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## **INFORMATION NOTE**

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From: General Secretariat of the Council  
To: Permanent Representatives Committee/Council

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Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365  
- Outcome of the European Parliament's first reading,  
(Strasbourg, 25 to 28 March 2019)

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## **I. INTRODUCTION**

The rapporteurs, Babette WINTER (S&D, DE) and Kay SWINBURNE (ECR, UK), presented a report on the proposal for a Regulation on behalf of the Committee on Economic and Monetary Affairs. The report contained one amendment (amendment 1) to the proposal.

## II. VOTE

When it voted on 27 March 2019, the plenary adopted in a single vote the amendment (amendment 1) to the proposal for a Regulation.

The Commission's proposal as thus amended constitutes the Parliament's first-reading position which is contained in its legislative resolution as set out in the Annex hereto<sup>1</sup>.

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<sup>1</sup> The version of the Parliament's position in the legislative resolution has been marked up to indicate the changes made by the amendments to the Commission's proposal. Additions to the Commission's text are highlighted in ***bold and italics***. The symbol "■" indicates deleted text.

## **Framework for the recovery and resolution of central counterparties \*\*\*I**

**European Parliament legislative resolution of 27 March 2019 on the proposal for a regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365 (COM(2016)0856 – C8-0484/2016 – 2016/0365(COD))**

### **(Ordinary legislative procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2016)0856),
  - having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0484/2016),
  - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
  - having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the Italian Senate, the Spanish Parliament and the Romanian Senate asserting that the draft legislative act does not comply with the principle of subsidiarity,
  - having regard to the opinion of the European Central Bank of 20 September 2017<sup>2</sup>,
  - having regard to the opinion of the European Economic and Social committee of 29 March 2017<sup>3</sup>
  - having regard to Rule 59 of its Rules of Procedure,
  - having regard to the report of the Committee on Economic and Monetary Affairs (A8-0015/2018),
1. Adopts its position at first reading hereinafter set out;
  2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
  3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

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<sup>2</sup> OJ C 372, 1.11.2017, p. 6.

<sup>3</sup> OJ C 209, 30.6.2017, p. 28.

## Amendment 1

### AMENDMENTS BY THE EUROPEAN PARLIAMENT\*

to the Commission proposal

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Proposal for a

### **REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365**

(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,<sup>4</sup>

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

Having regard to the opinion of the European Economic and Social Committee,<sup>5</sup>

Having regard to the opinion of the European Central Bank,<sup>6</sup>

Acting in accordance with the ordinary legislative procedure,

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\* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol **■**.

<sup>4</sup> OJ C , , p. .

<sup>5</sup> OJ C 209, 30.6.2017, p. 28.

<sup>6</sup> OJ C 372, 1.11.2017, p. 6.

Whereas:

- (1) Financial markets are pivotal for the functioning of modern economies. The more integrated they are, the *greater the potential for* efficient allocation of economic resources will be, *potentially* benefitting economic performance. However, in order to improve the functioning of the single market in financial services, it is important to have procedures in place *to deal with market failures and* to ensure that if a financial institution or a financial market infrastructure that is active in this market faces financial distress or is at the point of failure, such an event does not de-stabilise the entire financial market and damage growth across the wider economy. Central counterparties (CCPs) are key components of financial markets, stepping in between participants to act as the buyer to every seller and the seller to every buyer, and playing a central role in processing financial transactions and managing exposures to diverse risks inherent in those transactions. CCPs centralise the handling of counterparties' transactions and positions, and honour the obligations created by the transactions and receive adequate collateral from their members as margin and as contributions to default funds.
- (2) Central counterparties (CCPs) are key components of *global* financial markets, stepping in between participants to act as the buyer to every seller and the seller to every buyer, and playing a central role in processing financial transactions and managing exposures to diverse risks inherent in those transactions. CCPs centralise the handling of counterparties' transactions and positions, and honour the obligations created by the transactions and *require* adequate collateral from their members as margin and as contributions to default funds.
- (3) The integration of Union financial markets has meant that CCPs have evolved from primarily serving domestic needs and markets to constituting critical nodes in Union financial markets more widely. CCPs authorised in the Union today clear several product classes, from listed and over-the-counter (OTC) financial and commodity derivatives to cash equities, bonds and other products such as repos. They provide their services across national borders to a broad range of financial and other institutions across the Union. While some CCPs authorised in the Union remain focussed on domestic markets, they are all systemically important in at least their home markets.
- (4) As a significant amount of the financial risk of the Union financial system is processed by and concentrated in CCPs on behalf of clearing members and their clients, effective

