CCPs, setting upfront the bar for comparable compliance without pre-empting ESMA's assessment.

3.1 Analysis of costs and benefits

By ensuring that the assessment of comparable compliance focuses on how a Tier 2 CCP's compliance with third-country rules can effectively satisfy compliance with EMIR and takes into account the pre-existing equivalence decision, the proposed modalities meet their objectives. The costs to third-country CCPs being assessed and the costs to ESMA are reduced, while providing for a level playing field between EU and Tier 2 CCPs and safeguarding financial stability.

The costs to third-country CCPs are minimised as much as possible. First, where comparable compliance is found, a Tier 2 CCP faces, in principle, no additional compliance costs as that CCP can comply with EMIR through compliance with its domestic rules. Second, the costs of preparing the reasoned request are reduced, as the delegated act sets upfront the essential elements for justifying comparable compliance, making it easier for a Tier 2 CCP to explain why compliance with its domestic law effectively satisfies compliance with EMIR.

As far as ESMA is concerned, on the one hand, costs may increase, as ESMA needs to ensure in cooperation with the relevant third-country authorities that its understanding of a Tier 2 CCP's compliance with its domestic law is accurate and comprehensive. In addition, ESMA will face costs to assess comparable compliance with Title IV of EMIR, with the need to consult the relevant third-country authorities before rejecting a request for comparable compliance and inform the Commission thereof.

On the other hand, the costs of conducting the assessment for ESMA may also be lowered since the assessment of comparable compliance is simplified by no longer setting out a different assessment process for 'core provisions' of EMIR. In addition, the elements to be assessed no longer reflect a strict requirement-by-requirement approach and therefore provide for a less burdensome assessment. The costs for ESMA to carry out that assessment could therefore be reduced, without impinging on the costs relating to the ongoing supervision of Tier 2 CCPs as provided under Article 25b of EMIR.

3.2 Proportionality

This delegated act specifies the minimum elements to be assessed and the modalities and conditions to assess whether a Tier 2 CCP can benefit from comparable compliance, both within the recognition process or at any point in time thereafter. This delegated act facilitates a Tier 2 CCP's request for comparable compliance by providing it upfront with greater clarity on what is required for a positive assessment of comparable compliance, enabling it to tailor their request accordingly. This objective is achieved by limiting the assessment to requirements that are critical to ensure a level-playing field amongst operators and safeguard the stability of the EU's financial system.

3.3 Subsidiarity

The objective of this Regulation is to specify the minimum elements to be assessed and the modalities and conditions ESMA should take into account when assessing whether a Tier 2 CCP can satisfy compliance with EMIR by complying with its domestic law.

Under EMIR, ESMA is responsible for carrying out the supervision of Tier 2 CCPs that access the EU's single market. Member States and national supervisors, therefore, cannot assess comparable compliance as they have no competence over Tier 2 CCPs.

As such, the objective of this delegated act to assess comparable compliance cannot be achieved by the Member States and can therefore, by reason of the scale of actions, be better achieved at EU level, in line with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU).

4. LEGAL ELEMENTS OF THE DELEGATED ACT

4.1 Article 1

This provision sets out the procedure for a Tier 2 CCP to request comparable compliance, including timelines for that CCP to provide complete information to ESMA and for ESMA to complete its assessment.

4.2 Article 2

This provision sets out the modalities for ESMA to assess whether a Tier 2 CCP's compliance with the applicable third-country framework satisfies compliance with Article 16 of EMIR ('Capital requirements').

4.3 Article 3

This provision introduces modalities for ESMA to assess whether a Tier 2 CCP's compliance with the applicable third-country framework satisfies compliance with Title IV of EMIR (organisational requirements, conduct of business rules, prudential requirements) following a detailed assessment of certain elements.

4.4 Article 4

This provision sets out modalities for ESMA to assess whether a Tier 2 CCP's compliance with the applicable third-country framework satisfies compliance with Title V of EMIR ('Interoperability arrangements') following a detailed assessment of certain elements.

4.5 Article 5

This provision sets out specific conditions to conduct the assessment of comparable compliance. It sets out that ESMA should not refuse comparable compliance merely because a Tier 2 CCP applies an exemption under its home rules which is comparable to any of those set out in EMIR. It also stipulates that, where a Tier 2 CCP's compliance with a specific requirement of EMIR results in breaching the applicable third-country framework, ESMA should grant comparable compliance only where certain conditions are met.

4.6 Article 6

This provision specifies that a Tier 2 CCP that benefits from comparable compliance should keep ESMA informed of any changes to the applicable third-country framework.

4.7 Annexes

Annex I sets out the elements to assess comparable compliance with Title IV of EMIR.

Annex II sets out the elements to assess comparable compliance with Title V of EMIR.

