



**COUNCIL OF
THE EUROPEAN UNION**

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"I" ITEM NOTE

From: Presidency

To: Permanent Representatives Committee (Part 2)

Subject: Revised rules for markets in financial instruments (MiFID/MiFIR)

- a) Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast) (MiFID)
- b) Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories (MiFIR)

- Approval of the final compromise text

Delegations will find attached the text of the above-mentioned Regulation, as provisionally agreed with the European Parliament.

REGULATION (EU) No .../...
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

**on markets in financial instruments and amending Regulation (EU) No 648/2012 on OTC
derivatives, central counterparties and trade repositories**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The financial crisis has exposed weaknesses in the transparency of financial markets **which can contribute to harmful socio-economic effects**. Strengthening transparency is one of the shared principles to strengthen the financial system as confirmed by the G20 **Leaders' statement** in London on 2 April 2009. In order to strengthen the transparency and improve the functioning of the internal market for financial instruments, a new framework establishing uniform requirements for the transparency of transactions in markets for financial instruments should be put in place. The framework should establish comprehensive rules for a broad range of financial instruments. It should complement requirements for the transparency of orders and transactions in respect of shares established in Directive 2004/39/EC of the European Parliament and the Council³.

¹ OJ C 161, 7.6.2012. p. 3.

² OJ C 143, 22.5.2012, p. 74.

³ Directive 2004/39/EC of the European Parliament and the Council of 21 April 2004 on markets in financial instruments **amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).**

- (2) The High-Level Group on Financial Supervision in the EU chaired by Jacques de Larosière invited the Union to develop a more harmonised set of financial *regulations*. In the context of the future European supervision architecture, the European Council of 18 and 19 June 2009 also stressed the need to establish a European single rule book applicable to all financial institutions in the *internal market*.
- (3) The new legislation should as a consequence consist of two different legal instruments, a Directive and this Regulation. Together, both legal instruments should form the legal framework governing the requirements applicable to investment firms, regulated markets and data reporting services providers. This Regulation should therefore be read together with the Directive. The need to establish a single set of rules for all institutions in respect of certain requirements and to avoid potential regulatory arbitrage as well as to provide more legal certainty and less regulatory complexity for market participants warrants the use of a legal basis allowing for the creation of a Regulation. In order to remove the remaining obstacles to trade and significant distortions of competition resulting from divergences between national laws and to prevent any further likely obstacles to trade and significant distortions of competition from arising, it is therefore necessary to adopt a Regulation establishing uniform rules applicable in all Member States. This directly applicable legal act aims at contributing in a determining manner to the smooth functioning of the internal market and should, consequently, be based on the provisions of Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted in accordance with the consistent case-law of the Court of Justice of the European Union.

- (4) Directive 2004/39/EC ■ established rules for making the trading in shares admitted to trading on a regulated market pre- and post-trade transparent and for reporting transactions in financial instruments admitted to trading on a regulated market to competent authorities. The directive needs to be recast in order to appropriately reflect developments in financial markets and to address weaknesses and to close loopholes that were inter alia exposed in the financial market crisis.
- (5) Provisions in respect of trade and regulatory transparency requirements needs to take the form of directly applicable law applied to all investment firms that should follow uniform rules in all Union markets, in order to provide for a uniform application of a single regulatory framework, to strengthen confidence in the transparency of markets across the Union, *to* reduce regulatory complexity and firms' compliance costs, especially for financial institutions operating on a cross-border basis, and *to* contribute to the elimination of distortions of competition. The adoption of a regulation ensuring direct applicability is best suited to accomplish *those* regulatory goals and ensure uniform conditions by preventing diverging national requirements as a result of the transposition of a directive.

(5a) *It is important to ensure that trading in financial instruments is carried out as far as possible on organised venues and that all such venues are appropriately regulated. Under Directive 2004/39/EC some trading systems developed which were not adequately captured by the regulatory regime. Any trading system in financial instruments, such as entities currently known as broker crossing networks, should in the future be properly regulated and be authorised under one of the types of multilateral trading venues or as a systematic internaliser under the conditions set out in Regulation and in Directive .../.../EU*.*

* *OJ: Please insert the number of the document contained in document COD 2011/0298.*

- (6) The definitions of **regulated market** and **multilateral trading facility** (MTF) should be **clarified** and **remain** closely aligned with each other to reflect the fact that they represent **effectively** the same organised trading functionality. The definitions should exclude bilateral systems where an investment firm enters into every trade on own account, even as a riskless counterparty interposed between the buyer and seller. **Regulated markets and MTFs should not be allowed to execute client orders against proprietary capital.** The term ‘system’ encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules. Regulated markets and MTFs are not obliged to operate a ‘technical’ system for matching orders **and should be able to operate other trading protocols including systems whereby users are able to trade against quotes they request from multiple providers.** A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this **Regulation** and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. The term ‘buying and selling interests’ is to be understood in a broad sense and includes orders, quotes and indications of interest.

One of the important requirements concerns the obligation that the interests be brought together in the system by means of non-discretionary rules set by the system operator means that they are brought together under the system's rules or by means of the system's protocols or internal operating procedures (including procedures embodied in computer software). The term 'non-discretionary rules' means ■ rules *that* leave the *regulated market or the market operator or* investment firm operating an MTF with no discretion as to how interests may interact. The definitions require that interests be brought together in such a way as to result in a contract *which occurs where* execution takes place under the system's rules or by means of the system's protocols or internal operating procedures.

- (7) In order to make European markets more transparent and *efficient and* to level the playing field between various venues offering *multilateral* trading services it is necessary to introduce a new *trading venue* category of organised trading facility (OTF) *for bonds, structured finance products, emissions allowances and derivatives and to ensure that it is appropriately regulated and applies non-discriminatory rules regarding access to the facility*. This new category is broadly defined so that now and in the future it should be able to capture all types of organised execution and arranging of trading which do not correspond to the functionalities or regulatory specifications of existing venues. Consequently appropriate organisational requirements and transparency rules which support efficient price discovery need to be applied. ■ The new category ■ encompasses systems eligible for trading clearing-eligible and sufficiently liquid derivatives.

It *should* not include facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests, other entities aggregating or pooling potential buying or selling interests, **■** electronic post-trade confirmation services, *or portfolio compression, which reduces non-market risks in existing derivatives portfolios without changing the market risk of the portfolios. Portfolio compression may be provided by a range of firms which are not regulated as such by this Regulation or by Directive .../.../EU**, such as CCPs, trade repositories as well as by investment firms or market operators. It is appropriate to clarify that where investment firms and market operators carry out portfolio compression certain provisions of this Regulation and Directive .../.../EU* are not applicable in relation to portfolio compression. Given that CSDs regulated by [CSDR] are subject to the same requirements as investment firms when providing investment services or performing investment activities not explicitly listed in Sections A or B of the Annex to that Regulation, the same provisions of this Regulation and Directive .../.../EU* as referred to in the previous sentence should also not be applicable to them when carrying out portfolio compression.

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- (8) This new category ■ OTF will complement the existing types of trading venues. While regulated markets and MTFs *have* non-discretionary *rules for the* execution of transactions, the operator of an OTF should *carry out order execution on a discretionary basis subject, where applicable, to the pre-transparency requirements and best execution obligations*. Consequently, conduct of business rules, best execution and client order handling obligations should apply to the transactions concluded on an OTF operated by an investment firm or a market operator. *In addition, it should be noted that any market operator authorised to operate an OTF shall ensure compliance with the provisions in Chapter 1 of Directive .../.../EU* regarding Conditions and Procedures for Authorisation for Investment Firms. The investment firm or the market operator operating an OTF can exercise discretion at two different levels: (1) when deciding to place an order on the OTF or to retract it again and (2) when deciding not to match a specific order with the orders available in the system at a given point in time, provided that this complies with specific instructions received from clients and with best execution obligations.*

* *OJ: Please insert the number of the document contained in document COD 2011/0298.*

For the system that crosses clients' orders the operator may decide if, when and how much of two or more orders it wants to match within the system. In accordance with Article 20(1), (1a), (1b) and (1c) of Directive 2004/39/EC and without prejudice to Article 20(1aa) of Directive 2004/39/EC, for a system that arranges transactions in non-equities, the firm may facilitate negotiation between clients as to bring together two or more potentially compatible trading interest in a transaction. At both discretionary levels the OTF operator must have regard to its obligations under Articles 18 and 27 of Directive .../.../EU. The market operator or investment firm operating an OTF shall make clear to users of the venue how they will exercise discretion. Because an OTF constitutes a genuine trading platform, the platform operator should be neutral. Therefore, the investment firm or market operator operating the OTF should be subject to requirements in relation to non-discriminatory execution and neither the investment firm or market operator operating the OTF nor any entity that is part of the same corporate group and/or legal person as the investment firm and/or market operator should be allowed to execute client orders in an OTF against its proprietary capital.*

For the purpose of facilitating the execution of one or more client orders in bonds, structured finance products, emission allowances and derivatives that have not been declared subject to the clearing obligation in accordance with Article 5 of Regulation (EU) No 648/2012, an OTF operator will be allowed to use ‘matched principal’ trading provided the client has consented to this process. In relation to sovereign debt instruments for which there is not a liquid market an investment firm or market operator operating an OTF may engage in dealing on own account other than matched principal trading. When matched principal trading is used all pre-trade and post-trade transparency requirements as well as best execution obligations must be complied with. The OTF operator or any entity that is part of the same corporate group and/or legal person as the investment firm and/or market operator shall not act as systematic internaliser in the OTF operated by it. Furthermore, the operator of an OTF should be subject to the same obligations as an MTF in relation to the sound management of potential conflicts of interest.

- (9) All organised trading should be conducted on regulated venues and be fully transparent, both pre and post trade. *Appropriately calibrated transparency* requirements therefore need to apply to all types of trading venues, and to all financial instruments traded thereon.

(9a) *In order to ensure more trading takes place on regulated trading venues and systematic internalisers, a trading obligation for shares admitted to trading on a regulated market or traded on a trading venue should be introduced for investment firms in this Regulation. This trading obligation requires investment firms to undertake all trades including trades dealt on own account and also trades dealt when executing client orders on a regulated market, MTF, or systematic internaliser. However an exclusion from this trading obligation should be provided if there is a legitimate reason. Those legitimate reasons are where trades are non-systematic, ad-hoc, irregular and infrequent, or are technical trades such as give-up trades which do not contribute to the price discovery process. Such an exclusion from this trading obligation should not be used to circumvent the restrictions introduced on the use of the reference price waiver and the negotiated price waiver or to operate a broker crossing network or other crossing system.*

With reference to the option for trades to be done on a systematic internaliser, this is without prejudice to the systematic internaliser regime set out in this Regulation. The intention is that if the investment firm itself meets the relevant criteria specified in this Regulation to be deemed a systematic internaliser in that particular share, the trade may be dealt in that way; however, if it is not deemed a systematic internaliser in that particular share, the investment firm may still undertake the trade on another systematic internaliser once it is in conformity with its best execution obligations and the option is available to it. In addition, in order to ensure that multilateral trading with respect to shares, depositary receipts, ETFs, certificates and other similar financial instruments is properly regulated, an investment firm that operates an internal matching system on a multilateral basis should be authorised as a MTF. It should also be clarified that the best execution provisions set out in Directive 2004/39/EC should be applied in such a manner as not to impede the trading obligations set out under this Regulation.

- (10) Trading in depositary receipts, exchange-traded funds, certificates, similar financial instruments and shares other than those admitted to trading on a regulated market takes place in largely the same fashion, and fulfils a nearly identical economic purpose, as trading in shares admitted to trading on a regulated market. Transparency provisions applicable to shares admitted to trading on regulated markets should thus be extended to these instruments.

- (11) While, in principle, acknowledging the need for a regime of waivers from pre-trade transparency to support the efficient functioning of markets, the actual waiver provisions for shares currently applicable on the basis of Directive 2004/39/EC and *of* Regulation (EC) No 1287/2006 of the European Parliament and of the Council⁴, need to be scrutinised as to their continued appropriateness in terms of scope and conditions applicable. In order to ensure a uniform application of the waivers from pre-trade transparency in shares and eventually other similar instruments and non-equity products for specific market models and types and sizes of orders, the European Supervisory Authority (European Securities and Markets Authority) (ESMA), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁵, should assess the compatibility of individual requests for applying a waiver with this Regulation and future delegated acts. ESMA's assessment should take the form of an opinion in accordance with Article 29 of Regulation (EU) No 1095/2010 . In addition, the already existing waivers for shares should be reviewed by ESMA within an appropriate timeframe and an assessment *should* be made, following the same procedure, *as to* whether they are still in compliance with the rules *set out* in this Regulation and *in* delegated acts *provided for herein*.

⁴ Regulation (EC) No 1287/2006 of the European Parliament and of the Council of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 1).

⁵ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (12) The financial crisis exposed specific weaknesses in the way information on trading opportunities and prices in financial instruments other than shares is available to market participants, namely in terms of timing, granularity, equal access, and reliability. ***Timely pre-*** and post-trade transparency requirements taking account of the different characteristics and market structures of specific types of instruments other than shares should thus be introduced ***and calibrated for different types of trading systems, including order-book, quote-driven, hybrid, periodic auction trading and voice trading systems.*** In order to provide a sound transparency framework for all relevant instruments, these should apply to bonds, structured finance products, ***emission allowances and*** derivatives which are traded ***on a trading venue.*** ***Therefore, exemptions from pre-trade transparency and adaptations of the requirements in relation to deferred publication should be available only in certain defined cases.***

- (13) It is necessary to introduce an appropriate level of trade transparency in markets for bonds, structured finance products and derivatives in order to help the valuation of products as well as the efficiency of price formation. Structured finance products should, *in particular*, include asset backed securities as defined in Article 2(5) of *Commission* Regulation (EC) No 809/2004⁶, comprising among others collateralised debt obligations.
- (14) In order to ensure uniform applicable conditions between trading venues, the same pre- and post-trade transparency requirements should apply to the different types of venues. The transparency requirements should be calibrated for different types of instruments, including *equities*, bonds, and derivatives, *taking into account the interests of investors and issuers, including government bond issuers, and market liquidity. The requirements should also be calibrated* for different types of trading, including order-book and quote-driven systems *such as request for quote* as well as hybrid and voice broking systems, and take account of **█** transaction size, *including turnover, and other relevant criteria*.

⁶ *Commission* Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (OJ L 149, 30.4.2004, p. 3).

(14a) In order to avoid any negative impact on the price formation process, it is necessary to introduce an appropriate volume cap mechanism for orders placed in systems which are based on a trading methodology by which the price is determined in accordance with a reference price and for certain negotiated transactions. This mechanism shall have a double cap, whereby a volume cap is applied to each trading venue that uses these waivers so only a certain percentage of trading can be done on each trading venue, and in addition there is also an overall volume cap which if exceeded would result in the suspension of the use of these waivers across the Union.

In relation to the negotiated transactions, it shall only apply to those transactions that are made within the current volume weighted spread reflected on the order book or the quotes of the market makers of the trading venue operating that system. It shall exclude negotiated transactions that are dealt in illiquid stocks, and those transactions that are subject to conditions other than the current market price as they do not contribute to the price formation process.

- (15) In order to ensure that trading carried out OTC does not jeopardise efficient price discovery or a transparent level-playing field between means of trading, appropriate pre-trade transparency requirements should apply to investment firms dealing on own account in financial instruments OTC insofar as it is carried out in their capacity as systematic internalisers in relation to shares, depositary receipts, exchange-traded funds, certificates or other similar financial instruments *for which there is a liquid market* and bonds, structured finance products, *emission allowances* and **■** derivatives *which are traded on a trading venue and for which there is a liquid market*.
- (16) An investment firm executing client orders against own proprietary capital should be deemed a systematic internaliser, unless the transactions are carried out outside *a trading venue* on an occasional, ad hoc and irregular basis. *Thus, systematic* internalisers should be defined as investment firms which, on an organised, frequent **■** systematic *and substantial* basis, deal on own account by executing client orders outside a *trading venue*. *The requirements for systematic internalisers in this Regulation should apply to an investment firm only in relation to each single financial instrument, (e.g. on ISIN-code level) in which it is a systematic internaliser. In order to ensure an objective and effective application of the definition of systematic internaliser to investment firms, there should be a pre-determined threshold for systematic internalisation containing an exact specification of what is meant by frequent, systematic and substantial basis.*

(16a) While an OTF is any system or facility in which multiple third-party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third-party buying and selling interests. *For instance, a so-called single-dealer platform, where trading always takes place against a single investment firm should be considered a systematic internaliser, were it to comply with the requirements included in this Directive. However, a so-called multi-dealer platform, with multiple dealers interacting for the same financial instrument, should not be considered a systematic internaliser.*

(17) Systematic internalisers may decide *on the basis of their commercial policy and in an objective non-discriminatory way the clients to whom they* give access to their quotes, *distinguishing between* categories of clients *but should be entitled to take account of distinctions between clients, for example in relation to credit risk.* Systematic internalisers *should not be* obliged to publish firm quotes, *execute clients' orders and give access to their quotes* in relation to *equity* transactions above standard market size *and non-equity transactions above the size specific to the instrument.*

Systematic internalisers' compliance with their obligations should be checked by and information made available to competent authorities to enable them to do so.

- (18) It is not the intention of this Regulation to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, *other than within* a systematic internaliser.
- (19) Market data should be easily and readily available to users in a format as disaggregated as possible to allow investors, and data service providers serving their needs, to customise data solutions to the furthest possible degree. Therefore, pre- and post-trade transparency data should be made available to the public in an "unbundled" fashion in order to reduce costs for market participants when purchasing data.
- (20) Directive 95/46/EC of the European Parliament and of the Council⁷ and Regulation (EC) No 45/2001 of the European Parliament and of the Council⁸ should be fully applicable to the exchange, transmission and processing of personal data for the purposes of this Regulation, particularly Title IV, by Member States and ESMA.

⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

⁸ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

- (21) Considering the agreement reached by the parties to the G20 Pittsburgh summit on 25 September 2009 to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms where appropriate, a formal regulatory procedure should be defined for mandating trading between financial counterparties and large non-financial counterparties in all derivatives which have been considered to be clearing-eligible and which are sufficiently liquid to take place on a range of trading venues subject to comparable regulation and enabling participants to trade with multiple counterparties. The assessment of sufficient liquidity should take account of market characteristics at national level including elements such as the number and type of market participants in a given market, and of transaction characteristics, such as the size and frequency of transactions in that market.

A liquid market in a product class will be characterised by a high number of active market participants, including a suitable mix of liquidity providers and liquidity takers, relative to the number of traded products, which execute trades frequently in those products in sizes below a size that is large in scale. Such market activity should be indicated by a high number of resting bids and offers in the relevant derivative leading to a narrow spread for a transaction of normal market size. The assessment of sufficient liquidity should recognize that the liquidity of a derivative can vary significantly according to market conditions and its life cycle.

- (22) Considering the agreement reached by the parties to the G20 in Pittsburgh on 25 September 2009 to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms where appropriate on the one hand, and the relatively lower liquidity of various OTC derivatives on the other, it is appropriate to provide for a suitable range of eligible venues on which trading pursuant to this commitment can take place. All eligible venues should be subject to closely aligned regulatory requirements in terms of organisational and operational aspects, arrangements to mitigate conflicts of interest, surveillance of all trading activity, pre-and post-trade transparency calibrated by financial instrument *and types of trading system*, and for multiple third-party trading interests to be able to interact with one another. The possibility for operators of venues to arrange transactions pursuant to this commitment between multiple third parties in a discretionary fashion should however be foreseen in order to improve the conditions for execution and liquidity.

- (22a) *The obligation to conclude transactions in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation on a regulated market, MTF, OTF or third country trading venue shall not apply to the components of non-price forming post-trade risk reduction services which reduce non-market risks in derivatives portfolios including existing OTC derivatives portfolios in accordance with Regulation (EU) No 648/2012 without changing the market risk of the portfolios. In addition, while it is appropriate to make specific provision for portfolio compression, this Regulation is not intended to prevent the use of other post-trade risk reduction services.*
- (23) The trading obligation established for these derivatives should allow for efficient competition between eligible trading venues. Therefore those trading venues should not be able to claim exclusive rights in relation to any derivatives subject to this trading obligation preventing other trading venues from offering trading in these instruments. For effective competition between trading venues for derivatives, it is essential that trading venues have non-discriminatory and transparent access to central counterparties (CCPs). Non-discriminatory access to a CCP should mean that a trading venue has the right to non-discriminatory treatment in terms of how contracts traded on its platform are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP, and non-discriminatory clearing fees.