regulation and robust supervision of CCPs is essential. In force since August 2012, Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>7</sup> requires CCPs to observe high prudential, organisational and conduct of business standards. Competent authorities are tasked with the full oversight of their activities, working together within *supervisory* colleges which group together relevant authorities for the specific tasks allocated to them. In accordance with commitments entered into by G20 leaders since the financial crisis, Regulation (EU) No 648/2012 also requires standardised OTC derivatives to be centrally cleared by a CCP. As the obligation to centrally clear OTC derivatives comes into effect, the volume and range of business done by CCPs is likely to increase which may, in turn, provide additional challenges for the CCPs' risk management strategies.

- (5) Regulation (EU) No 648/2012 has contributed to the increased resilience of CCPs and of wider financial markets against the broad range of risks processed and concentrated in CCPs. However, no system of rules and practices can prevent existing resources from being inadequate in managing the risks incurred by the CCP, including one or more defaults by clearing members. Faced with a scenario of severe distress or impending failure, financial institutions should in principle remain subject to normal insolvency proceedings. However, as the financial crisis has shown, in particular during a period of prolonged economic instability and uncertainty, such proceedings can disrupt functions critical to the economy, jeopardising financial stability. Normal corporate insolvency procedures may not always ensure sufficient speed of intervention or adequately prioritise the continuation of the critical functions of financial institutions for the sake of preserving financial stability. In order to prevent these negative consequences of normal insolvency proceedings, it is necessary to create a special resolution framework for CCPs.
- (6) The crisis also highlighted the lack of adequate tools to preserve the critical functions provided by failing financial institutions. It further demonstrated the lack of frameworks to enable cooperation and coordination amongst authorities, in particular those located in different Member States or jurisdictions, to ensure the implementation of swift and decisive action. Without such tools and lack of cooperation and coordination frameworks, Member States were compelled to save financial institutions using taxpayers' money in order to stem contagion and reduce panic. While CCPs were not direct recipients of public financial support in the crisis, they were indirect beneficiaries of the rescue measures undertaken in

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<sup>7</sup> 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).

relation to banks and were protected from the effects which banks failing on their obligations would otherwise have had on them. A recovery and resolution framework for CCPs is therefore necessary to prevent reliance on taxpayers' money in the event of their disorderly failure. *Such a framework should also address the possibility of CCPs entering into resolution for reasons other than the default of one or several of their clearing members.*

- (7) The objective of a credible recovery and resolution framework is to ensure, to the greatest extent possible, that CCPs set out measures to recover from financial distress, to maintain the critical functions of a CCP which is failing or likely to fail while winding down the remaining activities through normal insolvency proceedings, and to preserve financial stability while minimising the cost of a CCP failure on *end clients and* taxpayers. The recovery and resolution framework further bolsters CCPs' and authorities' preparedness to mitigate financial stress and provide authorities with further insight into CCPs' preparations for stress scenarios. It also provides authorities with powers to prepare for the potential resolution of a CCP and deal with the declining health of a CCP in a coordinated manner, thus contributing to the smooth functioning of financial markets.
- (8) Currently, there are no harmonised provisions for the recovery and resolution of CCPs across the Union. Some Member States have already enacted legislative changes that require CCPs to draw up recovery plans and that introduce mechanisms to resolve failing CCPs. Furthermore, there are considerable substantive and procedural differences between Member States on the laws, regulations and administrative provisions which govern the insolvency of CCPs. The absence of common conditions, powers and processes for recovery and resolution of CCPs is likely to constitute a barrier to the smooth operation of the internal market and hinder cooperation between national authorities when dealing with the failure of a CCP and applying appropriate loss allocation mechanisms on its members, both in the Union and globally. This is particularly true where different approaches mean that national authorities do not have the same level of control or the same ability to resolve CCPs. Those differences in recovery and resolution regimes may affect CCPs and their members differently across Member States, potentially creating competitive distortions across the internal market. The absence of common rules and tools for how distress or failure in a CCP would be handled can affect participants' choice to clear and CCPs' choice of their place of establishment, thereby preventing CCPs from fully benefiting from their fundamental freedoms within the single market. In turn, this could discourage participants from accessing

CCPs across borders in the internal market and hinder further integration in Europe's capital markets. Common recovery and resolution rules in all Member States are therefore necessary to ensure that CCPs are not limited in exercising their internal market freedoms by the financial capacity of Member States and their authorities to manage their failure.