COMMISSION DELEGATED REGULATION (EU) .../...

of 14.7.2020

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the minimum elements to be assessed by ESMA when assessing third-country CCPs' requests for comparable compliance and the modalities and conditions of that assessment

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories³, and in particular Article 25a(3) thereof,

Whereas:

- (1) According to Article 25a of Regulation (EU) No 648/2012, a third-country central counterparty (CCP) that is systemically important or likely to become systemically important for the financial stability of the Union or one or more of its Member States (Tier 2 CCP) may request the European Securities and Markets Authority (ESMA) to assess whether that Tier 2 CCP's compliance with the applicable third-country framework may be deemed to satisfy compliance with the requirements set out in Article 16 and in Titles IV and V of Regulation (EU) No 648/2012 (comparable compliance), and to adopt a decision accordingly.
- (2) Comparable compliance preserves the financial stability of the Union and ensures a level-playing field between Tier 2 CCPs and CCPs authorised in the Union while reducing administrative and regulatory burdens for those Tier 2 CCPs. The assessment of comparable compliance should, therefore, verify whether a Tier 2 CCP's compliance with the third-country framework effectively satisfies compliance with any or all requirements set out in Article 16, Title IV and V of Regulation (EU) No 648/2012. This Regulation should therefore indicate the elements to be assessed by ESMA when assessing a Tier 2 CCP's request for comparable compliance. When conducting that assessment, ESMA should also consider that CCP's compliance with any requirements in delegated or implementing acts that further specify those elements, including those requirements related to margin requirements, liquidity risk controls, and collateral requirements.
- (3) In its assessment of whether compliance with the applicable third-country framework satisfies compliance with the requirements set out in Article 16, Title IV and V of Regulation (EU) No 648/2012, ESMA might also consider the recommendations developed by the Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions.

³

OJ L 201, 27.7.2012, p. 1.

- (4) ESMA should conduct a detailed assessment to determine whether to grant a Tier 2 CCP comparable compliance for Title IV of Regulation (EU) No 648/2012. Any potential refusal of comparable compliance with respect to that Title IV might impact the equivalence assessment conducted by the Commission pursuant to Article 25(6) of that Regulation. ESMA should therefore inform the Commission where it intends not to grant comparable compliance with respect to that Title.
- (5) Where a Tier 2 CCP has entered into an interoperability arrangement with a CCP authorised under Article 14 of Regulation (EU) No 648/2012, that arrangement constitutes a direct link and, therefore, a direct channel of contagion, to a CCP in the Union. For such arrangements, ESMA should conduct a detailed assessment to determine whether to grant comparable compliance for Title V of that Regulation. An interoperability arrangement between a Tier 2 CCP and another third-country CCP does not constitute a direct link to a CCP in the Union but might, under certain circumstances, function as an indirect channel of contagion. For such arrangements, ESMA should only conduct a detailed assessment where the impact of that arrangement on the financial stability of the Union or one or more of its Member States justifies it.
- (6) Since one of the objectives of comparable compliance is to reduce administrative and regulatory burden for Tier 2 CCPs, comparable compliance should not be refused only because a Tier 2 CCP applies, under the applicable third-country framework, exemptions that are comparable to those set out in paragraphs 4 and 5 of Article 1 of Regulation (EU) No 648/2012. The assessment of comparable compliance should also take into account the extent to which not granting it may result in the impossibility for the Tier 2 CCP to comply with both Union and third-country requirements at the same time.
- (7) ESMA's decision on whether to grant comparable compliance should be based on the assessment conducted at the time of the adoption of that decision. In order for ESMA to reassess its decision whenever relevant developments, including changes to a CCP's internal rules and procedures occur, the Tier 2 CCP should notify ESMA of any such developments.
- (8) Regulation (EU) No 2019/2099 of the European Parliament and of the Council⁴, which inserted Article 25a into Regulation (EU) No 648/2012, started to apply on 1 January 2020. To ensure that that article is fully operational, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

Article I

Procedure for submitting a request for comparable compliance

1. The reasoned request referred to in Article 25a(1) of Regulation (EU) No 648/2012 shall be submitted either within the deadline set by ESMA in the notification informing the third-country CCP that it is not considered to be a Tier 1 CCP or at any

⁴ Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (OJ L 322, 12.12.2019, p. 1).

moment after a third-country CCP has been recognised by ESMA as a Tier 2 CCP in accordance with Article 25(2b).

The Tier 2 CCP shall inform its competent authority of the submission referred to in the first subparagraph.

2. The reasoned request referred to in paragraph 1 shall specify:
 - (a) the requirements for which the Tier 2 CCP requests comparable compliance;
 - (b) the reasons why the Tier 2 CCP's compliance with the applicable third-country framework satisfies compliance with the relevant requirements set out in Article 16 and Titles IV and V of Regulation (EU) No 648/2012;
 - (c) the way in which the Tier 2 CCP complies with any conditions set out for the application of the implementing act referred to in Article 25(6) of Regulation (EU) No 648/2012.

For the purposes of point (b), the Tier 2 CCP shall provide, where relevant, the evidence referred to in Article 5.