- (24) Competent authorities' powers should be complemented with an explicit mechanism for prohibiting or restricting the marketing, distribution and sale of any financial instrument *or structured deposit* giving rise to serious concerns regarding investor protection, orderly functioning and integrity of financial markets, or *commodities markets*, *or* the stability of the whole or part of the financial system, together with appropriate coordination and contingency powers for ESMA *or, for structured deposits, EBA*. The exercise of such powers *by competent authorities and, in exceptional cases, by ESMA or EBA* should be subject to the need to fulfil a number of specific conditions. *Where those conditions are met, the competent authority or, in exceptional cases, ESMA or EBA should be able to impose a prohibition or restriction on a precautionary basis before a financial instrument or structured deposit has been marketed, distributed or sold to clients.*

These powers do not imply any requirement to introduce or apply a product approval or licensing by the competent authority, ESMA or EBA, and do not relieve investment firms of their responsibility to comply with the all relevant requirements set out in Directive .../.../EU and this Regulation. The orderly functioning and integrity of commodity markets should be included as a criterion for intervention by competent authorities in order to enable action to be taken to counteract possible negative externalities on commodities markets from activities on financial markets. This is true, in particular, for agricultural commodity markets which are to ensure a secure supply of food for the population. In these cases, the measures should also be co-ordinated with the authorities competent for the commodity markets concerned.*

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- (25) Competent authorities should notify ESMA of the details of any of their requests to reduce a position in relation to a derivative contract, of any one-off limits, as well as of any ex-ante position limits in order to improve coordination and convergence in how these powers are applied. The essential details of any ex-ante position limits applied by a competent authority should be published on ESMA's website.
- (26) ESMA should be able to request information from any person regarding their position in relation to a derivative contract, to request that position to be reduced, as well as to limit the ability of persons to undertake individual transactions in relation to commodity derivatives. ESMA should then notify relevant competent authorities of measures it proposes to undertake and should also publish *those* measures.

- (27) The details of transactions in financial instruments should be reported to competent authorities to enable them to detect and investigate potential cases of market abuse, to monitor the fair and orderly functioning of markets, as well as the activities of investment firms. The scope of this oversight includes all instruments which are *traded on a trading venue and financial instruments where the underlying is a financial instrument traded on a trading venue or where the underlying is an index or basket composed of financial instruments traded on a trading venue. The obligation should apply whether or not such transactions in any of these instruments were carried out on a trading venue.* In order to avoid an unnecessary administrative burden on investment firms, financial instruments that are not susceptible to market abuse should be excluded from the reporting obligation. *The reports should use a legal entity identifier in line with the G-20 commitments. ESMA should report to the Commission on the functioning of this reporting to the competent authorities and the Commission may take steps to propose any changes.*
- (27a) *The operator of a trading venue should provide its competent authority with relevant instrument reference data. These notifications are to be transmitted by the competent authorities without delay to ESMA, which shall publish them immediately on its website to enable ESMA and competent authorities to use, analyse and exchange transaction reports.*

(28) In order to serve their purpose as a tool for market monitoring, transaction reports should identify the person who has made the investment decision, as well as those responsible for its execution. *In addition to the transparency regime provided for in Regulation (EU) No 236/2012, the marking of short sales provides useful supplementary information to enable competent authorities to monitor levels of short selling.* Competent authorities also need to have full access to records at all stages in the order execution process, from the initial decision to trade, through to its execution. Therefore, investment firms *should* keep records of all their *orders and all their* transactions in financial instruments, and operators of platforms are required to keep records of all orders submitted to their systems. ESMA should coordinate the exchange of information among competent authorities to ensure that they have access to all records of transactions and orders, including those entered on platforms that operate outside their territory, in financial instruments under their supervision.

- (29) Double reporting of the same information should be avoided. Reports submitted to trade repositories registered or recognised in accordance with Regulation **(EU) No 648/2012 of the European Parliament and of the Council**⁹ for the relevant instruments which contain all the required information for transaction reporting purposes should not need to be reported to competent authorities, but should be transmitted to them by the trade repositories. Regulation **(EU) No 648/2012** should be amended to this effect.
- (30) Any exchange or transmission of information by competent authorities should be in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC ■ . Any exchange or transmission of information by ESMA should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001 ■ , which should be fully applicable to the processing of personal data for the purposes of this Regulation.

⁹ 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** (**OJ L 201, 27.7.2012, p. 1**).

- (31) Regulation (*EU*) *No 648/2012* sets out the criteria according to which classes of OTC derivatives should be subject to the clearing obligation. It also prevents competitive distortions by requiring non-discriminatory access to ■ CCPs ■ offering clearing of OTC derivatives to trading venues and non-discriminatory access to the trade feeds of trading venues to CCPs offering clearing of OTC derivatives. As OTC derivatives are defined as derivatives contracts whose execution does not take place on a regulated market, there is a need to introduce similar requirements for regulated markets under this Regulation. *Derivatives* traded on regulated markets should also be *centrally cleared*.

- (32) In addition to requirements in Directive 2004/39/EC that prevent Member States from unduly restricting access to post-trade infrastructure such as CCP and settlement arrangements, it is necessary that this Regulation removes various other commercial barriers that can be used to prevent competition in the clearing of financial instruments. To avoid any discriminatory practices, CCPs should accept to clear transactions executed in different trading venues, to the extent that those venues comply with the operational and technical requirements established by the CCP, ***including the risk management requirements***. Access should ***be granted by a CCP*** if certain access criteria specified in ***regulatory technical standards are met***. ***With regard to newly established CCPs that have been authorised or recognised for a period of less than three years at the point of entry into force of this Regulation, with respect to transferable securities and money market instruments, there should be the possibility for competent authorities to approve a transitional period of up to two years and a half before they are exposed to full non-discriminatory access in relation to transferable securities and money market instruments. However, if a CCP chooses to avail of the transitional arrangement it may not benefit from the access rights to a trading venue under this Regulation for the duration of the transitional arrangement. Furthermore, no trading venue with a close link to that CCP may benefit from the access rights to a CCP under this Regulation for the duration of the transitional arrangement.***

(32a) *Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories sets out the conditions under which non-discriminatory access between Central Counterparties (CCPs) and trading venues should be granted for OTC derivatives. Regulation (EU) No 648/2012 defines OTC derivatives as derivatives whose execution does not take place on a regulated market or on a third-country market considered as equivalent to a regulated market in accordance with Article 19(6) of Directive 2004/39/EC. In order to avoid any gaps or overlaps and to ensure consistency between Regulation (EU) No 648/2012 and this Regulation, the requirements set out in this Regulation on non-discriminatory access between CCPs and trading venues apply to derivatives traded on regulated markets or on a third-country market considered as equivalent to a regulated market in accordance with Directive .../.../EU* and all non-derivative financial instruments.*

* *OJ: Please insert the number of the document contained in document COD 2011/0298.*

- (33) Trading venues should also be required to provide access including data feeds on a transparent and non-discriminatory basis to CCPs that wish to clear transactions executed on a trading venue. *However, this should not necessitate the use of interoperability arrangements for clearing transactions in derivatives or create liquidity fragmentation in a way that would threaten the smooth and orderly functioning of markets. Access should only be denied by a trading venue if certain access criteria specified in regulatory technical standards are not met. With regard to exchange traded derivatives, it would be disproportionate to require smaller trading venues, particularly those closely linked to CCPs, to comply with non-discriminatory access requirements immediately if they have not yet acquired the technological capability to engage on a level playing field with the majority of the post-trade infrastructure market. Therefore trading venues below the relevant threshold should have the option of exempting themselves, and therefore their associated CCPs, from non-discriminatory access requirements in respect of exchange traded derivatives for a three year period with the possibility of subsequent renewals. However, if a trading venue chooses to exempt itself, it may not benefit from the access rights to a CCP under this Regulation for the duration of the exemption.*

Furthermore, no CCP with a close link to that trading venue may benefit from the access rights to a trading venue under this Regulation for the duration of the exemption. Regulation (EU) 648/2012 identifies that where commercial and intellectual property rights relate to financial services related to derivatives contracts, licenses should be available on proportionate, fair, reasonable and non-discriminatory terms. Therefore, access to licences of, and information relating to, benchmarks that are used to determine the value of financial instruments should be provided to CCPs and other trading venues on a proportionate, fair, reasonable and non-discriminatory basis and any license should be on reasonable commercial terms. Without prejudice to the application of competition rules, where any new benchmark is developed following the entry into force of this Regulation an obligation to licence should start 30 months after a financial instrument referencing that benchmark commenced trading or was admitted to trading. Access to licenses is critical to facilitate access between trading venues and CCPs under Article 28 and 29 as otherwise licensing arrangements could still prevent access between trading venues and CCPs that they have requested access to.

The removal of barriers and discriminatory practices is intended to increase competition for clearing and trading of financial instruments in order to lower investment and borrowing costs, eliminate inefficiencies and foster innovation in Union markets. The Commission should continue to closely monitor the evolution of post-trade infrastructure and should, where necessary, intervene in order to prevent competitive distortions from occurring in the internal market, *in particular where the refusal of access to infrastructure or to benchmarks contravenes Articles 101 or 102 TFEU. The licencing duties under this regulation should be without prejudice to the general obligation of proprietary owners of benchmarks under competition rules and Articles 101 and 102 TFEU in particular, concerning access to benchmarks that are indispensable to enter a new market. Approvals of competent authorities to not apply access rights for transitional periods are not authorisations or amendments of authorisations.*

- (34) The provision of services by third-country firms in the Union is subject to national regimes and requirements. *Those* regimes are highly differentiated and the firms authorised in accordance with them do not enjoy the freedom to provide services and the right of establishment in Member States other than the one where they are established. It is appropriate to introduce a common regulatory framework at Union level. The regime should harmonize the existing fragmented framework, ensure certainty and uniform treatment of third-country firms accessing the Union, ensure that *an assessment of effective* equivalence ■ has been carried out by the Commission in relation to the *prudential* and *business conduct* framework of third countries and should provide for a comparable level of protections to *clients* in the Union receiving services by third-country firms.

In applying the regime the Commission and Member States should prioritise the areas covered by the G-20 commitments and agreements with the Union's largest trading partners and should have regard to the central role that the Union plays in worldwide financial markets and ensure that the application of third-country requirements does not prevent Union investors and issuers from investing in or obtaining funding from third countries or third-country investors and issuers from investing, raising capital or obtaining other financial services in Union markets unless this is necessary for objective and evidence-based prudential reasons. In carrying out the assessments, the Commission shall have regard to the International Organisation of Securities Commission's (IOSCO) Objectives and Principles of Securities Regulation and its recommendations as amended and interpreted by IOSCO.

Where a decision cannot be made determining effective equivalence the provision of services by third-country firms in the European Union remains subject to national regimes. The Commission should initiate the equivalence assessment on its own initiative. Member States may indicate their interest that a certain third-country or certain third countries are subject to the equivalence assessment carried out by the Commission, without such indications being binding on the Commission to initiate the equivalence process. The equivalence assessment should be outcome-based; it should assess to what extent the respective third-country regulatory and supervisory framework achieves similar and adequate regulatory effects and to what extent it meets the same objectives as the European Union legislation. When initiating these equivalence assessments, the Commission may prioritise among third-country jurisdictions taking into account the materiality of the equivalence finding to European union firms and clients, the existence of supervisory and cooperation agreements between the third country and the EU Member States, the existence of an effective equivalent system for the recognition of investment firms authorised under foreign regimes as well as the interest and willingness of the third country to engage in the equivalence assessment process. The Commission should monitor any significant changes to the regulatory and supervisory framework of the third country and review the equivalence decisions where appropriate.

- (35) The provision of services without branches should be limited to eligible counterparties **and professional clients per se**. It should be subject to registration by ESMA and to supervision in the third country. Proper cooperation arrangements should be in place between ESMA and the competent authorities in the third country.
- (36) The provisions of this Regulation regulating the provision of services **or undertaking of activities** by third-country firms in the Union should not affect the possibility for persons established in the Union to receive investment services by a third-country firm **in the Union** at their own exclusive initiative **or for Union investment firms or credit institutions to receive investment services or activities from a third-country firm at their own exclusive initiative or for a client to receive investment services from a third-country firm at their own exclusive initiative through the mediation of such a credit institution or investment firm**. **Where** a third-country firm provides services at own exclusive initiative of a person established in the Union, the services should not be deemed as provided in the territory of the Union. **Where** a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.

(36a) With regard to the recognition of third-country firms, and in accordance with the Union's international obligations under the agreement establishing the World Trade Organisation, including the General Agreement on Trade in Services, decisions determining third-country regulatory and supervisory regimes as equivalent to the regulatory and supervisory regime of the Union should be adopted only if the legal regime of the third country provides for an effective equivalent system for the recognition of investment firms authorised under foreign legal regimes in accordance with, amongst others, the general regulatory goals and standards set out by the G20 in September 2009 of improving transparency in the derivatives markets, mitigating systemic risk, and protecting against market abuse. Such a system should be considered equivalent if it ensures that the substantial result of the applicable regulatory regime is similar to Union requirements and should be considered effective if those rules are being applied in a consistent manner.

(37) A range of fraudulent practices have occurred in spot secondary markets in emission allowances (EUA) which could undermine trust in the emissions trading schemes, *set up* by Directive 2003/87/EC *of the European Parliament and of the Council*¹⁰, and measures are being taken to strengthen the system of EUA registries and conditions for opening an account to trade EUAs. In order to reinforce the integrity and safeguard the efficient functioning of those markets, including comprehensive supervision of trading activity, it is appropriate to complement measures taken under Directive 2003/87/EC by bringing emission allowances fully into the scope of this Directive and of Directive 2003/6/EC of the European Parliament and of the Council¹¹, by classifying them as financial instruments.

¹⁰ Directive 2003/87/EC *of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).*

¹¹ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (*OJ L 96, 12.4.2003, p. 16*).

- (38) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty. In particular, the delegated acts should be adopted in respect of specific details concerning definitions; ■ specific cost-related provisions related to the availability of market data; ■ and the further determination of conditions under which threats to investor protection, the orderly functioning and integrity of financial markets, or the stability of the whole or part of the financial system of the Union may warrant ESMA action. *It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.*

(39) ***In order to ensure uniform conditions for the implementation of this Regulation,*** implementing powers ***should be conferred on the Commission*** relating to the adoption of the equivalence decision concerning third-country legal and supervisory frameworks for the provision of services by third-country firms ***or third country trading venues, for the sole purpose of eligibility as trading venues for derivatives subject to the trading obligation,*** should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council **■**¹².

¹² Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

(40) *Since the objectives of this Regulation, namely to establish uniform requirements relating to financial instruments in relation to disclosure of trade data, reporting of transactions to the competent authorities, trading of derivatives and shares on organised venues, non-discriminatory access to CCPs, trading venues and benchmarks, product intervention powers and powers on position management and position limits, provision of investment services or activities by third-country firms cannot be sufficiently achieved by the Member States, because, although* national competent authorities are better placed to monitor market developments, the overall impact of the problems related to trade transparency, transaction reporting, derivatives trading, and bans of products and practices can only be fully perceived in a Union-wide context, *and can therefore, by reason of its scale and effects,* be better achieved at the Union level; the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

- (40a) *No action taken by any competent authority or ESMA in the performance of their duties should directly or indirectly discriminate against any member state or group of member states as a venue for the provision of investment services and activities in any currency.*
- (41) Technical standards in financial services should ensure adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA, with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.

- (42) The Commission should adopt the draft regulatory technical standards developed by ESMA according to *Articles 3 to 10 regarding the precise characteristics of trade transparency requirements, Article 4, 4a and 8 regarding the detailed conditions for waivers from pre-trade transparency, Articles 6 and 10 regarding deferred post-trade publication arrangements, Article 13 regarding the criteria for the application of the pre-trade transparency obligations for systematic internalisers, Article 20b regarding the content and frequency of data requests for the provision of information for the purposes of transparency and other calculations, Article 20c regarding transactions that do not contribute to the price discovery process, Article 22 regarding the order data to be retained, Article 23 regarding the content and specifications of transaction reports, Article [23a] regarding the content and specification of instrument reference data, Article 24 regarding the types of contracts which have a direct, substantial and foreseeable effect within the Union and the cases where the trading obligation for derivatives is necessary, Article 25 regarding the requirements for systems and procedures to ensure that transactions in cleared derivatives are submitted and accepted for clearing, Article 25aa specifying types of indirect clearing service arrangements, Article 26 regarding the liquidity criteria for derivatives to be considered subject to an obligation to trade on organised trading venues, Article 28 regarding non-discriminatory access to a CCP, Article 29 regarding non-discriminatory access to a trading venue, Article 30 regarding non-discriminatory access to and obligation to licence benchmarks, and Article 36 concerning the information that the applicant third-country firm shall provide to ESMA in its application for registration by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council¹³.*

¹³ Regulation (EU) No 1093/2010 *of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).*

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- (43a) *Article 99 of Directive .../.../EU* provides for a transitional exemption for certain C6 energy derivative contracts. It is therefore necessary that the technical standards specifying the clearing obligation developed by ESMA in accordance with Article 5(2)(b) of Regulation (EU) No 648/2012 take this into account and do not impose a clearing obligation on derivative contracts which would subsequently be subject to the transitional exemption for C6 energy derivative contracts.*
- (44) The application of the requirements in this Regulation should be deferred in order to align applicability with the application of the transposed rules of the recast Directive and to establish all essential implementing measures. The entire regulatory package should then be applied from the same point in time. Only the application of the empowerments for implementing measures should not be deferred so that the necessary steps to draft and adopt these implementing measures can start as early as possible.

* *OJ: Please insert the number of the document contained in document COD 2011/0298.*

(45) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, *in particular* the right to the protection of personal data (Article 8), the freedom to conduct a business (Article 16), the right to consumer protection (Article 38), the right to an effective remedy and to a fair trial (Article 47), and the right not to be tried or punished twice for the same offence (Article 50), and has to be applied in accordance with those rights and principles.

(45a) *The European Data Protection Supervisor has been consulted,*

HAVE ADOPTED THIS REGULATION:

TITLE I
SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter and scope

1. This Regulation establishes uniform requirements in relation to the following:
 - (a) disclosure of trade data to the public;
 - (b) reporting of transactions to the competent authorities;
 - (c) trading of derivatives on organised venues;
 - (d) non-discriminatory access to clearing and non-discriminatory access to trading in benchmarks;
 - (e) product intervention powers of competent authorities and ESMA and *EBA and* powers of ESMA on position management *controls* and position limits;
 - (f) provision of investment services or activities *by third-country firms following an applicable equivalence decision by the Commission with or without a branch* ■ .

2. This Regulation applies to investment firms, *authorised under Directive .../.../EU** and credit institutions authorised under Directive 2006/48/EC when providing ■ investment services and/or performing investment activities and *to market operators including any trading venues they operate*.
3. Title V of this Regulation also applies to all financial counterparties as defined in Article 2(8) of *Regulation (EU) No 648/2012* and *to* all non-financial counterparties falling under Article 10(1)(b) of *that* Regulation ■ .
4. Title VI of this Regulation also applies to *central counterparties* (CCPs) and persons with proprietary rights to benchmarks.
- 4b. *Title VIII of this Regulation applies to third-country firms providing investment services or activities within the Union following an applicable equivalence decision by the Commission with or without a branch.*

* *OJ: Please insert the number of the document contained in document COD(2011)0298.*

- 4c. Articles 7, 9, 17 and 20 shall not apply to regulated markets, market operators and investment firms in respect of a transaction where the counterparty is a member of the ESCB and this transaction is entered into in performance of monetary, foreign exchange and financial stability policy which that member of the ESCB is legally empowered to pursue.*
- 4d. Paragraph 4c shall not apply to a regulated market, market operators and investment firms as a counterparty in respect of any transaction unless the relevant ESCB member has given prior notification to that counterparty that the transaction is exempt.*
- 4e. Paragraph 4c shall not apply in respect of transactions entered into by any member of the ESCB members in performance of their investment operations.*
- 4f. ESMA, in close cooperation with the ESCB, shall develop draft regulatory technical standards specifying the monetary policy operations and other tasks in the public interest of each member of the ESCB and the types of transactions to which paragraphs 4c and 4e apply.*

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

4g. *The Commission shall be empowered to adopt delegated acts in accordance with Article 41 to extend the scope of paragraph 4c to other central banks.*

To that end, by 1 June 2015 the Commission shall present to the European Parliament and the Council a report assessing the treatment of central banks and the Bank for International Settlements. The report shall include an analysis of their statutory tasks and their trading volumes in the Union. The report shall:

(a) identify provisions applicable in the relevant third countries regarding the regulatory disclosure of central bank transactions, including transactions undertaken by members of the ESCB in those third countries, and

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(b) assess the potential impact that regulatory disclosure requirements in the Union may have on third-country central bank transactions.