- (9) The review of the regulatory framework applicable to banks and other financial institutions which has taken place in the wake of the crisis, and in particular the strengthening of banks' capital and liquidity buffers, better tools for macro-prudential policies and comprehensive rules on the recovery and resolution of banks, have reduced the likelihood of future crises and enhanced the resilience of all financial institutions and market infrastructures, including CCPs, to economic stress, whether caused by systemic disturbances or by events specific to individual institutions. Since 1 January 2015, a recovery and resolution regime for banks has applied in all Member States pursuant to Directive 2014/59/EU of the European Parliament and of the Council<sup>8</sup>.
- (10) Building on the approach for bank recovery and resolution, **competent authorities and resolution** authorities should be prepared and have adequate recovery and resolution tools at their disposal to handle situations involving CCP failures. However, due to their different functions and business models, the risks inherent in banks and CCPs are different. Specific tools and powers are therefore needed for CCP failure scenarios caused both by the failure of the CCP's clearing members or as a result of non-default events.
- (11) The use of a Regulation is necessary in order to complement and build on the approach established by Regulation (EU) No 648/2012, which provides for uniform prudential requirements applicable to CCPs. Setting recovery and resolution requirements in a Directive could create inconsistencies by the adoption of potentially different national laws in respect of an area otherwise governed by directly applicable Union law and increasingly characterised by the cross-border provision of CCPs' services. It is therefore appropriate to also adopt uniform and directly applicable rules on recovery and resolution of CCPs.
- (12) In order to ensure consistency with existing Union legislation in the area of financial services, as well as the greatest possible level of financial stability across the Union, the

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<sup>8</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).



recovery and resolution regime should apply to all CCPs subject to the prudential requirements laid down in Regulation (EU) No 648/2012, regardless of whether they have a bank licence. *While there may be differences in the risk profile associated with alternative corporate structures, this Regulation treats CCPs as independent entities under any group or market structure and ensures that a CCP's recovery and resolution plan is free-standing, irrespective of the structure of the CCP's group. This relates in particular to the requirements to hold sufficient financial resources at an entity level to manage a default or non-default situation.*

- (13) In order to ensure that resolution actions are taken efficiently and effectively, and in line with resolution objectives, Member States should appoint public administrative authorities or authorities entrusted with public administrative powers to perform functions and tasks in relation to resolution. Member States should also ensure that appropriate resources are allocated to those resolution authorities. Where a Member State designates the authority responsible for the prudential supervision of CCPs as a resolution authority, *the independence of the decision-making process should be ensured and all necessary arrangements should be put in place to separate the supervisory and resolution functions to avoid any conflicts of interest and risk of regulatory forbearance.*
- (14) In light of the consequences that the failure of a CCP and the subsequent actions may have on the financial system and the economy of a Member State, as well as the possible ultimate need to use public funds *as a last resort* to resolve a crisis, the Ministries of Finance or other relevant ministries in the Member States should be closely involved, at an early stage, in the process of recovery and resolution.
- (15) As CCPs often provide services across the Union, effective recovery and resolution requires cooperation among competent authorities and resolution authorities within supervisory and resolution colleges, notably at the preparatory stages of recovery and resolution. That includes the assessment of recovery plans developed by the CCP, the *assessment* of resolution plans *prepared by the resolution authority of the CCP*, and addressing any impediments to resolvability.
- (16) Resolution of CCPs should strike the balance between the need, on the one hand, for procedures that take into account the urgency of the situation and allow for efficient, fair and timely solutions and, on the other, the necessity to protect financial stability in all the Member States where the CCP provides services. The authorities whose areas of competence would be affected by the failure of a CCP should share their views in the

resolution college to achieve these objectives. Similarly, in order to ensure a regular exchange of views and coordination with relevant third countries authorities, these should be invited to participate in resolution colleges as observers where necessary. Authorities should always take into account the impact of their decisions on the financial stability in the Member States where the CCP's operations are critical or important for local financial markets, including where clearing members are located and where linked trading venues and financial market infrastructures are established.

***(16a) In light of the cross-border global nature of certain CCP operations, decisions of resolution authorities can have economic and fiscal effects in other jurisdictions. To the extent reasonably possible, such cross-border implications should be borne in mind in recovery and resolution situations, whilst also taking into account the sovereignty of fiscal authorities in other jurisdictions.***

(17) In order to prepare the decisions of ESMA in relation to the tasks allocated to it and to ensure the comprehensive involvement of EBA and its members in the preparation of these decisions, ESMA should create an internal Resolution Committee and should invite relevant EBA competent authorities to participate as observers.