3. The Tier 2 CCP shall, at ESMA's request, include in the reasoned request referred to in paragraph 1:
 - (a) a statement from its competent authority confirming that the Tier 2 CCP is of good repute and standing;
 - (b) where necessary, with regard to the requirements set out in Article 16 and Title V of Regulation (EU) No 648/2012, a translation of the relevant applicable third-country framework into a language commonly used in finance.
4. ESMA shall assess, within 30 working days of receipt of a reasoned request submitted in accordance with paragraph 1, whether that reasoned request is complete. ESMA shall set a deadline by which the Tier 2 CCP has to provide additional information where the request is incomplete.
5. ESMA shall decide whether to grant comparable compliance for the requirements included in the reasoned request within 90 working days from the receipt of a complete reasoned request submitted in accordance with paragraph 4 of this Article. ESMA may postpone that decision where the reasoned request or the additional information referred to in paragraph 4 are not submitted in time and the assessment of that request could, as a result, delay ESMA's decision on the recognition of the third-country CCP or the review of its recognition.
6. A Tier 2 CCP for which ESMA has not granted comparable compliance for one or more requirements may not submit a new reasoned request as referred to in paragraph 1 regarding those requirements, unless there has been a relevant change to the applicable third-country framework or to the way in which that CCP complies with that framework.

Article 2

Comparable compliance with respect to Article 16 of Regulation (EU) No 648/2012

1. ESMA shall grant comparable compliance with respect to Article 16(1) of Regulation (EU) No 648/2012 where a Tier 2 CCP's capital, including retained

earnings and reserves, has a permanent and available initial capital which corresponds to at least EUR 7,5 million.

2. ESMA shall grant comparable compliance with respect to Article 16(2) of Regulation (EU) No 648/2012 where a Tier 2 CCP's capital, including retained earnings and reserves, is at all times higher than or equal to the sum of:
 - (a) the CCP's capital requirements for winding down or restructuring its activities;
 - (b) the CCP's capital requirements for operational and legal risks;
 - (c) the CCP's capital requirements for credit, counterparty and market risks that are not already covered by the specific financial resources referred to in Articles 41 to 44 of Regulation (EU) No 648/2012 or comparable specific financial resources required by the CCP's home jurisdiction's legal order;
 - (d) the CCP's capital requirements for business risk.

For the purposes of the first subparagraph, ESMA shall calculate the capital requirements in accordance with the specific capital requirements set out in the applicable third-country framework, or, where that framework does not provide for any of those capital requirements, in accordance with the relevant requirements set out in Articles 2 to 5 of Commission Delegated Regulation (EU) No 152/2013⁵.

Article 3

Comparable compliance with respect to Title IV of Regulation (EU) No 648/2012

1. ESMA shall grant comparable compliance with respect to the requirements set out in Title IV of Regulation (EU) No 648/2012 where:
 - (a) the Tier 2 CCP complies with the requirements referred to in the implementing act referred to in Article 25(6) of that Regulation, if any;
 - (b) the Tier 2 CCP complies with all relevant elements set out in Annex I to this Regulation.
2. Before ESMA adopts a decision not to grant comparable compliance, it shall:
 - (a) verify its understanding of the applicable third-country framework and the way in which the Tier 2 CCP complies with it with that CCP's competent authority,
 - (b) inform the Commission thereof.

Article 4

Comparable compliance with respect to Title V of Regulation (EU) No 648/2012

1. Where a Tier 2 CCP has entered into an interoperability arrangement with a CCP authorised under Article 14 of Regulation (EU) No 648/2012, ESMA shall grant comparable compliance with respect to the requirements set out in Title V of that Regulation where the Tier 2 CCP complies with all relevant elements set out in Annex II to this Regulation.

⁵ Commission Delegated Regulation (EU) No 152/2013 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 capital requirements for central counterparties (OJ L 52, 23.2.2013, p. 37).

2. Where a Tier 2 CCP has entered into an interoperability arrangement with a third-country CCP, ESMA shall grant comparable compliance with respect to the requirements set out in Title V of Regulation (EU) No 648/2012 unless the impact of that arrangement on the financial stability of the Union or one or more of its Member States justifies assessing whether to grant comparable compliance in accordance with paragraph 1.

Article 5

Exemptions and incompatible requirements

1. ESMA shall not refuse comparable compliance with respect to the requirements set out in Article 16 and Titles IV and V of Regulation (EU) No 648/2012 for the mere reason that the Tier 2 CCP applies an exemption under the applicable third-country framework which is comparable to any of those set out in paragraphs 4 and 5 of Article 1 of that Regulation. The Tier 2 CCP shall provide evidence that the Union and third-country exemption are comparable.
2. Where complying with a specific requirement set out in Article 16 or Titles IV or V of Regulation (EU) No 648/2012 implies a breach of the applicable third-country framework, ESMA shall grant comparable compliance with respect to that requirement only where the Tier 2 CCP provides evidence that:
 - (a) it is impossible to comply with that requirement without breaching a mandatory provision of the applicable third-country framework;
 - (b) the applicable third-country framework effectively achieves the same objectives as Article 16 and Titles IV and V of Regulation (EU) No 648/2012;
 - (c) it complies with the applicable third-country framework.

Article 6

Changes to the applicable third-country framework

A Tier 2 CCP that has been granted comparable compliance shall notify ESMA of any change to its applicable third-country framework and to its internal rules and procedures. ESMA shall inform the Commission of those notifications.

Article 7

Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 14.7.2020

*For the Commission
The President
Ursula VON DER LEYEN*