If the report concludes that the exemption provided for in paragraph 4c is necessary in respect of transactions where the counterparty is a third- country central bank carrying out monetary policy, foreign exchange and financial stability operations, the Commission shall provide that this exemption applies to that third-country central bank.

Article 2

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:
 - (1) ‘investment firm’ means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis;

Member States may include in the definition of investment firms undertakings which are not legal persons, provided that:

- (a) their legal status ensures a level of protection for third parties' interests equivalent to that afforded by legal persons, and
- (b) they are subject to equivalent prudential supervision appropriate to their legal form.

However, where a natural person provides services involving the holding of third parties' funds or transferable securities, that person may be considered as an investment firm for the purposes of this Regulation and of Directive .../.../EU* only if, without prejudice to the other requirements imposed in Directive .../.../EU*, in this Regulation and in Directive .../.../EU [new CRD], he complies with the following conditions:

- (a) the ownership rights of third parties in instruments and funds must be safeguarded, especially in the event of the insolvency of the firm or of its proprietors, seizure, set-off or any other action by creditors of the firm or of its proprietors;

* OJ: Please insert the number of the document contained in document COD(2011)0298.

- (b) the firm must be subject to rules designed to monitor the firm's solvency and that of its proprietors;
- (c) the firm's annual accounts must be audited by one or more persons empowered, under national law, to audit accounts;
- (d) where the firm has only one proprietor, he must make provision for the protection of investors in the event of the firm's cessation of business following his death, his incapacity or any other such event;

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(2a) *'multilateral system' means any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system;*

(3) 'systematic internaliser' means an investment firm which, on an organised, frequent ■ systematic *and substantial* basis, deals on own account by executing client orders outside a regulated market or an MTF or an OTF *without operating a multilateral system;*

The frequent and systematic basis shall be measured by the number of OTC trades in the financial instrument carried out by the investment firm on own account by executing client orders. The substantial basis shall be measured either by the size of the OTC trading carried out by the investment firm in relation to the total trading of the investment firm in a specific financial instrument or by the size of the OTC trading carried out by the investment firm in relation to the total trading in the Union in a specific financial instrument. Both pre-set limits, the one for frequent and systematic basis and the other for substantial basis, should be crossed in order to be defined as a systematic internaliser; also an investment firm which chooses to opt-in under the systematic internaliser regime shall be defined as a systematic internaliser;

- (4) ‘market operator’ means a person or persons who manages and/or operates the business of a regulated market. The market operator may be the regulated market itself;

- (5) ‘regulated market’ means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III of Directive .../.../EU*;
- (6) ‘multilateral trading facility’ or ‘MTF’ means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with the provisions of Title II of Directive .../.../EU*;

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(7) 'organised trading facility' or 'OTF' means a **multilateral** system **■** which is not a regulated market or MTF **and** in which multiple third-party buying and selling interests in **bonds, structured finance products, emission allowances or derivatives** are able to interact in the system in a way that results in a contract in accordance with the provisions of Title II of Directive .../.../EU*;

(7aa) 'matched principal trading' means a transaction where the facilitator interposes between the buyer and seller to the transaction in such a way that it is never exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously and the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction;

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(7a) 'liquid market' means:

- (a) for the purposes of Articles 8(1)(d), 10(1)(b) and 17(1) of this Regulation and 20(1)(aa) of Directive .../.../EU*, a market for a financial instrument or a class of financial instruments, where there are ready and willing buyers and sellers on a continuous basis, assessed according to the following criteria and taking into consideration the specific market structures of the particular financial instrument or of the particular class of financial instruments:**
- (i) the average frequency and size of transactions over a range of market conditions, having regard to the nature and life-cycle of products within the class of financial instrument;**
 - (ii) the number and type of market participants, including the ratio of market participants to traded instruments in a given product;**
 - (iii) the average size of spreads, when available;**

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(b) *for the purposes of Article 4, 13 of this [Regulation], a market of a financial instrument where this financial instrument is traded daily and the market is assessed according to the following criteria:*

(i) *the free float;*

(ii) *the average daily number of transactions in those financial instruments;*

(iii) *the average daily turnover for those financial instruments;*

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(9) ‘transferable securities’ means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

- (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
 - (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;
- (10) ‘depositary receipts’ means those securities which are negotiable on the capital market and which represent ownership of the securities of a non-domiciled issuer while being able to be admitted to trading on a regulated market and traded independently of the securities of the non-domiciled issuer;
- (11) ‘exchange-traded fund’ means *a fund of which at least one unit or share class is traded throughout the day on at least one trading venue and with at least one market maker which takes action to ensure that the price of its units or shares on the trading venue does not vary significantly from its net asset value and, where applicable, from its indicative net asset value;*

- (12) ‘certificates’ means those securities which are negotiable on the capital market and which in case of a repayment of investment by the issuer are ranked above shares but below unsecured bond instruments and other similar instruments;
- (13) ‘structured finance products’ means those securities created to securitise and transfer credit risk associated with a pool of financial assets entitling the security holder to receive regular payments that depend on the cash flow from the underlying assets;
- (14) ‘derivatives’ means those financial instruments defined in point 9(c) and referred to in Annex I Section C (4) to (10) of Directive .../.../EU*;
- (15) ‘commodity derivatives’ means those financial instruments defined in point 9(c) relating to a commodity or an underlying *referred to* in Section C(10) of Annex I to Directive .../.../EU*, or within points (5), (6), (7) and (10) of Section C of Annex I to Directive .../.../EU*;

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(15a) ‘exchange traded derivative’ means a derivative that is traded on a regulated market as defined in Article 2(5) of this Regulation or on a third-country market considered as equivalent to a regulated market in accordance with Article 24 of this Regulation, and as such does not fall within the definition of OTC derivative under Regulation (EU) No 648/2012.

(16) ‘actionable indication of interest’ means a message from one *member or participant* to another *within* a trading system *in relation to* available trading interest that contains all necessary information to agree on a trade;

■

(18) ‘approved publication arrangement ■’ means a person authorised under the provisions established in Directive .../.../EU* to provide the service of publishing trade reports on behalf of investment firms pursuant to Articles *19* and *20* of this Regulation;

* OJ: Please insert the number of the document contained in document COD(2011)0298.

- (19) ‘consolidated tape provider **■**’ means a person authorised under the provisions established in Directive .../.../EU* to provide the service of collecting trade reports for financial instruments listed in Articles 5, 6, **9**, 11 and 12, **19 and 20** of this Regulation from regulated markets, *MTFs, OTFs and approved publication arrangements* and consolidating them into a continuous electronic live data stream providing **■** price and volume data per financial instrument;
- (20) ‘approved reporting mechanism **■**’ means a person authorised under the provisions established in Directive .../.../EU* to provide the service of reporting details of transactions to competent authorities or ESMA on behalf of investment firms;

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* OJ: Please insert the number of the document contained in document COD(2011)0298.

- (24) 'benchmark' means any *rate*, index or **■** figure, *made available to the public or published that is periodically or regularly determined* by the application of a formula to, *or on the basis of* the value of one or more underlying assets or prices, *including estimated prices, actual or estimated interest rates or other values, or surveys and* by reference to which the amount payable under a financial instrument *or the value of a financial instrument* is determined.
- (25) 'trading venue' means any regulated market, *an MTF* or *an OTF*;
- (26) '*CCP*' means a *CCP within the meaning of point (1) of Article 2* **■** of Regulation (EU) No 648/2012;
- (26a) '*interoperability arrangement*' means an *interoperability arrangement within the meaning of point (12) of Article 2 of Regulation (EU) No 648/2012*;
- (27) 'investment services and activities' means the services and activities *within the meaning of point (1) of Article 4(2)* of Directive .../.../EU*;

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(28) 'third-country financial institution' means an entity, the head office of which is established in a third country, that is authorised or licensed under the law of that third country to carry on any of the *services or* activities listed in Directive 2006/48/EC, Directive .../.../EU^{*}, Directive 2009/138/EC *of the European Parliament and of the Council*¹⁴, Directive 2009/65/EC *of the European Parliament and of the Council*¹⁵, Directive 2003/41/EC *of the European Parliament and of the Council*¹⁶ or Directive 2011/61/EU *of the European Parliament and of the Council*¹⁷;

* OJ: Please insert the number of the document contained in document COD(2011)0298.

¹⁴ Directive 2009/138/EC *of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).*

¹⁵ Directive 2009/65/EC *of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).*

¹⁶ Directive 2003/41/EC *of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).*

¹⁷ Directive 2011/61/EU *of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).*

- (28a) *'Third-country firm' means a firm that would be a credit institution providing investment services or performing investment activities, an investment firm if its head office or registered office were located within the Union;*
- (29) *'wholesale energy product' means those contracts and derivatives within the meaning of Article 2(4) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council¹⁸.*
- (30) *'Agricultural commodity derivatives' means those derivative contracts relating to products listed in Article 1 and Annex I of Regulation (EC) No 1234/2007;*

¹⁸ Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).

(33) *'Home Member State' means:*

(a) *in the case of investment firms:*

(i) *if the investment firm is a natural person, the Member State in which its head office is situated;*

(ii) *if the investment firm is a legal person, the Member State in which its registered office is situated;*

(iii) *if the investment firm has, under its national law, no registered office, the Member State in which its head office is situated;*

(b) *in the case of a regulated market, the Member State in which the regulated market is registered or, if under the law of that Member State it has no registered office, the Member State in which the head office of the regulated market is situated;*

- (c) *in the case of an APA, an ARM or a CTP:*
- (i) *if the APA, ARM or CTP is a natural person, the Member State in which its head office is situated;*
 - (ii) *if the APA, ARM or CTP is a legal person, the Member State in which its registered office is situated;*
 - (iii) *if the APA, ARM or CTP has, under its national law, no registered office, the Member State in which its head office is situated;*
- (34) *'Host Member State' means the Member State, other than the Home Member State, in which an investment firm has a branch or provides investment services and/or activities, or the Member State in which a regulated market provides appropriate arrangements so as to facilitate access to trading on its system by remote members or participants established in that same Member State;*

(35) *'Close links' means a situation in which two or more natural or legal persons are linked by:*

- (a) *'participation' which means the ownership, direct or by way of control, of 20 % or more of the voting rights or capital of an undertaking;*
- (b) *'control' which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1(1) and (2) of Seventh Council Directive 83/349/EEC¹⁹, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered a subsidiary of the parent undertaking which is at the head of those undertakings;*
- (c) *a situation in which they are permanently linked to one and the same person by a control relationship.*

¹⁹ *Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1).*

- (36) *The notion of ‘liquidity fragmentation’ means when one of the following situations occur:*
- (a) *when the participants in a trading venue are unable to conclude a transaction with one or more other participants in that venue because of the absence of clearing arrangements to which all participants have access;*
 - (b) *when a clearing member or its clients would be forced to hold their positions in a financial instrument in more than one CCP which would limit the potential for the netting of financial exposures*
- (37) *‘sovereign issuer’ means any of the following that issues debt instruments:*
- (i) *the Union;*

- (ii) *a Member State, including a government department, an agency, or a special purpose vehicle of the Member State;*
 - (iii) *in the case of a federal Member State, a member of the federation;*
 - (iv) *a special purpose vehicle for several Member States;*
 - (v) *an international financial institution established by two or more Member States which has the purpose of mobilising funding and provide financial assistance to the benefit of its members that are experiencing or threatened by severe financing problems; or*
 - (vi) *the European Investment Bank;*
- (38) *'sovereign debt' means a debt instrument issued by a sovereign issuer;*

(39) *'Portfolio compression' means a risk reduction service in which two or more counterparties wholly or partially terminate some or all of the derivatives submitted by those counterparties for inclusion in the portfolio compression and replace the terminated derivatives with another derivative whose combined notional value is less than the combined notional value of the terminated derivatives.*

2. The definitions provided in *Article 4(2) of Directive .../.../EU** **also apply to this Regulation.**
3. The Commission **shall be empowered to** adopt **■** delegated acts in accordance with Article 41 **further** specifying **certain** technical elements of the definitions laid down in paragraph 1 to adjust them to market development.

* OJ: Please insert the number of the document contained in document COD(2011)0298.

TITLE II
TRANSPARENCY FOR TRADING VENUES

CHAPTER 1
TRANSPARENCY FOR EQUITY INSTRUMENTS

Article 3

Pre-trade transparency requirements for trading venues in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments

1. **Market operators** and investment firms **■** operating **a trading venue** shall make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for shares, depositary receipts, **ETFs**, certificates and other similar financial instruments **■** traded on **a trading venue**. This requirement shall also apply to actionable indication of interests. **Market operators and** investment firms **■** operating **a trading venue** shall make this information available to the public on a continuous basis during normal trading hours.
 - 1a. **The above transparency requirements should be calibrated for different types of trading systems including order-book, quote-driven, hybrid and periodic auction trading systems.**

2. **Market operators** and investment firms ■ operating **a trading venue** shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information **referred to in** the first paragraph to investment firms which are obliged to publish their quotes in shares, depositary receipts, **ETFs**, certificates and other similar financial instruments pursuant to Article 13.

Article 4

■ **Waivers for equity instruments**

1. Competent authorities shall be able to waive the obligation for **market operators** and investment firms ■ operating **a trading venue** to make public the information referred to in Article 3(1) **for**:
 - (a) **systems matching orders based on a trading methodology by which the price of the financial instrument referred to in Article 3(1) is derived from the trading venue where that financial instrument was first admitted to trading or the most relevant market in terms of liquidity, where that reference price is widely published and is regarded by market participants as a reliable reference price. The continued use of this waiver shall be subject to the conditions outlined in Article 4a.**

- (b) *systems that formalise negotiated transactions which:*
- (i) *are made within the current volume weighted spread reflected on the order book or the quotes of the market makers of the trading venue operating that system. These are subject to the conditions outlined in Article 4a; or*
 - (i*) *are in an illiquid share, depositary receipt, ETF, certificate or other similar financial instrument that does not fall within the meaning of a liquid market as defined in Article 2(7a)(b) of this Regulation, and are dealt within a percentage of a suitable reference price, being a percentage and a reference price set in advance by the system operator*
 - (ii) *are subject to conditions other than the current market price of that financial instrument;*
- (c) orders that are large in scale compared with normal market size;
- (d) *orders held in an order management facility of the trading venue pending disclosure.*

- 1a.** *The reference price referred to in paragraph 1(a) shall be established by obtaining:*
- (a) the midpoint within the current bid and offer prices of the trading venue where that financial instrument was first admitted to trading or the most relevant market in terms of liquidity; or*
 - (b) when the price referred to in point (a) is not available, the open and/or closing price of the relevant trading session. Orders may only reference these prices outside the continuous trading phase of the relevant trading session.*
- 1b.** *Where trading venues operate systems which formalise negotiated transactions in accordance with paragraph 1(b)(i):*
- (i) those transactions shall be carried out in accordance with the rules of the trading venue;*

- (ii) *the trading venue shall ensure that arrangements, systems and procedures are in place to prevent and detect market abuse or attempted market abuse in relation to such negotiated transactions in accordance with Article 11 of Regulation (EU) No .../...^{*};*
- (iii) *the trading venue shall establish, maintain and implement systems to detect any attempt to use the waiver to circumvent other requirements of this Regulation or Directive .../.../EU^{*} and to report attempts to the competent authority.*

Where a competent authority grants a waiver in accordance with paragraph 1(b) (i) or (ii), that competent authority shall monitor the use of the waiver by the trading venue to ensure that the conditions for use of the waiver are respected.

^{*} *OJ: Please insert the number of the document contained in document COD(2011)0295.*
^{*} *OJ: Please insert the number of the document contained in document COD(2011)0298.*

2. Before granting a waiver in accordance with paragraph 1, competent authorities shall notify ESMA and other competent authorities of the intended use of each individual waiver and provide an explanation regarding *its* functioning, ***including the details of the trading venue where the reference price is established as referred to in paragraph 1(a)***.
- Notification of the intention to grant a waiver shall be made not less than ***four*** months before the waiver is intended to take effect. Within ***two*** months following receipt of the notification, ESMA shall issue ***a non-binding*** opinion to the competent authority in question assessing the compatibility of each waiver with the requirements established in paragraph 1 and specified in the ***regulatory technical standard*** adopted pursuant to ***paragraph 3***. Where that competent authority grants a waiver and a competent authority of another Member State disagrees with this, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010. ESMA shall monitor the application of the waivers and shall submit an annual report to the Commission on how they are applied in practice.

2a. *A competent authority may, either on its own initiative or upon request by another competent authority, withdraw a waiver granted under paragraph 1, as specified pursuant to paragraph 3 if it observes that the waiver is being used in a way that deviates from its original purpose or if it believes that the waiver is being used to circumvent the requirements established in this Article.*

Competent authorities shall notify ESMA and other competent authorities of such withdrawal providing full reasons for their decision.

3. *ESMA shall develop draft regulatory technical standards specifying the following:*

- (a) the range of bid and *offer prices* or designated market-maker quotes, and the depth of trading interest at those prices, to be made public for each class of financial instrument concerned *in accordance with Article 3(1), taking into account the necessary calibration for different types of trading systems as referred to in Article 3(1a)*;

■

- (c) *the most relevant market in terms of liquidity* of a financial instrument **in accordance with paragraph 1(a)**;
- (ca) *the specific characteristics of a negotiated transaction in relation to the different ways the member or participant of a trading venue can execute such a transaction*;
- (cb) *the negotiated transactions that do not contribute to price formation which avail of the waiver provided for under paragraph 1(b)(ii)*;
- (d) the size ■ of orders *that are large in scale and the type and the minimum size of orders held in an order management facility of a trading venue pending disclosure* for which pre-trade disclosure may be waived under paragraph 1 for each class of financial instrument concerned;

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

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OJ: Please insert the date 12 months after the entry into force of this Regulation.

4. Waivers granted by competent authorities in accordance with Article 29(2) and Article 44(2) of Directive 2004/39/EC and Articles 18, **19 and** 20 of Commission Regulation (EC) No 1287/2006²⁰ before ... * shall be reviewed by ESMA by ... **. ESMA shall issue an opinion to the competent authority in question assessing the continued compatibility of each of those waivers with the requirements established in this Regulation and any delegated act and regulatory technical standard based on this Regulation.

²⁰ Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p.1).

* *OJ: Please insert the date 30 months after the entry into force of this Regulation.*

** *OJ: Please insert the date 54 months after the entry into force of this Regulation.*

Article 4a
Volume Cap Mechanism

- 1. *In order to ensure that the use of the waivers provided for in Article 4(1)(a) and 4(1)(b)(i) does not unduly harm price formation, trading under these waivers is restricted as follows:***
- (i) the percentage of trading in a financial instrument carried out on a trading venue under these waivers shall be limited to 4 % of the total volume of trading in that financial instrument on all trading venues across the Union over the previous 12-month period.***
 - (ii) overall Union trading in a financial instrument carried out under these waivers shall be limited to 8 % of the total volume of trading in that financial instrument on all trading venues across the Union over the previous 12-month period.***

This volume cap mechanism shall not apply to negotiated transactions which are in a share, depositary receipt, ETF, certificate or other similar financial instrument for which there is not a liquid market as determined in accordance with Article 2(7a)(b) and are dealt within a percentage of a suitable reference price as referred to in Art 4(1)(b)(i), or to negotiated transactions that are subject to conditions other than the current market price of that financial instrument as referred to in Art 4(1)(b)(ii).*

2. *When the percentage of trading in a financial instrument carried out on a trading venue under the waivers has exceeded the limit referred to in paragraph 1(i), the competent authority that authorised the use of these waivers by that venue shall within 2 working days suspend their use on that venue in that financial instrument based on the data published by ESMA referred to in paragraph 4, for a period of 6 months.*

3. *When the percentage of trading in a financial instrument carried out on all trading venues across the Union under these waivers has exceeded the limit referred to in paragraph 1(ii), all competent authorities shall within 2 working days suspend the use of these waivers across the Union for a period of 6 months.*
4. *ESMA shall publish within 5 working days of the end of each calendar month, the total volume of Union trading per financial instrument in the previous 12 months, the percentage of trading in a financial instrument carried out across the EU under these waivers and also on each trading venue in the previous 12 months, and the methodology that is used to derive these percentages.*
- 4a. *In the event that the report referenced in paragraph 4 identifies any trading venue where trading in any financial instrument carried out under the waivers has exceeded 3,75 % of the total EU trading in the financial instrument, based on the previous 12 months trading, ESMA shall publish an additional report within five working days of the 15th day of the calendar month in which the report referred to in paragraph 4 is published. This report shall contain the information specified in paragraph 4 in respect of those financial instruments where the aforementioned 3,75 % has been exceeded.*

- 4b.** *In the event that the report referenced in paragraph 4 identifies that overall Union trading in any financial instrument carried out under the waivers has exceeded 7,75 % of the total Union trading in the financial instrument, based on the previous 12 months trading, ESMA shall publish an additional report within 5 working days of the 15th on the day of the calendar month in which the report referred to in paragraph 4 is published. This report shall contain the information specified in paragraph 4 in respect of those financial instruments where the aforementioned 7,75 % has been exceeded.*
- 5.** *In order that there is a reliable basis for monitoring the trading taking place under these waivers and for determining whether the limits referred to in paragraph 1 have been exceeded, operators of trading venues shall be obligated to have in place systems and procedures to:*
- (i) enable the identification of all trades which have taken place on its venue under these waivers; and*
 - (ii) ensure it does not exceed the permitted percentage of trading allowed under these waivers as referred to in paragraph 1(i) under any circumstances.*

6. *The commencement period for the publication of trading data by ESMA, and for which trading in a financial instrument under these waivers is to be monitored shall start ...* *
Without prejudice to article 4(2a), competent authorities shall be empowered to suspend the use of these waivers from the date of application of this Regulation and thereafter on a monthly basis.

7. *ESMA shall develop draft regulatory technical standards to specify the method, including the flagging of transactions, by which it collates, calculates and publishes the transaction data, as outlined in paragraph 4, in order to provide an accurate measurement of the total volume of trading per financial instrument and the percentages of trading that use these waivers across the Union and per trading venue.*

ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

* *OJ: Please insert the date 18 months after entry into force of this Regulation*

** *OJ: Please insert the date 12 months after entry into force of this Regulation.*

Article 5

Post-trade transparency requirements for trading venues in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments

1. **Market operators** and investment firms ■ operating **a trading venue** shall make public the price, volume and time of the transactions executed in respect of shares, depositary receipts, **ETFs**, certificates and other similar financial instruments ■ traded on **that trading venue**. **Market operators and** investment firms ■ operating **a trading venue** shall make details of all such transactions public as close to real-time as is technically possible.
2. **Market operators** and investment firms ■ operating **a trading venue** shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under paragraph 1 to investment firms which are obliged to publish the details of their transactions in shares, depositary receipts, **ETFs**, certificates and other similar financial instruments pursuant to Article 19.

Article 6

Authorisation of deferred publication

1. Competent authorities shall be able to authorise *market operators and investment firms operating a trading venue* to provide for deferred publication of the details of transactions based on their type or size.

In particular, the competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share, depositary receipt, *ETF*, certificate or other similar financial instrument or that class of share, depositary receipt, *ETF*, certificate or other similar financial instrument.

Market operators and investment firms **■** operating *a trading venue* shall obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication, and shall clearly disclose these arrangements to market participants and the public. ESMA shall monitor the application of these arrangements for deferred trade-publication and shall submit an annual report to the Commission on how they are applied in practice.

Where a competent authority authorises deferred publication and a competent authority of another Member State disagrees with this or disagrees with the effective application of the authorisation granted, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

2. *ESMA shall develop draft regulatory technical standards specifying the following in such a way as to enable the publication of information required under Article 66 of Directive .../.../EU*:*
 - (a) *the details of transactions that ■ investment firms, including systematic internalisers and market operators and investment firms ■ operating a trading venue shall make available to the public for each class of financial instrument concerned in accordance with Article 5(1), including identifiers for the different types of transactions published under Articles 5(1) and 19, distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;*

* *OJ: Please insert the number of the document contained in document COD(2011)0298.*

- (b) *the time limit that would be deemed in compliance with the obligation to publish as close to real time as possible including when trades are executed outside ordinary trading hours.*
- (c) the conditions for authorising ■ investment *firms*, including ■ systematic *internalisers and market operators and investment firms operating a trading venue to provide* for ■ deferred publication of ■ the *details of transactions for each class of financial instruments concerned in accordance with paragraph 1 of this article and Article 19(1)*;
- (d) the criteria to be applied when deciding the transactions for which, due to their size or the type, *including liquidity profile* of *the* share, depositary receipt, ETF, certificate or other similar financial instrument involved, deferred publication is allowed for each class of financial instrument concerned.

ESMA shall submit those draft regulatory technical standards to the Commission by ... *

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

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OJ: Please insert the date 12 months after the entry into force of this Regulation.

CHAPTER 2
TRANSPARENCY FOR NON-EQUITY INSTRUMENTS

Article 7

Pre-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives

1. ***Market operators*** and investment firms **█** operating ***a trading venue*** shall make public ***current bid and offer*** prices and the depth of trading interests at those prices ***which are*** advertised through their systems for bonds, and structured finance products **█**, emission allowances and **█** derivatives **█** traded on ***a trading venue***. This requirement shall also apply to actionable indication of interests. ***Market operators*** and investment firms **█** operating ***a trading venue*** shall make this information available to the public on a continuous basis during normal trading hours. ***That publication obligation does not apply to those derivative transactions of non-financial counterparties which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.***
- 1a. ***The above transparency requirements shall be calibrated for different types of trading systems, including order-book, quote-driven, hybrid, periodic auction trading and voice trading systems.***

2. **Market operators** and investment firms **■** operating **a trading venue** shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information referred to in the first paragraph to investment firms which are obliged to publish their quotes in bonds, structured finance products, emission allowances and derivatives pursuant to Article 17.

3. **Market operators and investment firms operating a trading venue shall, where a waiver is granted in accordance with Article 8(1)(b), make public at least an indicative pre-trade bid and offer prices which are close to the price of the trading interests advertised through their systems in bonds, structured finance products, emission allowances and derivatives traded on a trading venue. Market operators and investment firms operating a trading venue shall make this information available to the public through appropriate electronic means on a continuous basis during normal trading hours. These arrangements shall ensure that information is provided on reasonable commercial terms and on a non-discriminatory basis.**

Article 8

■ Waivers *relating to non-equity instruments*

1. Competent authorities shall be able to waive the obligation for *market operators* and investment firms ■ operating *a trading venue* to make public the information referred to in Article 7(1) for ■ :
 - (a) *orders that are large in scale compared with normal market size and orders held in an order management facility of the trading venue pending disclosure;*
 - (b) *actionable indications of interest in request-for-quote and voice trading systems that are above a size specific to the instrument, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors;*
 - (d) *derivatives which are not subject to the trading obligation specified in Article 24 and other financial instruments for which there is not a liquid market.*

2. Before granting a waiver in accordance with **paragraph 1** , competent authorities shall notify ESMA and other competent authorities of the intended use of **each individual waiver** and provide an explanation regarding their functioning. Notification of the intention to grant a waiver shall be made not less than **four** months before the waiver is intended to take effect. Within **two** months following receipt of the notification, ESMA shall issue an opinion to the competent authority in question assessing the compatibility of **the** waiver with the requirements established in **paragraph 1** and specified in the regulatory technical standards adopted pursuant to paragraph 5. Where that competent authority grants a waiver and a competent authority of another Member State disagrees with this, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010. ESMA shall monitor the application of the waivers and submit an annual report to the Commission on how they are applied in practice.

3. **Competent authorities, may, either on their own initiative or upon request by other competent authorities, withdraw a waiver granted under paragraph 1 if they observe that the waiver is being used in a way that deviates from its original purpose or if they consider that the waiver is being used to circumvent the requirements established in this Article.**

Competent authorities shall notify ESMA and other competent authorities of such withdrawal without delay and before it takes effect, providing full reasons for their decision.

4. *The competent authority responsible for supervising one or more trading venues on which a class of bond, structured finance product, emission allowance or derivative is traded may, where the liquidity of that class of financial instrument falls below a specified threshold, temporarily suspend the obligations referred to in Article 7. The specified threshold shall be defined based on objective criteria specific to the market for the financial instrument concerned. Notification of such temporary suspension shall be published on the website of the relevant competent authority.*

The temporary suspension shall be valid for an initial period not exceeding three months from the date of its publication on the website of the relevant competent authority. Such a suspension may be renewed for further periods not exceeding three months at a time if the grounds for the temporary suspension continue to be applicable. Where the temporary suspension is not renewed after that three-month period, it shall automatically lapse.

Before suspending or renewing the temporary suspension under this paragraph of the obligations referred to in Article 7, the relevant competent authority shall notify ESMA of its intention and provide an explanation. ESMA shall issue an opinion to the competent authority as soon as practicable on whether in its view the suspension or the renewal of the temporary suspension is justified in accordance with the previous subparagraphs.

5. *ESMA shall develop draft regulatory technical standards specifying the following:*
- (a) *the parameters and methods for calculating the threshold of liquidity referred to in paragraph 4 in relation to the financial instrument. The parameters and methods for Member States to calculate the threshold shall be set in such a way that when the threshold is reached, it represents a significant decline in liquidity across all venues within the Union for the financial instrument concerned based on the criteria used under Article 2(7a) of this Regulation;*

- (aa) the range of bid and offer prices or quotes and the depth of trading interests at those prices, or indicative pre-trade bid and offer prices which are close to the price of the trading interest, to be made public for each class of financial instrument concerned in accordance with of Articles 7(1) and 7(3), taking into account the necessary calibration for different types of trading systems as referred to in Article 7(1a);*
- (b) the size of orders that are large in scale and the type and the minimum size of orders held in an order management facility pending disclosure for which pre-trade disclosure may be waived under paragraph 1 for each class of financial instrument concerned;*
- (c) the size specific to the instrument referred to in paragraph 1(b) and the definition of request-for-quote and voice trading systems for which pre-trade disclosure may be waived under paragraph 1;*

When determining the size specific to the instrument that would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors, in accordance with paragraph 1(b), ESMA shall take the following factors into account:

- (i) whether, at such sizes, liquidity providers would be able to hedge their risks;*
 - (ii) where a market in the instrument, or a class of instruments, consists in part of retail investors, the average value of transactions undertaken by those investors;*
- (d) the financial instruments or the classes of financial instruments for which there is not a liquid market where pre-trade disclosure may be waived under paragraph 1.*

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

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* *OJ: Please insert date 12 months after entry into force of this Regulation.*

Article 9

Post-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives

1. **Market operators** and investment firms ■ operating **a trading venue** shall make public the price, volume and time of the transactions executed in respect of bonds, structured finance products ■ , emission allowances and ■ derivatives ■ traded on **a trading venue**. **Market operators** and investment firms ■ operating **a trading venue** shall make details of all such transactions public as close to real-time as is technically possible.
2. **Market operators** and investment firms ■ operating **a trading venue** shall give access, on reasonable commercial terms and on ■ non-discriminatory basis, to the arrangements they employ for making public the information under the first paragraph to investment firms which are obliged to publish the details of their transactions in bonds, structured finance products, emission allowances and derivatives pursuant to Article 20.

Article 10

Authorisation of deferred publication

1. Competent authorities shall be able to authorise *market operators* and investment firms **■** operating *a trading venue* to provide for deferred publication of the details of transactions based on *the size or type of the transaction*.

In particular, the competent authorities may authorise the deferred publication in respect of transactions that:

- (a) are large in scale compared with the normal market size for that bond, structured finance product, emission allowance or derivative *traded on a trading venue, or for that class of bond, structured finance product, emission allowance or derivative. traded on a trading venue; or*
- (b) *are related to a bond, structured finance product, emission allowance or derivative traded on a trading venue, or for that class of bond, structured finance product, emission allowance or derivative traded on a trading venue for which there is not a liquid market;*

- (c) *are above a size specific to that bond, structured finance product, emission allowance or derivative traded on a trading venue, or for that class of bond, structured finance product, emission allowance or derivative traded on a trading venue, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors.*

Market operators and investment firms **■** operating *a trading venue* shall obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication, and shall clearly disclose these arrangements to market participants and the **■** public. ESMA shall monitor the application of these arrangements for deferred trade-publication and shall submit an annual report to the Commission on how they are used in practice.

2. *The competent authority responsible for supervising one or more trading venues on which a class of bond, structured finance product, emission allowance or derivative is traded may, where the liquidity of that class of financial instrument falls below the threshold determined in accordance with the methodology of Article 8(5)(a), temporarily suspend the obligations referred to in Article 9. This threshold shall be defined based on objective criteria specific to the market for the financial instrument concerned. Such temporary suspension shall be published on the website of the relevant competent authority.*

The temporary suspension shall be valid for an initial period not exceeding three months from the date of its publication on the website of the relevant competent authority. Such a suspension may be renewed for further periods not exceeding three months at a time if the grounds for the temporary suspension continue to be applicable. In case the temporary suspension is not renewed after that three-month period, it shall automatically lapse.

Before suspending or renewing the temporary suspension of the obligations referred to in Article 9, the relevant competent authority shall notify ESMA of its intention and provide an explanation. ESMA shall issue an opinion to the competent authority as soon as practicable on whether in its view the suspension or the renewal of the temporary suspension is justified in accordance with the previous subparagraphs.

3. *Competent authorities may, in conjunction with an authorisation of deferred publication:*
- (a) request the publication of limited details of a transaction or details of several transactions in an aggregated form, or a combination thereof, during the time period of deferral;*
 - (b) allow the omission of the publication of the volume of an individual transaction during an extended time period of deferral;*
 - (ba) regarding non-equity instruments that are not sovereign debt, allow the publication of several transactions in an aggregated form during an extended time period of deferral;*

(c) regarding sovereign debt instruments, allow the publication of several transactions in an aggregated form for an indefinite period of time.

In relation to sovereign debt instruments, points (b) and (c) may be used either separately or consecutively whereby once the volume omission extended period lapses, the volumes could then be published in aggregated form.

In relation to all other instruments, when the deferral time period lapses, the outstanding details of the transaction and all the details of the transactions on an individual basis shall be published.

4. *ESMA shall develop draft regulatory technical standards specifying the following in such a way as to enable the publication of information required under Article 66 of Directive .../.../EU**:

- (a) the details of *transactions* that ■ investment firms, including systematic internalisers, *and market operators* and investment firms ■ operating *a trading venue shall make* available to the public for each class of financial instrument concerned *in accordance with Article 9(1), including identifiers for the different types of transactions published under Articles 9(1) and 20(1), distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;*

* *OJ: Please insert the number of the document contained in document COD(2011)0298.*

- (ab) *the time limit that would be deemed in compliance with the obligation to publish as close to real time as possible including when trades are executed outside ordinary trading hours;*
- (b) *the conditions for authorising investment firms, including systematic internalisers, and market operators and investment firms operating a trading venue, to provide for deferred publication of the details of transactions for each class of financial instrument concerned in accordance with paragraph 1 of this Article and Article 20(1);*
- (ba) *the criteria to be applied when determining the size or type of a transaction for which deferred publication and publication of limited details of a transaction, or publication of details of several transactions in an aggregated form, or omission of the publication of the volume of a transaction with particular reference to allowing an extended length of time of deferral for certain financial instruments depending on their liquidity, is allowed under paragraph 3.*

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

*

OJ: Please insert the date 12 months after entry into force of this Regulation.

CHAPTER 3
OBLIGATION TO OFFER TRADE DATA ON A SEPARATE AND REASONABLE
COMMERCIAL BASIS

Article 11

Obligation to make pre- and post-trade data available separately

1. **Market** operators and investment firms operating *a trading venue* shall make the information published in accordance with Articles 3 to 10 available to the public by offering pre- and post-trade transparency data separately.
2. **ESMA shall develop draft regulatory technical standards** specifying the offering of pre- and post-trade transparency data, including the level of disaggregation of the data to be made available to the public as referred to in paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by ... *

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

* ***OJ: Please insert the date 12 months after entry into force of this Regulation.***

Article 12

Obligation to make pre- and post-trade data available on a reasonable commercial basis

1. *Market operators* and *investment firms operating a trading venue* shall make the information published in accordance with Articles 3 to 10 available to the public on a reasonable commercial basis **and ensure non-discriminatory access to the information**. **Such** information shall be made available free of charge 15 minutes after **publication** .
2. The Commission **shall** adopt **delegated acts** in accordance with Article 41 **clarifying** what constitutes a reasonable commercial basis to make information public as referred to in paragraph 1.

TITLE III
TRANSPARENCY FOR *SYSTEMATIC INTERNALISERS AND* INVESTMENT FIRMS
TRADING OTC

Article 13

Obligation for *systematic internalisers* to make public firm quotes in *respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments*

1. *Investment firms* shall *make public* firm *quotes* in *respect of* those shares, depositary receipts, *ETFs*, certificates and other similar financial instruments traded on *a trading venue* for which they are systematic internalisers and for which there is a liquid market *as defined in Article 2(7a)(b)*.

In case there is not a liquid market *for the financial instruments mentioned in the previous subparagraph*, systematic internalisers shall disclose quotes to their clients *upon* request.

2. This Article and Articles 14, 15 and 16 shall apply to systematic internalisers when *they deal in* sizes up to standard market size. Systematic internalisers shall not be subject to the provisions of this Article *and Articles 14, 15 and 16 when they deal in sizes above standard market size*.
3. Systematic internalisers may decide the size or sizes at which they will quote. The minimum quote size shall *be* at least the equivalent of 10% of the standard market size of a share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument *traded on a trading venue*. For a particular share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument *traded on a trading venue* each quote shall include a firm bid and offer price or prices for a size or sizes which could be up to standard market size for the class of shares, depositary receipts, exchange-traded funds, certificates or other similar financial instruments to which the financial instrument belongs. The price or prices shall also reflect the prevailing market conditions for that share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument.

4. Shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments shall be grouped in classes on the basis of the arithmetic average value of the orders executed in the market for that financial instrument. The standard market size for each class of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments shall be a size representative of the arithmetic average value of the orders executed in the market for the financial instruments included in each class.
5. The market for each share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument shall be comprised of all orders executed in the European Union in respect of that financial instrument excluding those *that are* large in scale compared to normal market size.
6. The competent authority of the most relevant market in terms of liquidity as defined in Article 23 for each share, depositary receipt, exchange-traded fund, certificate and other similar financial instrument shall determine at least annually, on the basis of the arithmetic average value of the orders executed in the market in respect of that financial instrument, the class to which it belongs. This information shall be made public to all market participants *and communicated to ESMA which shall publish the information on its website.*

7. In order to ensure the efficient valuation of shares, depositary receipts, *ETFs*, certificates and other similar financial instruments and *maximise* the possibility of investment firms *to obtain* the best deal for their clients, *ESMA shall develop draft regulatory technical standards further* specifying *the modalities of* the publication of a firm quote as referred to in paragraph 1, *the determination of whether prices reflect prevailing market conditions as referred to in paragraph 3*, and *of* the standard market size as referred to in *paragraphs 2 and 4*.

ESMA shall submit those draft regulatory technical standards to the Commission by ... *

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 14

Execution of client orders

1. Systematic internalisers shall make public their quotes on a regular and continuous basis during normal trading hours. They *may* update their quotes at any time. They shall also be allowed, under exceptional market conditions, to withdraw their quotes.

* *OJ: Please insert the date 12 months after entry into force of this Regulation.*

Member State shall require that firms that meet the definition of systematic internaliser notify their competent authority. Such notification shall be transmitted to ESMA. ESMA shall establish a list of all SIs in the Union.

The ***quotes*** shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.

2. Systematic internalisers shall, while complying with the provisions set down in Article 27 of Directive .../.../EU*, execute the orders they receive from their clients in relation to the shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments for which they are systematic internalisers at the quoted prices at the time of reception of the order.

However, ***in justified cases***, they may execute those orders at a better price ■ provided that this price falls within a public range close to market conditions.

3. Systematic internalisers may also execute orders they receive from their professional clients at prices different than their quoted ones without having to comply with the requirements established in paragraph 2, in respect of transactions where execution in several securities is part of one transaction or in respect of orders that are subject to conditions other than the current market price.

* OJ: Please insert the number of the document contained in document COD(2011)0298.

4. Where a systematic internaliser quoting only one quote or whose highest quote is lower than the standard market size receives an order from a client of a size bigger than its quotation size, but lower than the standard market size, it may decide to execute that part of the order which exceeds its quotation size, provided that it is executed at the quoted price, except where otherwise permitted under the conditions of the previous two paragraphs. Where the systematic internaliser is quoting in different sizes and receives an order between those sizes, which it chooses to execute, it shall execute the order at one of the quoted prices in compliance with the provisions of Article 28 of Directive .../.../EU*, except where otherwise permitted under the conditions of *paragraphs 2 and 3 of this Article*.
5. In order to ensure the efficient valuation of shares, depositary receipts, *ETFs*, certificates and other similar financial instruments and maximise the possibility of investment firms *to obtain* the best deal for their clients, the Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying the criteria specifying when prices fall within a public range close to market conditions as referred to in paragraph 2.
6. The Commission *shall be empowered to* adopt delegated acts in accordance with Article 41, ■ clarifying what constitutes a reasonable commercial basis to make quotes public as referred to in paragraph 1.

* OJ: Please insert the number of the document contained in document COD(2011)0298.

Article 15

Obligations of competent authorities

The competent authorities shall check the following:

- (a) that investment firms regularly update bid and offer prices published in accordance with Article 13 and maintain prices which reflect the prevailing market conditions;
- (b) that investment firms comply with the conditions for price improvement laid down in Article 14(2).

Article 16

Access to quotes

1. Systematic internalisers shall be allowed to decide, on the basis of their commercial policy and in an objective non-discriminatory way, the *clients* to whom they give access to their quotes. To that end there shall be clear standards for governing access to their quotes. Systematic internalisers may refuse to enter into or discontinue business relationships with *clients* on the basis of commercial considerations such as the *client* credit status, the counterparty risk and the final settlement of the transaction.

2. In order to limit the risk of *exposure* to multiple transactions from the same client, systematic internalisers shall be allowed to limit in a non-discriminatory way the number of transactions from the same client which they undertake to enter at the published conditions. They *may* also **■**, in a non-discriminatory way and in accordance with the provisions of Article 28 of Directive .../.../EU*, limit the total number of transactions from different clients at the same time provided that this is allowable only where the number and/or volume of orders sought by clients considerably exceeds the norm.
3. In order to ensure the efficient valuation of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and maximises the possibility *for* investment firms *to obtain* the best deal for their clients the Commission shall adopt **■** delegated acts in accordance with Article 41 **■** specifying:

* OJ: Please insert the number of the document contained in document COD(2011)0298.

- (a) the criteria specifying when a quote is published on a regular and continuous basis and is easily accessible as *referred to in Article 14(1) as* well as the means by which investment firms may comply with their obligation to make public their quotes, which shall include the following possibilities:
 - (i) through the facilities of any regulated market which has admitted the instrument in question to trading;
 - (ii) through an *APA*;
 - (iii) through proprietary arrangements;
- (b) the criteria specifying those transactions where execution in several securities is part of one transaction or *those* orders that are subject to conditions other than current market price *as referred to in Article 14(3)*;
- (c) the criteria specifying what can be considered as exceptional market *conditions* that allow for the withdrawal of quotes as well as *the* conditions for updating quotes *as referred to in Article 14(1)*;

- (d) the criteria specifying when the number and/or volume of orders sought by clients considerably exceeds the norm as referred to in paragraph 2;
- (e) the criteria specifying when prices fall within a public range close to market conditions as referred to in Article 14(2).

Article 17

Obligation *for systematic internalisers to make public* firm quotes in *respect of* bonds, structured finance products, emission *allowances* and derivatives

1. ***Investment firms*** shall ***make public*** firm quotes ***in respect of*** bonds, structured finance products ■ , emission allowances and derivatives ■ traded on a ***trading venue for which they are systematic internalisers and for which there is a liquid market as defined in Article 2(7a)(a)*** when the following conditions are fulfilled:
 - (a) they are prompted for a quote by a client of the systematic internaliser;
 - (b) they agree to provide a quote.

- 1a. In relation to, structured finance products, emission allowances and derivatives traded on a trading venue for which there is not a liquid market, systematic internalisers shall disclose quotes to their clients on request if they agree to provide a quote. This obligation may be waived where the conditions specified in Article 8(1) are met.*
- 1b. Systematic internalisers may update their quotes at any time. They may also withdraw their quotes under exceptional market conditions.*
2. Systematic internalisers shall make the firm quotes **published** pursuant to paragraph 1 available to *their* other clients **■**. *Notwithstanding, they shall be allowed to decide, on the basis of their commercial policy and* in an objective non-discriminatory way, *the clients to whom they give access to their quotes. To that end, systematic internalisers shall have in place clear standards for governing access to their quotes. Systematic internalisers may refuse to enter into or discontinue business relationships with clients on the basis of commercial considerations such as the client credit status, the counterparty risk and the final settlement of the transaction.*

3. *Systematic internalisers* shall undertake to enter into transactions ***under the published conditions*** with any other client to whom the quote is made available ***in accordance with paragraph 2*** when the quoted size is at or below the size specific to the instrument ***determined in accordance with Article 8(5)(c)***.

Systematic internalisers shall not be subject to the obligation to publish a firm quote pursuant to paragraph 1 for financial instruments that fall below the threshold of liquidity determined in accordance with Article 8(4).

4. Systematic internalisers shall be allowed to establish non-discriminatory and transparent limits on the number of transactions they undertake to enter into with clients pursuant to any given quote.
5. The quotes ***published*** pursuant to paragraph 1 ***and 2 and those*** at or below the size mentioned in paragraph 3 shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.

6. The *quoted price or prices* shall be such as to ensure that the *systematic internaliser* complies with its obligations under Article 27 of Directive .../.../EU*, *where applicable*, and shall reflect prevailing market conditions in relation to prices at which transactions are concluded for the same or similar instruments on *a trading venue*.

However, in justified cases, they may execute orders at a better price provided that this price falls within a public range close to market conditions.

7. *Systematic internalisers shall not be subject to the provisions of this Article when they deal in sizes above the size specific to the instrument determined in accordance with Article 8(5)(c).*

* OJ: Please insert the number of the document contained in document COD(2011)0298.

Article 18
Monitoring by ESMA

1. Competent authorities and ESMA shall monitor the application of Article 17 regarding the sizes at which quotes are made available to clients of the investment firm and to other market participants relative to other trading activity of the firm, and the degree to which the quotes reflect prevailing market conditions in relation to transactions in the same or similar instruments on *a trading venue*. *By ...**, ESMA shall report to the Commission on the application of Article 17. In *the event* of significant quoting and trading activity just beyond the threshold mentioned in Article 17(3) or outside prevailing market conditions, *ESMA* shall report to the Commission before *that date*.

2. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying the sizes mentioned in Article 17(3) at which *a* firm shall enter into transactions with any other client to whom the quote is made available. *The size specific to the instrument shall be determined in accordance with the criteria set in Article 8(5)(c)*.

* *OJ: Please insert the date 54 months* after entry into force of this Regulation.

3. The Commission *shall* adopt ■ delegated acts in accordance with Article 41 ■ clarifying what constitutes a reasonable commercial basis to make quotes public as referred to in Article 17(5).

Article 19

Post-trade disclosure by investment firms, including systematic internalisers, in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments

1. Investment firms which, either on own account or on behalf of clients, conclude transactions in shares, depositary receipts, *ETFs*, certificates *and* other similar financial instruments *traded on a* trading *venue*, shall make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public through an APA.

2. The information which is made public in accordance with paragraph 1 and the time-limits within which it is published shall comply with the requirements adopted pursuant to Article 5, *including the regulatory technical standards adopted in accordance with Article 6(2)(a)*. Where the measures adopted pursuant to Article 6 provide for deferred *publication* for certain categories of transaction in shares, depositary receipts, *ETFs*, certificates *and* other similar financial instruments *traded on a trading venue*, this possibility shall also apply to those transactions when undertaken outside *trading venues*.
3. *ESMA shall develop draft regulatory technical standards* specifying the following:
 - (a) identifiers for the different types of *transactions* published under this Article, distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;
 - (b) *the application* of the obligation under paragraph 1 to transactions involving the use of those financial instruments for collateral, lending or other purposes where the exchange of financial instruments is determined by factors other than the current market valuation of the instrument;

(ba) the party to a transaction that has to make the transaction public in accordance with paragraph 1 if both parties to the transaction are investment firms.

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 20

Post-trade disclosure by investment firms, including systematic internalisers, in respect of bonds, structured finance products, emission allowances and derivatives

1. Investment firms which, either on own account or on behalf of clients, conclude transactions in bonds, structured finance products, emission allowances and derivatives traded on *a trading venue* shall make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public through an APA.

* *OJ: Please insert the date 12 months after entry into force of this Regulation.*

- 1a. Each individual transaction shall be made public once through a single APA.***
2. The information which is made public in accordance with paragraph 1 and the time-limits within which it is published shall comply with the requirements adopted pursuant to ***Article 9, including the regulatory technical standards adopted in accordance with Article 10(4)(a).***
3. ***Competent authorities shall be able to authorise investment firms to provide for deferred publication, or may request the publication of limited details of a transaction or details of several transactions in an aggregated form, or a combination thereof, during the time period of the deferral or may allow the omission of the publication of the volume for individual transactions during an extended time period of deferral, or in the case of non-equity instruments that are not sovereign debt, may allow the publication of several transactions in an aggregated form during an extended time period of deferral, or in the case of sovereign debt instruments may allow the publication of several transactions in an aggregated form for an indefinite period of time, and may temporarily suspend the obligations referred to in paragraph 1 on the same conditions as set forth in Article 10.***

Where the measures adopted pursuant to Article 10 provide for deferred publication and publication of limited details or details in an aggregated form, or a combination thereof, or for omission of the publication of the volume for certain categories of transactions in bonds, structured finance products, emission allowances and derivatives traded on a trading venue, this possibility shall also apply to those transactions when undertaken outside trading venues.

4. *ESMA shall develop draft regulatory technical standards specifying the following in such a way as to enable the publication of information required under Article 66 of Directive .../.../EU**:

- (a) *the* identifiers for the different types of *transactions* published *in accordance with* this Article, distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;
- (b) the *application of* the obligation under paragraph 1 to transactions involving the use of those financial instruments for collateral, lending or other purposes where the exchange of financial instruments is determined by factors other than the current market valuation of the instrument;

*

OJ: Please insert the number of the document contained in COD(2011)0298.

(ba) the party to a transaction that has to make the transaction public in accordance with paragraph 1 if both parties to the transaction are investment firms.

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **.*

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 20b

Providing information for the purposes of transparency and other calculations

1. In order to carry out calculations for determining the requirements for the pre-trade and post-trade transparency and the trading obligation regimes imposed by Articles 3 to 10, Articles 13 to 20 and Article 26, which are applicable to financial instruments and for determining whether an investment firm is a systematic internaliser as defined in Article 2(3), competent authorities may require information from:

(a) trading venues;

****** *OJ: Please insert a date 12 months after entry into force of this Regulation.*

(b) APAs; and

(c) CTPs.

2. *Trading venues, APAs and CTPs shall store the necessary data for a sufficient period of time.*
 - 2a. *Competent authorities shall transmit to ESMA such information as ESMA requires to produce the reports referred to in Article 4a(4), (4a) and (4b).*
3. *ESMA shall develop draft regulatory technical standards to specify the content and frequency of data requests and the formats and the timeframe in which trading venues, APAs and CTPs shall respond to such requests in accordance with paragraph 1 and the type of data that must be stored and the minimum period of time trading venues, APAs and CTPs shall store data in order to be able to respond to such requests in accordance with paragraph 2.*

ESMA shall submit those draft regulatory technical standards to the Commission by*

Power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

* *OJ: Please insert a date 12 months after entry into force of this Regulation.*

Article 20c

Trading Obligation for Investment Firms

1. *An investment firm shall ensure the trades it undertakes in shares admitted to trading on a regulated market or traded on a trading venue shall take place on a regulated market, MTF or systematic internaliser, or a third-country trading venue assessed as equivalent in accordance with Article 25(3)(a) of Directive .../.../EU* , as appropriate, unless their characteristics include that they:*
 - *are non-systematic, ad-hoc, irregular and infrequent, or*
 - *are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process.*

2. *An investment firm that operates an internal matching system which executes client orders in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments on a multilateral basis must ensure it is authorised as an MTF under this Directive and comply with all relevant provisions pertaining to such authorisations.*

* *OJ: Please insert the number of the document contained in COD(2011)0298.*

3. *In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the particular characteristics of those transactions in shares that do not contribute to the price discovery process as referred to in paragraph 1, taking into consideration cases such as:*

- a) Non-addressable liquidity trades; or*
- b) Where the exchange of such financial instruments is determined by factors other than the current market valuation of the financial instrument.*

ESMA shall submit those draft regulatory technical standards to the Commission by*

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

* *Please insert a date 12 months after entry into force of this Regulation.*

TITLE IV
TRANSACTION REPORTING

Article 21

Obligation to uphold integrity of markets

Without prejudice to the allocation of responsibilities for enforcing the provisions of Regulation (EU) No .../...^{*}, competent authorities coordinated by ESMA in accordance with Article 31 of Regulation (EU) No 1095/2010 shall monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.

^{*} *OJ: Please insert the number of the document contained in document COD(2011)0295.*

Article 22

Obligation to maintain records

1. Investment firms shall keep at the disposal of the competent authority, for **5** years, the relevant data relating to all **orders and all** transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Directive **2005/60/EC** of the European Parliament and of the Council²¹. ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No **1095/2010**.
2. The operator of a **trading venue** shall keep at the disposal of the competent authority, for at least five years, the relevant data relating to all orders in financial instruments which are advertised through their systems. The records shall contain **the relevant data that constitute the characteristics of the order, including those that link an order with the executed transaction(s) that stems from that order and (the details of which) should be reported in accordance with** Article 23(1) and (3). ESMA shall perform a facilitation and coordination role in relation to the access by competent authorities to information under the provisions of this paragraph.

²¹ Directive **2005/60/EC** of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

3. *ESMA shall develop draft regulatory technical standards to determine the details of the relevant order data required to be maintained under paragraph 2 of this Article that is not referred to in Article 23.*

These shall include the identification code of the member or participant which transmitted the order, the identification code of the order, the date and time the order was transmitted, the characteristics of the order, including the type of order, the limit price if applicable, the validity period, any specific order instructions, details of any modification, cancellation, partial or full execution of the order, the agency or principal capacity.

ESMA shall submit those draft regulatory technical standards to the Commission by*

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

* OJ: Please insert a date 12 months after the date of entry into force of this Regulation.

Article 23

Obligation to report transactions

1. Investment firms which execute transactions in financial instruments shall report ***complete and accurate*** details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day.

The competent authorities shall, in accordance with Article 89 of Directive .../.../EU*, establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives this information.

The competent authorities shall make available to ESMA, upon request, any information reported in accordance with this Article.

2. The obligation laid down in paragraph 1 shall ■-apply to:
 - (a) financial instruments which are admitted to trading ■ or ■ traded ***on a trading venue or for which a request for admission to trading has been made;***

* OJ: Please insert the number of the document contained in document COD(2011)0298.

- (b) *financial instruments where the underlying is a financial instrument traded on a trading venue; and*
- (c) *financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue*

The obligation shall apply to transactions in financial instruments referred to in points (a) to (c) irrespective of whether or not such transactions are carried out on the trading venue.

3. The reports shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, ***a designation to identify the applicable waiver under which the trade has taken place***, means of identifying the investment firms concerned, ***and a designation to identify a short sale as defined in Article 2(1)(b) of Regulation (EU) No 236/2012 of the European Parliament and of the Council²² in respect of any shares and sovereign debt within the scope of Articles 12, 13 and 17 of that Regulation.*** For transactions not carried out on a ***trading venue***, the reports shall also include a designation identifying the types of transactions in accordance with the measures to be adopted pursuant to Article 19(3)(a) and Article 20(4)(a). ***For commodity derivatives, the reports shall also indicate whether the transaction reduces risk in an objectively measurable way in accordance with Article 59 of Directive .../.../EU*.***

²² ***Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ L 86, 24.3.2012, p. 1).***

* OJ: Please insert the number of the document contained in document COD(2011)0298.

4. Investment firms which transmit orders shall include in the transmission of that order all the details *as specified in* paragraphs 1 and 3. Instead of including *the mentioned details when transmitting orders*, an investment firm may choose to report the transmitted order, *if it is executed, as a transaction* in accordance with the requirements under paragraph 1. *In this case, the transaction report by the investment firm shall state that it pertains to a transmitted order.*
5. The operator of a *trading venue* shall report details of transactions in instruments traded on *its* platform which are executed through *its* systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3.
- 5a. *In reporting the designation to identify the clients as required under paragraphs 3 and 4, investment firms shall use a legal entity identifier established to identify clients that are legal persons.*

ESMA shall develop by ... guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to ensure that the application of legal entity identifiers within the Union complies with international standards, in particular those established by the Financial Stability Board.*

*

OJ: Please insert the date 18 months after the date of entry into force of this Regulation.

6. The reports shall be made to the competent authority either by the investment firm itself, an ARM acting on its behalf or by the *trading venue* through whose system the transaction was completed, *in accordance with paragraphs 1, 3 and 8.*

Investment firms shall have responsibility for the completeness, accuracy and timely submission of the reports which are submitted to the competent authority.

By way of derogation from this responsibility, where an investment firm reports details of those transactions through an ARM which is acting on its behalf or a trading venue, the investment firm shall not be responsible for failures in the completeness, accuracy or timely submission of the reports which are attributable to the ARM or trading venue. In those cases and subject to Art 68(4) of Directive .../.../EU the ARM or trading venue shall be responsible for those failure.*

Investment firms must nevertheless take reasonable steps to verify the completeness, accuracy and timeliness of the transaction reports which were submitted on their behalf.

* *OJ: Please insert the number of the document contained in document COD(2011)0298.*

The Home Member State shall require the trading venue, when making reports on behalf of the investment firm, to have sound security mechanisms in place designed to guarantee the security and authentication of the means of transfer of information, to minimise the risk of data corruption and unauthorised access and to prevent information leakage maintaining the confidentiality of the data at all times. The Home Member State shall require the trading venue to maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

Trade-matching or reporting systems, including trade repositories registered or recognised in accordance with Title VI of Regulation (EU) No 648/2012, may be approved by the competent authority as an ARM *in order to transmit transaction reports to the competent authority in accordance with paragraphs 1, 3 and 8.*

In cases where transactions *have been* reported to a trade repository in accordance with Article 9 of Regulation (EU) No 648/2012 *which is approved as an ARM* and where these reports contain the details required under paragraphs 1, 3 and 8 *and are transmitted to the competent authority by the trade repository within the time limit set in paragraph 1*, the obligation on the investment firm laid down in paragraph 1 shall be considered to have been complied with.

Where there are errors or omissions in the transaction reports, the ARM, investment firm or trading venue reporting the transaction shall correct the information and submit a corrected report to the competent authority.

7. When, in accordance with Article 37(8) of Directive .../.../EU^{*}, reports provided for under this Article are transmitted to the competent authority of the Host Member State, it shall transmit this information to the competent authorities of the Home Member State of the investment firm, unless ***the competent authorities of the Home Member State*** decide that they do not want to receive this information.
8. ESMA shall develop draft regulatory technical standards to determine:
 - (a) data standards and formats for the information to be ***reported*** in accordance with paragraphs 1 and 3, including the methods and arrangements for reporting financial transactions and the form and content of such reports;
 - (b) the criteria for defining a relevant market in accordance with paragraph 1;

^{*} ***OJ: Please insert the number of the document contained in document COD(2011)0298.***

- (c) the references of the instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, the information and details of the identity of the client, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, ***a designation to identify the applicable waiver under which the trade has taken place, the*** means of identifying the investment firms concerned, the way in which the transaction was executed, **■** data fields necessary for the processing and analysis of the transaction reports in accordance with paragraph 3, ***and***
- (d) ***the designation to identify short sales of shares and sovereign debt as referred to in paragraph 3;***
- (e) ***the relevant categories of financial instrument to be reported in accordance with paragraph 2;***

- (cb) the conditions upon which legal entity identifiers are developed, attributed and maintained, by Member States in accordance with paragraph 5a, and the conditions under which these legal entity identifiers are used by investment firms so as to provide, pursuant to paragraphs 3, 4 and 5, for the designation to identify the clients in the transaction reports they are required to establish pursuant to paragraph 1.*
- (f) the application of transaction reporting obligations to branches of investment firms;*
- (g) what constitutes a transaction and execution of a transaction for the purposes of this Article.*
- (ga) when an investment firm is deemed to have transmitted an order for the purposes of paragraph 4.*

ESMA shall submit those draft regulatory technical standards to the Commission by ... *

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

* *OJ: Please insert the date 12 months after the entry into force of this Regulation.*

9. **By ...** ** ESMA shall report to the Commission on the functioning of this Article, including ***its interaction with the related reporting obligations under Regulation (EU) No 648/2012, and*** whether the content and format of transaction reports received and exchanged between competent authorities comprehensively ***enables monitoring of*** the activities of investment firms in accordance with Article 21 ***of this Regulation***. The Commission may take steps to propose any changes, including providing for transactions to be transmitted ***only*** to a ***single*** system appointed by ESMA instead of to competent authorities **■**. ***The Commission shall forward ESMA's report to the European Parliament and to the Council.***

Article 23a

Obligation to supply instrument reference data

1. ***With regard to instruments admitted to trading on regulated markets or traded on MTFs or OTFs trading venues shall provide competent authorities with identifying reference data for the purposes of transaction reporting under Article 23.***

** ***OJ please insert date: 54 months after the date of entry into force of this Regulation.***

With regard to other instruments covered by Article 23(2) traded on its system, each systematic internaliser shall provide its competent authority with reference data relating to those instruments.

Identifying reference data shall be made ready for submission to the competent authority in an electronic and standardised format before trading commences in the financial instrument that it refers to. The instrument reference data shall be updated whenever there are changes to the data with respect to an instrument. These notifications are to be transmitted by competent authorities without delay to ESMA, which shall publish them immediately on its website. ESMA shall give competent authorities access to these reference data.

4. *In order to allow competent authorities to monitor, pursuant to Article 23, the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market, ESMA and the competent authorities shall establish the necessary arrangements in order to ensure that:*
 - (a) *ESMA and the competent authorities effectively receive the instrument reference data pursuant to paragraph 1;*

- (b) *the quality of the data so received is appropriate for the purpose of transaction reporting under Article 23;*
- (c) *the instrument reference data received pursuant to paragraph 1 is efficiently exchanged between the relevant competent authorities.*

5. *ESMA shall develop draft regulatory technical standards to determine*

- (a) *data standards and formats for the instrument reference data in accordance with paragraph 1, including the methods and arrangements for supplying the data and any update thereto to competent authorities and transmitting it to ESMA in accordance with paragraph 1, and the form and content of such data;*
- (b) *the technical measures that are necessary in relation to the arrangements to be made by ESMA and the competent authorities pursuant to paragraph 4.*

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

* *OJ please insert date: 12 months after the date of entry into force of this Regulation.*

TITLE V
DERIVATIVES

Article 24

Obligation to trade on regulated markets, MTFs or OTFs

1. Financial counterparties as defined in *Article 2(8) of Regulation (EU) No 648/2012* and nonfinancial counterparties that meet the conditions referred to in *Article 10(1b) thereof* shall conclude transactions which are *neither* intragroup transactions as defined in *Article 3* of that Regulation *nor transactions covered by the transitional provisions in Article 89 of that Regulation* with other *such* financial counterparties **■** or *other such* non-financial counterparties that meet the conditions referred to in *Article 10(1)(b)* of Regulation (EU) *No 648/2012* in derivatives pertaining to a class of derivatives that has *also* been declared subject to the trading obligation in accordance with the procedure set out in Article 26 and listed in the register referred to in Article 27 only on:
 - (a) regulated markets;
 - (b) MTFs;

- (c) OTFs; or
- (d) third-country trading venues, provided that the Commission has adopted a decision in accordance with paragraph 4 and provided that the third country provides *for* an *effective* equivalent *system for the* recognition of trading venues authorised under Directive .../.../EU* to admit to trading or trade derivatives declared subject to a trading obligation in that third country on a non-exclusive basis.

2. The trading obligation shall also apply to counterparties referred to in paragraph 1 which enter into derivatives transactions pertaining to *a class of* derivatives *that has been* declared subject to the trading obligation with third-country financial institutions or other third-country entities that would be subject to the clearing obligation if they were established in the Union. The trading obligation shall also apply to third-country entities that would be subject to the clearing obligation if they were established in the Union, which enter into derivatives transactions pertaining to *a class of* derivatives *that has been* declared subject to the trading obligation, provided that the contract has a direct, substantial and foreseeable effect within the Union or where such obligation is necessary or appropriate to prevent the evasion of any provision of this Regulation.

* OJ: Please insert the number of the document contained in document COD(2011)0298.

ESMA shall regularly monitor the activity in derivatives which have not been declared subject to the trading obligation as described in paragraph 1 in order to identify cases where a particular class of contracts may pose systemic risk and to prevent regulatory arbitrage between derivative transactions subject to the trading obligation and derivative transactions which are not subject to the trading obligation.

3. Derivatives declared subject to the trading obligation *pursuant to paragraph 1* shall be eligible to be admitted to trading *on a regulated market* or to trade on any trading venue as referred to in paragraph 1 on a non-exclusive and non-discriminatory basis.
4. The Commission may, in accordance with the *examination* procedure referred to in *Article 42(2)* adopt decisions determining that the legal and supervisory framework of a third country ensures that a trading venue authorised in that third country complies with legally binding requirements which are equivalent to the requirements for the trading venues referred to in *paragraph 1(a), (b) and (c) of this Article*, resulting from this Regulation, Directive .../.../EU*, and Regulation (EU) No .../...**, and which are subject to effective supervision and enforcement in that third country.

* OJ: Please insert the number of the document contained in document COD(2011)0298.

** OJ: Please insert the number of the document contained in document COD(2011)0295.

These decisions shall be for the sole purpose of determining eligibility as a trading venue for derivatives subject to the trading obligation.

The legal and supervisory framework of a third country is considered ***to have*** equivalent ***effect*** where that framework fulfils all the following conditions:

- (a) trading venues in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
- (b) trading venues have clear and transparent rules regarding admission of financial instruments to trading so that such financial instruments are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;
- (c) issuers of financial instruments are subject to periodic and ongoing information requirements ensuring a high level of investor protection;
- (d) it ensures market transparency and integrity ***via rules addressing*** market abuse in the form of insider dealing and market manipulation;

A decision of the Commission under this paragraph may be limited to a category or categories of trading venues. In that case, a third-country trading venue is only included in paragraph 1(d) if it falls within a category covered by the Commission's decision.

5. *In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards* specifying the types of contracts referred to in paragraph 2 which have a direct, substantial and foreseeable effect within the Union and the cases where the trading obligation is necessary or appropriate to prevent the evasion of any provision of this Regulation.

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Where possible and appropriate, the regulatory technical standards referred to in this paragraph shall be identical to those adopted under Article 4(4) of Regulation (EU) No 648/2012.

* *OJ please insert date: 12 months after the entry into force of this Regulation.*

Article 25

Clearing obligation for derivatives traded on regulated markets *and timing of acceptance for clearing*

1. The operator of a regulated market shall ensure that all transactions in derivatives ■ that are concluded on that regulated market are cleared by a CCP.
2. *CCPs, trading venues and investment firms which act as clearing members in accordance with Article 3 of Regulation (EU) No 648/2012 shall have in place effective systems, procedures and arrangements in relation to cleared derivatives to ensure that transactions in cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable using automated systems.*

In this paragraph, “cleared derivatives” means

- (i) *all derivatives which are to be cleared pursuant to the clearing obligation under paragraph 1 or pursuant to the clearing obligation under Article 5 of Regulation (EU) No 648/2012;*
- (ii) *all derivatives which are otherwise agreed by the relevant parties to be cleared.*

ESMA shall develop draft regulatory technical standards to specify the minimum requirements for systems, procedures and arrangements (including the acceptance timeframes) under this paragraph taking into account the need to ensure proper management of operational or other risks, and shall have ongoing authority to update these requirements as industry standards evolve.

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

* *OJ: Please insert the date 12 months after the entry into force of this Regulation.*

Article 25aa
Indirect Clearing Arrangements

1. **Indirect clearing arrangements with regard to exchange traded derivatives are permissible provided that those arrangements do not increase counterparty risk and ensure that the assets and positions of the counterparty benefit from protection with equivalent effect to that referred to in Articles 39 and 48 of Regulation (EU) No 648/2012.**

2. **ESMA shall develop draft regulatory technical standards to specify the types of indirect clearing service arrangements where established that meet the conditions referred to above, ensuring consistency with provisions established for OTC derivatives under Chapter II of Commission Delegated Regulation (EU) No 149/2013²³.**

ESMA shall submit those draft regulatory technical standards to the Commission by ... *

²³ **Commission Delegated Regulation (EU) No 149/2013 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 indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (OJ L 52, 23.2.2013, p. 11).**

*** OJ: Please insert the date 12 months after the date of entry into force of this Regulation.**

Power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 25a

Portfolio Compression

- 1. When providing portfolio compression, investment firms and market operators shall not be subject to the best execution obligation in Article 27 of Directive .../.../EU* , the transparency obligations in Articles 7, 9, 17 and 20 of this Regulation and the obligation in Article 1(6) of Directive .../.../EU** The termination or replacement of the component derivatives in the portfolio compression shall not be subject to Article 24 of this Regulation.*
- 2. Investment firms and market operators providing portfolio compression shall make public through an APA the volumes of transactions subject to portfolio compressions and the time they were concluded within the time limits specified in Article 9 of this Regulation.*

*

OJ: Please insert the number of the document contained in document COD(2011)0298.

3. *Investment firms and market operators providing portfolio compressions shall keep complete and accurate records of all portfolio compressions which it organises or participates in. These records shall be made available promptly to the relevant competent authority or ESMA upon request.*
4. *The Commission may adopt by means of delegated acts in accordance with Article 41, measures specifying the following:*
- (a) the elements of portfolio compression,*
 - (b) the information to be published pursuant to paragraph 3,*
- in such a way as to make use as far as possible of any existing record keeping, reporting or publication requirements.*

Article 26

Trading obligation procedure

1. ESMA shall develop draft **regulatory** technical standards to determine the following
 - (a) which of the class of derivatives declared subject to the clearing obligation in accordance with **Article 5(2)** and (4) of **Regulation (EU) No 648/2012** or a relevant subset thereof shall be traded on the venues referred to in **Article 24(1) of this Regulation**;
 - (b) the date **or dates** from which the trading obligation takes effect, **including any phase in and the categories of counterparties to which the obligation applies where such phase in and such categories of counterparties have been provided for in regulatory technical standards in accordance with Article 5(2)(b) of Regulation (EU) No 648/2012**.

ESMA shall submit **those** draft **regulatory** technical standards **■** to the Commission within **six** months after the regulatory technical standards in accordance with **Article 5(2)** of Regulation (EU) **No 648/2012** are adopted by the Commission.

Before submitting the draft regulatory technical standards to the Commission for adoption, ESMA shall conduct a public consultation and, where appropriate, may consult with the competent authorities of third countries.

Power is conferred to the Commission to adopt the ***regulatory*** technical standards referred to in the first subparagraph in accordance with ***Articles 10 to 14*** of Regulation (EU) No 1095/2010.

2. In order for the trading obligation to take effect:
 - (a) the class of derivatives ***pursuant to paragraph 1(a)*** or a relevant subset thereof ***must*** be admitted to trading or traded on at least one ***trading venue as*** referred to in Article 24(1), and
 - (b) ***there must be sufficient third-party buying and selling interest in*** the class of derivatives or a relevant subset thereof ***so that such a class of derivatives is*** considered sufficiently liquid to trade only on the venues referred to in Article 24(1).

3. In developing the draft *regulatory* technical standards *referred to in paragraph 1*, ESMA shall consider the class of derivatives or a relevant subset thereof as sufficiently liquid pursuant to the following criteria:

(a) the average frequency *and size* of trades *over a range of market conditions, having regard to the nature and lifecycle of products within the class of derivatives*;

■

(b) the number and type of active market participants *including the ratio of market participants to products/contracts traded in a given product market*;

(c) *the average size of the spreads.*

In preparing those draft regulatory technical standards, ESMA shall take into consideration the anticipated impact this trading obligation might have on the liquidity of a class of derivatives or a relevant subset thereof and the commercial activities of end users which are not financial entities.

ESMA shall also determine whether the class of derivatives or relevant subset thereof is only sufficiently liquid in transactions below a certain size.

4. ESMA shall, on its own initiative, in accordance with the criteria set out in paragraph 2 and after conducting a public consultation, identify and notify to the Commission the classes of derivatives or individual derivative contracts that should be subject to the obligation to trade on the venues referred to in Article 24(1), but for which no CCP has yet received authorisation under Article **14** or **15** of **Regulation (EU) No 648/2012** or which is not admitted to trading or traded on a trading venue referred to in Article 24(1).

Following *the* notification by ESMA *referred to in the first subparagraph*, the Commission may publish a call for development of proposals for the trading of those derivatives on the venues referred to in Article 24(1).

5. ESMA shall in accordance with paragraph 1, submit to the Commission new draft **regulatory** technical standards to amend, suspend or revoke existing **regulatory** technical standards whenever there is a material change in the criteria set out in paragraph 2. Before doing so, ESMA may consult, where appropriate, the competent authorities of third countries. Power is conferred to the Commission to amend, suspend and revoke the existing **regulatory** technical standards in accordance with **Articles 10 to 14** of Regulation (EU) No 1095/2010.

6. *ESMA shall develop draft* regulatory technical standards specifying the criteria referred to in paragraph 2(b). ■

*ESMA shall submit drafts for those regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 26a

Mechanism to avoid duplicative or conflicting rules

1. *The Commission shall be assisted by ESMA in monitoring and preparing reports, at least on an annual basis, to the European Parliament and to the Council on the international application of principles laid down in Articles 24 and 25, in particular with regard to potential duplicative or conflicting requirements on market participants, and recommend possible actions.*

* *OJ please insert date: 12 months after the date of entry into force of this Regulation.*

2. *The Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of the relevant third country:*

- (a) are equivalent to the requirements resulting from Articles 24 and 25;*
- (b) ensure protection of professional secrecy that is equivalent to that set out in this Regulation;*
- (c) are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country.*

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 42.

3. *An implementing act on equivalence as referred to in paragraph 2 shall have the effect that counterparties entering into a transaction subject to this Regulation shall be deemed to have fulfilled the obligation contained in Article 24 and 25 where at least one of the counterparties is established in that third country and the counterparties are in compliance with those legal, supervisory and enforcement arrangements of the relevant third country.*

4. *The Commission shall, in cooperation with ESMA, monitor the effective implementation by third countries, for which an implementing act on equivalence has been adopted, of the requirements equivalent to those contained in Articles 24 and 25 and regularly report, at least on an annual basis, to the European Parliament and the Council.*

Within 30 calendar days of the presentation of the report where the report reveals a significant defect or inconsistency in the application of the equivalent requirements by third-country authorities, the Commission may withdraw the recognition as equivalent of the third-country legal framework in question. Where an implementing act on equivalence is withdrawn, transactions by counterparties shall automatically be subject again to all requirements contained in Articles 24 and 25 of this Regulation.

Article 27

Register of derivatives subject to the trading obligation

ESMA shall publish and maintain on its website a register specifying, in an exhaustive and unequivocal manner, the derivatives that are subject to the obligation to trade on the venues referred to in Article 24(1), the venues where they are admitted to trading or traded, and the dates from which the obligation takes effect.

TITLE VI

Non-discriminatory clearing access for financial instruments

Article 28

Non-discriminatory access to a CCP

1. Without prejudice to **Article 7** of Regulation (EU) No 648/2012, a CCP shall accept to clear financial instruments on a non-discriminatory and transparent basis, including as regards collateral requirements and fees related to access, regardless of the trading venue on which a transaction is executed. This in particular should ensure that a trading venue has the right to non-discriminatory treatment of contracts traded on *that trading venue* are treated in terms of:
 - (i) collateral requirements and netting of economically equivalent contracts, *where the inclusion of such contracts in the close-out and other netting procedures of a CCP based on the applicable insolvency law would not endanger the smooth and orderly functioning, the validity and/or enforceability of such procedures; and*
 - (ii) cross-margining with correlated contracts cleared by the same CCP *under a risk model that complies with Article 41 of Regulation (EU) No 648/2012.*

A CCP may require that the trading venue comply with the **■** operational and technical requirements established by the CCP *including the risk management requirements*. The requirement *in this paragraph* does not apply to any derivative contract that is already subject to the access obligations under Article 7 of Regulation (EU) No 648/2012.

A CCP is not bound by this Article if it is connected by close links to a trading venue which has given notification under Article 29(4a).

2. A request to access a *CCP by a trading venue* shall be formally submitted to a *CCP*, its relevant competent authority *and the competent authority of the trading venue*. *The request shall specify to which types of financial instruments access is requested.*

3. The CCP shall provide a written response to the trading venue within three months *in the case of transferable securities and money market instruments, and within six months in the case of exchange traded derivatives*, either permitting access, under the condition that a relevant competent authority has *granted* access pursuant to paragraph 4, or denying access. The CCP may deny a request for access only under the conditions specified in paragraph 7(a). If a CCP *denies* access it shall provide full reasons in its response and inform its competent authority in writing of the decision. *Where the trading venue is established in a different Member State to the CCP, the CCP shall also provide such notification and reasoning to the competent authority of the trading venue.* The CCP shall make access possible within three months of providing a positive response to the access request.
4. The competent authority of the CCP *or that of the trading venue shall grant* a trading venue access to a CCP *only* where such access:
- (a) would *not require an interoperability arrangement, in the case of derivatives that are not OTC derivatives pursuant to Article 2(7) of Regulation (EU) No 648/2012;*
or

(b) *would not* threaten the smooth *and* orderly functioning of *the* markets, *in particular due to liquidity fragmentation as defined in Article 2(36), or would not adversely affect systemic risk.*

Nothing in subparagraph (a) shall prevent access being granted where the request as it is mentioned in paragraph 1 requires interoperability and the trading venue and all CCPs party to the proposed interoperability arrangement have consented to the arrangement and the risks to which the incumbent CCP is exposed to arising from inter-CCP positions are collateralised at a third party.

Where the need for an interoperability arrangement is, or part of, the reason for denying a request, the trading venue will advise the CCP and inform ESMA which other CCPs have access to the trading venue and ESMA will publish this information so that investment firms may choose to exercise their rights under Article 39 of Directive .../.../EU in respect of those CCPs in order to facilitate alternative access arrangements.*

* *OJ: Please insert the number of the document contained in document COD(2011)0298.*

If a competent authority *refuses* access ■ it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons *to the other competent authority, the* CCP and the trading venue including the evidence on which the decision is based.

4a. *As regards transferable securities and money market instruments, a CCP that has been newly established and authorised as a CCP as defined in Article 2(1) of Regulation (EU) No 648/2012 to clear under Article 17 of Regulation (EU) No 648/2012 or recognised under Article 25 of Regulation (EU) No 648/2012 or authorised under a pre-existing national authorisation regime for a period of less than three years at the point of entry in force of this Regulation may, before the entry into application of this Regulation, apply to its competent authority for permission to avail itself of transitional arrangements. The competent authority may decide that this Article would not apply to the CCP in respect of transferable securities and money market instruments, for a transitional period of up to thirty months from the application of this Regulation.*

Where such a transitional period is approved, the CCP cannot benefit from the access rights under Article 29 or this Article in respect of transferable securities and money market instruments for the duration of this transitional arrangement. The competent authority shall notify members of the college of competent authorities for the CCP and ESMA when a transitional period is approved. ESMA shall publish a list of all notifications that it receives.

Where a CCP which has been approved for the transitional arrangements under this paragraph is connected by close links to one or more trading venues, those trading venues shall not benefit from access rights under Article 29 or this Article in respect of transferable securities and money market instruments for the duration of the transitional arrangement.

A CCP which is authorised during the three year period prior to entry into force, but is formed by a merger or acquisition involving at least one CCP authorised prior to this period, shall not be permitted to apply for the transitional arrangements under this paragraph.

7. ***ESMA shall develop draft regulatory technical standards specifying:***
- (a) the ***specific*** conditions under which ***an*** access ***request may*** be denied by a CCP, including ***the anticipated*** volume of transactions, the number and type of users, ***arrangements for managing operational risk and complexity*** or other factors creating significant undue risks.
 - (b) the conditions under which access ***shall be permitted by a CCP***, including confidentiality of information provided regarding financial instruments during the development phase, the non-discriminatory and transparent basis as regards clearing fees, collateral requirements and operational requirements regarding margining.
 - (c) ***the conditions under which granting access will threaten the smooth and orderly functioning of markets or would adversely affect systemic risk.***
 - (d) ***the procedure for making a notification under paragraph 4a.***
 - (e) ***the conditions for non-discriminatory treatment in terms of how contracts traded on that trading venue are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP.***

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

Article 29

Non-discriminatory access to a trading venue

1. Without prejudice to Article 8 of Regulation (EU) No 648/2012, a trading venue shall provide trade feeds on a non-discriminatory and transparent basis, including as regards fees related to access, upon request to any CCP authorised or recognised by Regulation (EU) No 648/2012 that wishes to clear **■** transactions *in financial instruments* that *are concluded on that* trading venue. This requirement does not apply to any derivative contract that is already subject to the access obligations under Article 8 of Regulation (EU) No 648/2012.

* *OJ: Please insert a date 12 months after entry into force of this Regulation.*

A trading venue is not bound by this Article if it is connected by close links to a CCP which has given notification that it is availing of the transitional arrangements under Article 28(4a).

2. A request to access a trading venue *by a CCP* shall be formally submitted to a trading venue, its relevant competent authority *and the competent authority of the CCP*.
3. The trading venue shall provide a written response to the CCP within three months *in the case of transferable securities and money market instruments, and within six months in the case of exchange traded derivatives*, either permitting access, under the condition that the relevant competent authority has *granted* access pursuant to paragraph 4, or denying access. The trading venue may deny access only under the conditions specified under paragraph 6(a). When access is *denied* the trading venue shall provide full reasons in its response **■** and inform its competent authority in writing of the decision. *Where the CCP is established in a different Member State to the trading venue, the trading venue shall also provide such notification and reasoning to the competent authority of the CCP.* The trading venue shall make access possible within three months of providing a positive response to the access request.

4. The competent authority of the trading venue *or that of the CCP shall grant* a CCP access to a trading venue *only* where such access **■** :

- (a) would *not require an interoperability arrangement, in the case of derivatives that are not OTC derivatives pursuant to Article 2(7) of Regulation (EU) No 648/2012; or*
- (b) *would not* threaten the smooth *and* orderly functioning of *the* markets, *in particular due to liquidity fragmentation as specified in Article 2(36) and the trading venue has put in place adequate mechanisms to prevent such fragmentation, or would not adversely affect systemic risk.*

Nothing in subparagraph (a) shall prevent access being granted where the request as it is mentioned in paragraph 1 requires interoperability and the trading venue and all CCPs party to the proposed interoperability arrangement have consented to the arrangement and the risks to which the incumbent CCP is exposed to arising from inter-CCP positions are collateralised at a third party.

Where the need for an interoperability arrangement is, or is part of, the reason for denying a request, the trading venue will advise the CCP and inform ESMA which other CCPs have access to the trading venue and ESMA will publish this information so that investment firms may choose to exercise their rights under Article 39 of Directive .../.../EU in respect of those CCPs in order to facilitate alternative access arrangements.*

If a competent authority denies access ■ it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons to the other **competent authority, the** trading venue and the CCP including the evidence on which its decision is based.

* *OJ: Please insert the number of the document contained in document COD(2011)0298.*

4a. *As regards exchange traded derivatives, a trading venue which falls below the relevant threshold in the calendar year preceding the entry into application of this Regulation, may, before the entry into application of this Regulation, notify ESMA and its competent authority that it does not wish to be bound by this Article for exchange traded derivatives included within that threshold, for a period of thirty months from the application of this Regulation. A trading venue which remains below the relevant threshold in every year of that, or any further, thirty month period may, at the end of the period, notify ESMA and its competent authority that it wishes to continue to not be bound by this Article for further thirty months. Where notification is given the trading venue cannot benefit from the access rights under Article 28 or this Article for exchange traded derivatives included within the relevant threshold, for the duration of the opt-out. ESMA shall publish a list of all notifications that it receives.*

The relevant threshold for the opt-out is an annual notional amount traded of One Thousand Billion Euros. The notional amount shall be single-counted and shall include all transactions in exchange traded derivatives concluded under the rules of the trading venue.

Where a trading venue is part of a group which is connected by close links the threshold shall be calculated by adding the annual notional amount traded of all the trading venues in the group as a whole that are based in the Union.

Where a trading venue which has made a notification under this paragraph is connected by close links to one or more CCPs, those CCPs shall not benefit from access rights under Article 28 or this Article for exchange traded derivatives within the relevant threshold, for the duration of the opt-out.

■

6. *ESMA shall develop draft regulatory technical standards specifying:*

(a) *the specific* conditions under which *an* access *request may* be denied by a trading venue, including conditions based on the *anticipated* volume of transactions, the number of users, *arrangements for managing operational risk* and complexity or other factors creating *significant* undue risks,

- (b) the conditions under which access ***shall be*** granted, including confidentiality of information provided regarding financial instruments during the development phase and the non-discriminatory and transparent basis as regards fees related to access.
- (c) ***the conditions under which granting access will threaten the smooth and orderly functioning of the markets, or would adversely affect systemic risk;***
- (e) ***the procedure for making a notification under paragraph 4a, including further specifications for calculation of the notional amount and the method by which ESMA may verify the calculation of the volumes and approve the opt-out.***

ESMA shall submit those draft regulatory technical standards to the Commission by ... ^{*}□.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

^{*} ***OJ please insert date: 12 months after the date of entry into force of this Regulation.***

Article 30

Non-discriminatory access to and obligation to licence benchmarks

1. Where the value of any financial instrument is calculated by reference to a benchmark, a person with proprietary rights to the benchmark shall ensure that CCPs and trading venues are permitted, for the purposes of trading and clearing, non-discriminatory access to:
 - (a) relevant price and data feeds and information on the composition, methodology and pricing of that benchmark *for the purposes of clearing and trading*; and
 - (b) licences.

A licence including access to information shall be granted on a *fair*, reasonable and *non-discriminatory basis* within three months following the request by a CCP or a trading venue ■ .

Access shall be given at a reasonable commercial price taking into account the price at which access to the benchmark is granted or the intellectual property rights are licensed on equivalent terms to another CCP, trading venues or any related persons for the purposes of clearing and trading ■ . *Different prices can be charged to different CCPs, trading venues or any related persons only where objectively justified having regard to reasonable commercial grounds such as the quantity, scope or field of use demanded.*

- 1a. Where a new benchmark is developed following the entry into application of this Regulation the obligation to licence starts no later than 30 months after a financial instrument referencing that benchmark commenced trading or was admitted to trading. Where a person with proprietary rights to a new benchmark owns an existing benchmark, it shall establish that compared to any such existing benchmark the new benchmark meets the cumulative criteria:*
- a) the new benchmark is not a mere copy or adaptation of any such existing benchmark and the methodology, including the underlying data, of the new benchmark is meaningfully different from any such existing benchmark; and*

b) the new benchmark is not a substitute for any such existing benchmark.

This paragraph shall be without prejudice to the application of competition rules and Article 101 and 102 TFEU in particular.

2. No CCP, trading venue or related entity may enter into an agreement with any provider of a benchmark the effect of which would be either:
 - (a) to prevent any other CCP or trading venue from obtaining access to such information or rights as referred to in paragraph 1; or
 - (b) to prevent any other CCP or trading venue from obtaining access to such *a licence, as referred to in paragraph 1.*
3. *ESMA shall develop draft regulatory technical standards specifying:*
 - (a) the information *through licensing* to be made available under paragraph 1(a) *for the sole use of the CCP or trading venue;*

- (b) *other* conditions under which access is granted, including confidentiality of information provided;
- (c) *the standards guiding how a benchmark may be proven to be new in accordance with paragraphs 1a(a) and (b).*

*ESMA shall submit those draft regulatory technical standards to the Commission by ... **

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

* *OJ: Please insert the date 12 months after the entry into force of this Regulation.*

Article 30a

Access for third-country CCPs and trading venues

- 1. A trading venue established in a third country may request access to a CCP established in the Union only if the Commission has adopted a decision in accordance with Article 24(4) relating to that third country. A CCP established in a third country may request access to a trading venue in the Union subject to that CCP being recognised under Article 25 of Regulation (EU) No 648/2012. CCPs and trading venues established in third countries shall only be permitted to make use of the access rights in Articles 28 to 29 provided that the Commission has adopted a decision in accordance with paragraph 3 that the legal and supervisory framework of the third country is considered to provide for an effective equivalent system for permitting CCPs and trading venues authorised under foreign regimes access to CCPs and trading venues established in that third country.*

2. *CCPs and trading venues established in third countries may only request a licence and the access rights in accordance with Article 30 provided that the Commission has adopted a decision in accordance with paragraph 3 that the legal and supervisory framework of that third country is considered to provide for an effective equivalent system under which CCPs and trading venues authorised in foreign jurisdictions are permitted access on a fair reasonable and non-discriminatory basis to:*
- (a) relevant price and data feeds and information of composition, methodology and pricing of benchmarks for the purposes of clearing and trading; and*
 - (b) licences,*
- from persons with proprietary rights to benchmarks established in that third country.*
3. *The Commission may, in accordance with the procedure referred to in Article 42, adopt decisions determining that the legal and supervisory framework of a third country ensures that a trading venue and CCP authorised in that third country complies with legally binding requirements which are equivalent to the requirements referred to in paragraph 2 and which are subject to effective supervision and enforcement in that third country.*

The legal and supervisory framework of a third country is considered equivalent where that framework fulfils all the following conditions:

- (a) trading venues in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;*
- (b) it provides for an effective equivalent system for permitting CCPs and trading venues authorised under foreign regimes access to CCPs and trading venues established in that third country;*
- (c) the legal and supervisory framework of that third country provide for an effective equivalent system under which CCPs and trading venues authorised in foreign jurisdictions are permitted access on a fair reasonable and non discriminatory basis to:
 - (i) relevant price and data feeds and information of composition, methodology and pricing of benchmarks for the purposes of clearing and trading; and*
 - (ii) licences,*from persons with proprietary rights to benchmarks established in that third country.*

TITLE VII

Supervisory measures on product intervention and positions

CHAPTER 1

PRODUCT MONITORING AND INTERVENTION

Article 31-a

Market monitoring

- 1. *In accordance with Article 9(2) of Regulation (EU) No 1095/2010, ESMA shall monitor the market for financial instruments which are marketed, distributed or sold in the Union.***
- 1a. *In accordance with Article 9(2) of Regulation (EU) No 1093/2010, EBA shall monitor the market for structured deposits which are marketed, distributed or sold in the Union.***
- 2. *Competent authorities shall monitor the market for financial instruments and structured deposits which are marketed, distributed or sold in or from their Member State.***

Article 31

ESMA *temporary intervention* powers

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may where the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:

- (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain *specified* features; or
- (b) a type of financial activity or practice.

A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by ESMA.

2. ESMA shall take a decision under paragraph 1 only if all of the following conditions are fulfilled:
- (a) the proposed action addresses a *significant* investor protection *concern* or *a threat* to the orderly functioning and integrity of financial markets or *commodity markets or* to the stability of the whole or part of the financial system in the Union;
 - (b) regulatory requirements under Union legislation that are applicable to the relevant financial instrument or activity do not address the threat;
 - (c) a competent authority or competent authorities have not taken action to address the threat or *the* actions that have been taken do not adequately address the threat.

Where the conditions set out in the first subparagraph are fulfilled, ESMA may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before a financial instrument has been marketed or sold to clients.

3. When taking action under this Article, ESMA shall *ensure that* the action:
- (a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action; █
 - (b) does not create a risk of regulatory arbitrage, *and*
 - (c) *has been taken after consultation with the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, in case the measure relates to agricultural commodities derivatives.*

Where a competent authority or competent authorities have taken a measure under Article 32, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 33.

4. Before deciding to take any action under this Article, ESMA shall notify competent authorities of the action it proposes.

5. ESMA shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect.
6. ESMA shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three-month period it shall expire.
7. Action adopted by ESMA under this Article shall prevail over any previous action taken by a competent authority.
8. The Commission shall adopt █ delegated acts in accordance with Article 41 █ specifying criteria and factors to be taken into account by ESMA in determining when *there is a significant* investor protection *concern* or *a threat* to the orderly functioning and integrity of financial markets *or commodity markets* and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a) █ .

These criteria and factors shall include:

- (a) the degree of complexity of a financial instrument and the relation to the type of client to whom it is marketed and sold;*
- (b) the size or the notional value of an issuance of financial instruments;*
- (c) the degree of innovation of a financial instrument, an activity or a practice;*
- (d) the leverage a product or practice provides.*

Article 31a

EBA temporary intervention powers

- 1. In accordance with Article 9(5) of Regulation (EU) No 1093/2010, EBA may where the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:*
 - (a) the marketing, distribution or sale of certain structured deposits or structured deposits with certain specified features; or*

(b) a type of financial activity or practice.

A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by EBA.

2. *EBA shall take a decision under paragraph 1 only if all of the following conditions are fulfilled:*

(a) the proposed action addresses a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union;

(b) regulatory requirements under Union legislation that are applicable to the relevant structured deposit or activity do not address the threat;

(c) a competent authority or competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address the threat.

Where the conditions set out in the first subparagraph are fulfilled, EBA may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before a structured deposit has been marketed or sold to clients.

3. *When taking action under this Article, EBA shall take all reasonable steps to ensure that the action:*

(a) *does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action; [and]*

(b) *does not create a risk of regulatory arbitrage.*

Where a competent authority or competent authorities have taken a measure under Article 32, EBA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 33.

4. *Before deciding to take any action under this Article, EBA shall notify competent authorities of the action it proposes.*

5. *EBA shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect.*
6. *EBAs shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three-month period it shall expire.*
7. *Action adopted by EBA under this Article shall prevail over any previous action taken by a competent authority.*

8. *The Commission shall adopt delegated acts in accordance with Article 41 specifying criteria and factors to be taken into account by EBA in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a).*

These criteria and factors shall include:

- (a) the degree of complexity of a structured deposit and the relation to the type of client to whom it is marketed and sold;*
- (b) the size or the notional value of an issuance of structured deposits;*
- (c) the degree of innovation of a structured deposit, an activity or a practice;*
- (d) the leverage a structured deposit or practice provides.*

Article 32

Product intervention by competent authorities

1. A competent authority may prohibit or restrict in or from that Member State:
 - (a) the marketing, distribution or sale of certain financial instruments or ***structured deposits or*** financial instruments ***or structured deposits*** with certain ***specified*** features; or
 - (b) a type of financial activity or practice.
2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that:
 - (a) ***either***
 - (i) a financial instrument, ***structured deposit*** or activity or practice gives rise to significant investor protection concerns or poses a **■** threat to the orderly functioning and integrity of financial markets ***or commodity markets*** or to the stability of whole or part of the financial system ***within at least one Member State; or***

- (ii) *a derivative has a detrimental effect on the price formation mechanism in the underlying market;*
- (b) existing regulatory requirements under Union *law* applicable to the financial instrument, *structured deposit* or activity or practice do not sufficiently address the risks referred to in *point* (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements;
- (c) the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument, *structured deposit* or activity *or practice*;
- (d) *the competent authority* has properly consulted **█** competent authorities in other Member States that may be significantly affected by the action; and
- (e) the action does not have a discriminatory effect on services or activities provided from another Member State.

- (f) *it has properly consulted with public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, in case a financial instrument or activity or practice poses a serious threat to the orderly functioning and integrity of the physical agricultural market.*

Where the conditions set out in the first subparagraph are fulfilled, the competent authority may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before a financial instrument or structured deposit has been marketed or sold to clients.

A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by the competent authority.

3. The competent authority shall not *impose a prohibition or restriction* under this Article unless, not less than one month before *the measure is intended to take effect*, it has notified all other competent authorities and ESMA in writing *or through another medium agreed between the authorities* the details of:
- (a) the financial instrument or activity or practice to which the proposed action relates;

- (b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and
- (c) the evidence upon which it has based its decision and upon which is satisfied that each of the conditions in paragraph 2 are met.

3a. *In exceptional cases where the competent authority deems it necessary to take urgent action under this Article in order to prevent detriment arising from the financial instruments, structured deposits, practices or activities mentioned in paragraph 1, the competent authority may take action on a provisional basis with no less than 24 hours written notice, before the measure is intended to take effect, to all other competent authorities and ESMA or, for structured deposits, EBA, provided that all the criteria in this Article are met and that, in addition, it is clearly established that a one month notification period would not adequately address the specific concern or threat. The competent authority may not take action on a provisional basis for a period exceeding three months.*

4. The competent authority shall publish on its website notice of any decision to impose any prohibition or restriction referred to in paragraph 1. The notice shall specify details of the prohibition or restriction, a time after the publication of the notice from which the measures will take effect and the evidence upon which it is satisfied each of the conditions in paragraph 2 are met. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice.
5. The competent authority shall revoke a prohibition or restriction if the conditions in paragraph 2 no longer apply.
6. The Commission shall adopt ■ delegated acts in accordance with Article 41 ■ specifying criteria and factors to be taken into account by competent authorities in determining when *there is a significant investor protection concern or a threat to* the orderly functioning and integrity of financial markets *or commodity markets or* to the stability of the ■ of the financial system *within at least one Member State* referred to in paragraph 2(a) ■ .

These criteria and factors shall include:

- (a) the degree of complexity of a financial instrument or structured deposit and the relation to the type of client to whom it is marketed and sold;*
- (c) the degree of innovation of a financial instrument or structured deposit, an activity or a practice;*
- (d) the leverage a product or practice provides;*
- (e) in relation to the orderly functioning and integrity of financial markets or commodity markets, the size or the notional value of an issuance of financial instruments or structured deposits.*

Article 33

Coordination by ESMA

1. ESMA *or, for structured deposits, EBA* shall perform a facilitation and coordination role in relation to action taken by competent authorities under Article 32. In particular ESMA *or, for structured deposits, EBA* shall ensure that action taken by a competent authority is justified and proportionate and that where appropriate a consistent approach is taken by competent authorities.
2. After receiving notification under Article 32 of any action that is to be imposed under that Article, ESMA *or, for structured deposits, EBA* shall adopt an opinion on whether **■** the prohibition or restriction is justified and proportionate. If ESMA *or, for structured deposits, EBA* considers that the taking of a measure by other competent authorities is necessary to address the risk, it shall also state this in *its* opinion. The opinion shall be published on ESMA's *or, for structured deposits, EBA* website.
3. Where a competent authority proposes to take, or takes, action contrary to an **■** opinion *adopted by ESMA or EBA* under paragraph 2 or declines to take action contrary to *such* an **■** opinion **■**, it shall immediately publish on its website a notice fully explaining its reasons for *so* doing **■**.

CHAPTER 2 POSITIONS

Article 34

Coordination of national position management measures and position limits by ESMA

1. ESMA shall perform a facilitation and coordination role in relation to measures taken by competent authorities pursuant to [insert cross references] of Directive .../.../EU*. In particular, ESMA shall ensure that a consistent approach is taken by competent authorities with regard to when these powers are exercised, the nature and scope of the measures imposed, and the duration and follow-up of any measures.
2. After receiving notification of any measure under Article 83(5) of Directive .../.../EU*, ESMA shall record the measure and the reasons thereof. In relation to measures taken pursuant to Article (71(2)(*ie*) or (*if*) of Directive .../.../EU*, it shall maintain and publish on its website a database with summaries of the measures in force including details of the person ■ concerned, the applicable financial instruments, any *limits on* the ■ size of *positions the persons* can hold *at all times*, any exemptions thereto *granted in accordance with Article 59*, and the reasons thereof.

* OJ: Please insert the number of the document contained in document COD(2011)0298.

Article 35

Position management powers of ESMA

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA shall, where **both** conditions in paragraph 2 are satisfied, take one or more of the following measures:
 - (a) request from any person **all relevant** information ■ regarding the size and purpose of a position or exposure entered into via a derivative;
 - (b) after analysing the information obtained , require any such person to reduce the size of **or to eliminate** the position or exposure **in accordance with the delegated act mentioned in paragraph 10(b)**;
 - (c) **as a last resort**, limit the ability of a person from entering into a commodity derivative.

2. ESMA shall take a decision under paragraph 1 only if **both** of the following conditions are fulfilled:

- (a) the measures listed **■** in paragraph 1 address a threat to the orderly functioning and integrity of financial markets, including ***commodity derivative markets in accordance with the objectives listed in Article 59(1) and including*** in relation to delivery arrangements for physical commodities, or **to** the stability of the whole or part of the financial system in the Union;
- (b) a competent authority or competent authorities have not taken measures to address the threat or **the** measures **■** taken do not sufficiently address the threat;

ESMA shall perform its assessment of the fulfilment of the conditions mentioned in subparagraphs (a) and (b) in accordance with the criteria and factors specified by the delegated act mentioned in paragraph 10(a).

■

3. When taking measures referred to in paragraph 1 ESMA shall *ensure that* the measure:
- (a) **█** significantly *addresses* the threat to the orderly functioning and integrity of financial markets, *including commodity derivative markets in accordance with the objectives listed in Article 59(1) and including in relation to* delivery arrangements for physical commodities, or *to* the stability of the whole or part of the financial system in the Union or significantly improve the ability of competent authorities to monitor the threat *as measured in accordance with the criteria and factors specified by the delegated act mentioned in paragraph 10(a)*;
 - (b) does not create a risk of regulatory arbitrage *as measured in accordance with paragraph 10(c)*;

- (c) does not have *any of the following* detrimental *effects* on the efficiency of financial markets *that is disproportionate to the benefits of the measure*: reducing liquidity in those markets, *restraining the conditions for reducing risks directly related to the commercial activity of a non-financial counterparty*, or creating uncertainty for market participants **█** .

ESMA shall consult the Agency for the Cooperation of Energy Regulators established under Regulation (EC) No 713/2009 before taking any measures related to wholesale energy products.

ESMA shall consult the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, before taking any measure related to agricultural commodity derivatives.

4. Before deciding to undertake or renew any measure referred to in paragraph 1, ESMA shall notify relevant competent authorities of the measure it proposes. In case of a request under *points (a) or (b) of* paragraph 1 the notification shall include the identity of the person or persons to whom it was addressed and the details and reasons thereof. In *the event* of a measure under paragraph 1(c) the notification shall include details *of* the person **■** concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum *size of a position* the person **■** in question can enter into, and the reasons thereof.
5. The notification shall be made not less than 24 hours before the measure is intended to take effect or to be renewed. In exceptional circumstances, ESMA may make the notification less than 24 hours before the measure is intended to take effect where it is not possible to give 24 hours notice.

6. ESMA shall publish on its website notice of any decision to impose or renew any measure referred to in paragraph 1(c). The notice shall include details on the person concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum size of a position the person in question can enter into, and the reasons thereof.
7. A measure *referred to in paragraph 1(c)* shall take effect when the notice is published or at a time specified in the notice that is after its publication and shall only apply to a transaction entered into after the measure takes effect.
8. ESMA shall review its measures referred to in paragraph 1(c) at appropriate intervals and at least every three months. If a measure is not renewed after that three month period, it shall automatically expire. Paragraphs 2 to 8 shall *also* apply to a renewal of measures.

9. A measure adopted by ESMA under this Article shall prevail over any previous measure taken by a competent authority under Article 71(2)(ie) or (if) of Directive .../.../EU*.
10. The Commission shall adopt █ in accordance with Article 41 *delegated acts* specifying criteria and factors to *determine*:
- a) *the existence of* a threat to the orderly functioning and integrity of financial markets, *including commodity derivative markets in accordance with the objectives listed in Article 59(1) and* including in relation to delivery arrangements for physical commodities, or *to* the stability of the whole or part of the financial system in the Union *as* referred to in paragraph 2(a) *taking account of the degree to which positions are used to hedge positions in physical commodities or commodity contracts and the degree to which prices in underlying markets are set by reference to the prices of commodity derivatives*;

* *OJ: Please insert the number of the document contained in document COD(2011)0298.*

- b) *the appropriate reduction of a position or exposure entered into via a derivative mentioned in paragraph 1(b) of this Article;*
- c) *the situations where a risk of regulatory arbitrage as mentioned in paragraph 3(b) of this Article could arise.*

Those criteria and factors shall take into account the regulatory technical standards referred to in Article 59(2a) of Directive .../.../EU and shall differentiate between situations where ESMA takes action because a competent authority has failed to act and those where ESMA addresses an additional risk which the competent authority is not able to sufficiently address pursuant to Article 71(i) or (ie) of Directive .../.../EU*.*

* *OJ: Please insert the number of the document contained in document COD(2011)0298.*

TITLE VIII

Provision of services and performance of activities by third-country firms following an equivalence decision with or without a branch

Article 36

General provisions

- 1 A third-country firm may provide **■** investment services *or perform activities* to eligible counterparties *and to professional clients within the meaning of Section I of Annex II to Directive .../.../EU** established *throughout* the Union without the establishment of a branch **■** where it is registered in the register of third-country firms kept by ESMA in accordance with Article 37.
2. ESMA *shall* register a third-country firm that has applied for the provision of investment services *or performance of activities throughout* the Union in accordance with paragraph 1 only where the following conditions are met:
 - (a) the Commission has adopted a decision in accordance with Article 37(1);

* *OJ: Please insert the number of the document contained in document COD(2011)0298.*

- (b) the firm is authorised in the jurisdiction where *its head office* is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country;
- (c) cooperation arrangements have been established pursuant to Article 37(2).

2a. *Where a third-country firm is registered in accordance with this Article, Member States shall not impose any additional requirements on the third-country firm in respect of matters covered by this Regulation or by Directive .../.../EU* and equally should not treat third-country firms more favourably than Union firms.*

- 3. The third-country firm referred to in paragraph 1 shall submit its application to ESMA after the adoption by the Commission of the decision referred to in Article 37 determining that the legal and supervisory framework of the third country in which the third-country firm is authorised is equivalent to the requirements described in Article 37(1).

* ***OJ: Please insert the number of the document contained in document COD(2011)0298.***

The applicant third-country firm shall provide ESMA with all information necessary for its registration. Within 30 working days of receipt of the application, ESMA shall assess whether the application is complete. If the application is not complete, ESMA shall set a deadline by which the applicant third-country firm is to provide additional information.

The registration decision shall be based on the conditions set out in paragraph 2.

Within 180 working days of the submission of a complete application, ESMA shall inform the applicant *third-country* firm in writing with a fully reasoned explanation whether the registration has been granted or refused.

Member States may allow third-country firms to provide investment services or perform investment activities together with ancillary services to eligible counterparties and professional clients within the meaning of Section I Annex II to Directive .../.../EU* in their territories in accordance with national regimes in the absence of the Commission decision in accordance with Article 37(1) or where such decision is no longer in effect.

* OJ: Please insert the number of the document contained in document COD(2011)0298.

4. Third-country firms providing services in accordance with this Article shall inform clients established in the Union, before the provision of any investment services, that they are not allowed to provide services to clients other than eligible counterparties **and to professional clients within the meaning of Section I of Annex II to Directive .../.../EU*** and that they are not subject to supervision in the Union. They shall indicate the name and the address of the competent authority responsible for supervision in the third country.

The information in the first subparagraph shall be provided in writing and in a prominent way.

Member States shall ensure that where an eligible counterparty or professional client within the meaning of Section I of Annex II established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, this Article does not apply to the provision of that service or activity by the third-country firm to that person including a relationship specifically related to the provision of that service or activity. An initiative by such clients shall not entitle the third-country firm to market new categories of investment product or investment service to that individual.

5. *Third- country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State.*
6. *ESMA shall develop draft regulatory technical standards* specifying the information that the applicant third-country firm shall provide to ESMA in its application for registration in accordance with paragraph 3 and the format of information to be provided in accordance with paragraph 4.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph **█** in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

ESMA shall submit *those* draft *regulatory technical standards* to the Commission **█** by
... *

* OJ: Please insert the date 12 months after the date of entry into force of this Regulation.

Article 37

Equivalence decision

1. The Commission may adopt a decision in accordance with the *examination* procedure referred to in Article 42(2) in relation to a third country *stating that* the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding *prudential and business conduct* requirements which have equivalent effect to the requirements set out in █ this Regulation, *in Directive 2006/49/EC of the European Parliament and of the Council*²⁴ and in Directive .../.../EU* and in *the* implementing measures *adopted under this Regulation* and *under those Directives EC and that the legal framework of* that third country provides for an *effective* equivalent *system for* the recognition of █ investment firms authorised under third-country legal regimes.

²⁴ *Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (OJ L 177, 30.6.2006, p. 201).*

* OJ: Please insert the number of the document contained in document COD(2011)0298.

The prudential *and business conduct* framework of a third country may be considered *to have* equivalent *effect* where that framework fulfils all the following conditions:

- (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
- (b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body;
- (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions;
- (d) firms providing investment services and activities are subject to appropriate conduct of business rules;
- (e) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation

2. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as *effectively* equivalent in accordance with paragraph 1. Such arrangements shall specify at least:
- (a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned, including access to all information regarding the non-Union firms authorised in third countries that is requested by ESMA;
 - (b) the mechanism for prompt notification to ESMA where a third-country competent authority deems that a third-country firm that it is supervising and ESMA has registered in the register provided for in Article 38 is in breach of the conditions of its authorisation or other legislation to which it is obliged to adhere;
 - (c) the procedures concerning the coordination of supervisory activities including, where appropriate, on-site inspections.

2a. *A third-country firm established in a country whose legal and supervisory framework has been recognised to be effectively equivalent in accordance with paragraph 1 and is authorised in accordance with Article 41 of Directive .../.../EU* shall be able to provide the services and activities covered under the authorisation to eligible counterparties and professional clients within the meaning of Section I of Annex II of Directive .../.../EU* in other Member States of the Union without the establishment of new branches. For this purpose, it shall comply with the information requirements for the cross-border provision of services and activities in Article 36 of Directive .../.../EU*.*

The branch shall remain subject to the supervision of the Member State where the branch is established in accordance with Article 41 of Directive .../.../EU. However, and without prejudice to the obligations to cooperate laid down in this Directive, the competent authority of the Member State where the branch is established and the competent authority of the host Member State may establish proportionate cooperation agreements in order to ensure that the branch of third-country firm providing investment services within the European Union delivers the appropriate level of investor protection.*

* OJ: Please insert the number of the document contained in document COD(2011)0298.

2a. *A thirdcountry firm may no longer use the rights under paragraph 1 of Article 36 where the Commission adopts a decision in accordance with the examination procedure referred to in Article 42(2) withdrawing its decision under paragraph 1 of this Article in relation to that third country.*

Article 38

Register

ESMA shall *keep a* register *of* the *third-country* firms allowed to provide investment services *or perform investment* activities in the Union in accordance with Article 36. The register shall be publicly accessible on the website of ESMA and shall contain information on the services or activities which the *third-country* firms are permitted to provide *or perform* and the reference of the competent authority responsible for their supervision in the third country.

Article 39

Withdrawal of registration

1. ESMA shall withdraw ■ the registration of a *third-country* firm in the register established in accordance with Article 38 *where*:
 - (a) ESMA has well-founded reasons based on documented evidence to believe that, in the provision of investment services and activities in the Union, the *third-country* firm is acting in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of markets; or
 - (b) ESMA has well-founded reasons based on documented evidence to believe that, in the provision of investment services and activities in the Union, the *third-country* firm has seriously infringed the provisions applicable to it in the third country and on the basis of which the Commission has adopted the Decision in accordance with Article 37(1); ■

- (c) ESMA has referred the matter to the competent authority of the third country and that *third-country* competent authority has not taken the appropriate measures needed to protect investors and the proper functioning of the markets in the Union or has failed to demonstrate that the *third-country* firm concerned complies with the requirements applicable to it in the third country; and
 - (d) ESMA has informed the *third-country* competent authority of its intention to withdraw the registration of the *third-country* firm at least 30 days before the withdrawal.
3. ESMA shall inform the Commission of any measure adopted in accordance with paragraph 1 without delay and shall publish its decision on its website.
 4. The Commission shall assess whether the conditions under which a decision in accordance with Article 37(1), has been adopted continue to persist in relation to the third country concerned.

Title IX
Delegated and implementing acts

CHAPTER 1
DELEGATED ACTS

Article 40
Delegated acts

The Commission shall be empowered to adopt delegated acts in accordance with Article 41 concerning [Insert list of Articles] █ .

Article 41
Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The █ power *to adopt delegated acts referred to in [insert list of Articles]* shall be conferred for an indeterminate period of time from ... *

* OJ: Please insert the date of entry into force of this Regulation.

3. The delegation of *power referred to in [insert list of Articles]* may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of *three months* of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by *three months* at the initiative of the European Parliament or the Council.

CHAPTER 2
IMPLEMENTING ACTS

Article 42
Committee procedure

1. **The** Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply **■**.

TITLE X

Final provisions

Article 43

Reports and review

1. Before ...^{*}, the Commission after consulting ESMA shall present a report to the European Parliament and to the Council on the impact in practice of the transparency obligations established pursuant to Articles 3 to 12, in particular on the ***impact of the volume cap mechanism described in Article 4a, including on the cost of trading for eligible counterparties and professional clients and on trading of shares of small and mid-cap companies, and its effectiveness in ensuring that the use of the relevant waivers does not harm price formation and how any appropriate sanctioning mechanism for breaches of the volume cap might operate, and on the application and continued appropriateness of the waivers to pre-trade transparency obligations established pursuant to Articles 4(2) to (3) and 8(2) to 8(5).***

* OJ: please insert date: 56 months after the date of entry into force of this Regulation.

- 1a.** *The report referred to in paragraph 1 above shall include the impact on European equity markets of the use of the waiver under Article 4(1)(a) and 4(1)(b)(i) and the volume cap mechanism under Article 4a, with particular reference to:*
- (a) the level and trend of non-lit order book trading within the European Union since the introduction of this Regulation;*
 - (b) the impact on the pre-trade transparent quoted spreads;*
 - (c) the impact on the depth of liquidity on lit order books;*
 - (d) the impact on competition and on investors within the Union;*
 - (da) the impact on trading of shares of small and mid-cap companies;*
 - (e) taking due account of developments at international level and discussions with third countries and international organisations.*

- 1b. If the report concludes that the use of the waiver under Article 4(1)(a) and 4(1)(b)(i) is harmful to price formation or to trading of shares of small and mid-cap companies, the Commission shall, where appropriate, make proposals, including amendments to this Regulation, regarding the use of these waivers. Such proposals shall include an impact assessment of the proposed amendments, and shall take into account the objectives of this Regulation and the effects on market disruption and competition, and potential impacts on investors in the Union.
2. Before ...^{*}, the Commission *shall*, after consulting ESMA, [] present a report to the *European Parliament and* to the Council [] on the functioning of *Article 23*, including whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enable to monitor the activities of investment firms in accordance with *Article 23(1)*. The Commission may make any appropriate proposals, including providing for transactions to be reported to a system appointed by ESMA instead of to competent authorities, which allows relevant competent authorities to access all the information reported pursuant to this Article *for the purposes of this Regulation and of Directive .../.../EU^{**} and the detection of insider dealing and market abuse in accordance with Regulation (EU) No .../...^{***}*.

* *OJ: please insert date: 56 months after the date of entry into force of this Regulation.*

** OJ: Please insert the number of the document contained in document COD(2011)0298.

*** OJ: Please insert the number of the document contained in document COD(2011)0295.

- 2a. *Before ...^{*}, the Commission shall, after consulting ESMA, present a report to the European Parliament and to the Council on appropriate solutions to reduce information asymmetries between market participants as well as tools for regulators to better monitor quotation activities on trading venues. Such report shall at least assess the feasibility of developing a European best bid and offer system for consolidated quotes to fulfil these objectives.*
3. Before ...^{*}, the Commission *shall*, after consulting ESMA, **█** present a report to the European Parliament and to the Council on the on the progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms pursuant to Articles 22 and 24.
4. *Before ...^{*}, the Commission after consulting ESMA shall present a report to the European Parliament and to the Council on the development in prices for pre and post trade transparency data from regulated markets, MTFs, OTFs, CTPs and APAs.*

* OJ: Please insert the date 56 months after the date of entry into force of this Regulation.

5. *Before ...^{*}, the Commission, after consulting ESMA, shall present a report to the Council and Parliament reviewing the interoperability provisions in Article 29 and Article 8 of Regulation (EU) No 648/2012.*
6. *Before ...^{*}, the Commission, after consulting ESMA, shall present a report to the Council and Parliament on the application of Articles 28, 29 and 30 and of Articles 7 and 8 of Regulation (EU) No 648/2012.*
- 6a. *Before ...^{*}, the Commission, after consulting ESMA, shall present a report to the Council and the Parliament on the impact of Article 28 and 29 of this Regulation on newly established CCPs as referred to in Article 28(4a) and trading venues connected to those CCPs by close links and whether the transitional arrangement specified in Article 28(4a) should be extended, weighing the possible benefits to consumers of improving competition and the degree of choice available to market participants against the possible disproportionate effect of these provisions on newer CCPs and the constraints of local market participants in accessing global CCPs and the smooth functioning of the market. Subject to the conclusions of this report, the Commission may adopt a delegated act in accordance with Article 41 to extend the transitional period in accordance with Article 28(4a) by a maximum of 30 months.*

^{*} *Please insert the date 30 months after the date of application of this Regulation as specified in Article 46.*

^{*} *Please insert the date 30 months after the date of application of this Regulation as specified in Article 46.*

7. *Before ...^{*}, the Commission, after consulting ESMA, shall present a report to the Council and Parliament on whether the threshold specified in Article 29(4a)(new) remains appropriate and whether the opt out mechanism in respect of exchange traded derivatives should remain available.*

8. *By ...^{*}, the Commission, based on a risk assessment carried out by ESMA in consultation with the ESRB, shall present a report to the Council and the Parliament assessing the need to temporarily exclude exchange traded derivatives from the scope of Article 28 and 29. This report shall take into account risks, if any, resulting from open access provisions regarding exchange traded derivatives to the overall stability and orderly functioning of the financial markets throughout the Union. Subject to the conclusions of this report, the Commission may adopt a delegated act in accordance with Article 41 to exclude exchange traded derivatives from the scope of Articles 28 and 29 for up to thirty months following application of this Regulation.*

^{*} *OJ: Please insert six months before the date of application of this Regulation as specified in Article 46.*

Article 44

Amendment of *Regulation (EU) No 648/2012*

1. ***In Article 81(3) of Regulation (EU) No 648/2012, the following subparagraph is added:***

"A trade repository shall transmit data to competent authorities in accordance with the requirements under Article 23 of Regulation (EU) No .../...*".

2. ***In Article 5(2) of Regulation (EU) No 648/2012, the following subparagraph is added:***

“In the developing of the draft regulatory technical standards under this paragraph ESMA shall not prejudice the transitional provision with respect to C6 energy derivative contracts as set out in Article 99 of Directive .../.../EU**.”

* OJ: Please insert the number of the document contained in document COD(2011)0296.

** OJ: Please insert the number of the document contained in document COD(2011)0298.

3. *Article 7(1) of Regulation (EU) No 648/2012 is amended as follows:*

"A CCP that has been authorised to clear OTC derivative contracts shall accept clearing such contracts on a non-discriminatory and transparent basis, including as regards collateral requirements and fees related to access, regardless of the trading venue. This in particular should ensure that a trading venue has the right to non-discriminatory treatment in terms of how contracts traded on that trading venue are treated in terms of:

- (i) collateral requirements and netting of economically equivalent contracts, where the inclusion of such contracts in the close-out and other netting procedures of a CCP based on the applicable insolvency law would not endanger the smooth and orderly functioning, the validity and/or enforceability of such procedures; and*
- (ii) cross-margining with correlated contracts cleared by the same CCP under a risk model that complies with Article 41 of Regulation (EU) No 648/2012.*

A CCP may require that a trading venue comply with the operational and technical requirements established by the CCP, including the risk-management requirements.

4. In Article 7 of Regulation (EU) No 648/2012, the following paragraph is added:

"6. The conditions in paragraph 1 regarding non-discriminatory treatment in terms of how contracts traded on that trading venue are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP shall be further specified by the technical standards adopted pursuant to Article 28(7)(e) of Regulation (EU) No .../... *."

Article 45

Transitional provision

1. **Third-country** firms shall be able to continue to provide services and activities in Member States, in accordance with national regimes until **three** year after **the adoption by the Commission of a decision in relation to the relevant third country in accordance with Article 37**.

█

* OJ: Please insert the number of the document contained in document COD(2011)0296.

3. *If the Commission assesses that there is not a need to exclude exchange traded derivatives from the scope of Articles 28 and 29 in accordance with Article 43(8), a CCP or a trading venue may, before the entry into application of this Regulation, apply to its competent authority for permission to avail itself of transitional arrangements. The competent authority, taking into account the risks resulting from the application of the access rights under Article 28 or 29 as regards exchange traded derivatives to the orderly functioning of the relevant CCP or trading venue, may decide that Article 28 or 29 would not apply to the relevant CCP or trading venue, respectively, in respect of exchange traded derivatives, for a transitional period of 30 months from the application of this Regulation. Where such a transitional period is approved, the CCP or trading venue cannot benefit from the access rights under Article 28 or 29, as regards exchange traded derivatives for the duration of this transitional period. The competent authority shall notify members of the college of competent authorities for the CCP and ESMA for the CCP and the trading venue when a transitional period is approved.*

Where a CCP which has been approved for the transitional arrangements, is connected by close links to one or more trading venues, those trading venues shall not benefit from access rights under Article 28 or 29 for exchange traded derivatives for the duration of this transitional period.

Where a trading venue, which has been approved for the transitional arrangements, is connected by close links to one or more CCPs, those CCPs shall not benefit from access rights under Article 28 or 29 for exchange traded derivatives for the duration of this transitional period.

Article 46

Entry into force and application

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

This Regulation shall apply from ...* except for *[list all paragraphs in Articles which confer the power to adopt delegated acts and regulatory / implementing standards]* and *Article 44(2)* which shall apply immediately following the entry into force of this Regulation *and except for Articles 30(1), 30(1a) and 30(2) which shall apply from ...***.

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

(1) Done at Brussels,

(2) *For the European Parliament* *For the Council*

(3) *The President* *The President*

* OJ: Please insert the date 30 months after the date of entry into force of this Regulation.

** OJ: Please insert the date 54 months after the date of entry into force of this Regulation.