(18) In order to address the potential failure of a CCP in an effective and proportionate manner, authorities should take into account a number of factors when exercising their recovery and resolution powers such as the nature of the CCP's business, ***legal and organisational*** structure, risk profile, size, legal status and interconnectedness to the financial system. The authorities should also take account of whether its failure and subsequent winding up under normal insolvency proceedings would be likely to have a significant negative effect on financial markets, on other financial institutions, or on the wider economy.

(19) In order to deal in an efficient manner with failing CCPs, authorities should have the power to impose preparatory measures on CCPs. A minimum standard should be established as regards the contents and information to be included in recovery plans to ensure that all CCPs in the Union have sufficiently detailed plans for recovery should they face financial distress. Such plans should ***contemplate an appropriate range of scenarios envisaging both systemic stress and stress specific to the CCP. The scenarios should contemplate situations of stress that would be more extreme than those used for the purposes of regular stress testing under Chapter XII of Commission Delegated Regulation (EU) No 153/2013, while remaining plausible, such as the failure of more than two clearing members to which the CCP has the largest exposures and one or several other CCPs.*** The recovery plan should

form part of the operating rules of the CCP agreed contractually with clearing members. Those operating rules should further contain provisions to ensure the enforceability of recovery measures outlined in the plan in all scenarios. Recovery plans should not assume access to public financial support or expose taxpayers to the risk of loss.

***(19a) Recovery plans should ensure proper incentives for CCPs, clearing members and clients not to let the situation deteriorate further and to incentivise cooperative behaviour. In order for that incentive structure to be credible, deviations from the recovery plan should be subject to approval by the competent authority.***

(20) CCPs should prepare and regularly update their recovery plans. ■ The recovery phase in this context should start when there is a significant deterioration of the CCP's financial situation or risk of breach of its prudential requirements under Regulation (EU) 648/2012. This should be indicated with relation to a framework of qualitative or quantitative indicators included in the recovery plan.

***(20a) Recovery plans should ensure that the sequencing of the use of recovery tools properly balances the allocation of losses between CCPs, clearing members and their clients. As a general principle, losses should be distributed between CCPs, clearing members, and their clients as a function of their ability to control the risks. This is in order to create sound incentives ex-ante and to ensure a fair allocation of losses and on that basis loss allocation also for non-default losses should be proportional to the level of responsibility of each stakeholder involved. Recovery plans should ensure that the CCP's capital is relied upon to bear first losses in default cases and even more so in non-default cases. Substantial loss absorption by clearing members should be foreseen before any tools are used that allocate losses to clients.***

(21) The CCP should submit its recovery plan to competent authorities and the supervisory college, established under Regulation (EU) No 648/2012, for a complete assessment, to be reached by joint decision of the college. The assessment should include whether the plan is comprehensive and whether it could feasibly restore the viability of the CCP, in a timely manner, including in periods of severe financial stress.

(22) Recovery plans should comprehensively set out the actions that the CCP would take to address any unmatched outstanding obligations, uncovered loss, liquidity shortfall, or capital inadequacy, as well as the actions to replenish any depleted pre-funded financial resources and liquidity arrangements in order to restore the CCP's viability and its continuing ability

to meet its requirements for authorisation *and must include sufficient loss absorption capacity to this end. The tools envisaged should be comprehensive. Each tool should be reliable, timely, and underpinned by a sound legal basis. They should create appropriate incentives for the CCP's shareholders, members and their clients to control the risk they bring to or incur in the system, monitor the risk-taking and risk-management activities of the CCP, and participate in the default management process.*

(22a) *Recovery plans should explicitly set out actions to be taken by the CCP in case of cyber-attacks where there is a potential effect of leading to a significant deterioration of their financial situation or a risk of breaching their prudential requirements under Regulation (EU) No 648/2012.*

(23) CCPs should ensure that the plans are non-discriminatory and balanced in terms of their impacts and the incentives they create. They should not disadvantage clearing members or clients in a disproportionate way. In particular, in accordance with Regulation (EU) No 648/2012 CCPs should ensure that their clearing members have limited exposures toward the CCP. CCPs should ensure that all relevant stakeholders are *involved in the drawing-up of the recovery plan through their involvement in the CCP's risk committee, as the case may be, and by being appropriately consulted. Since opinions may be expected to differ among stakeholders, CCPs should establish clear processes to manage the diversity of stakeholders' views as well as any conflict of interest between those stakeholders and the CCP.*

(23a) *CCPs should ensure that clients of non-defaulting clearing members are appropriately recompensed should their assets be used during the recovery process.*

(24) *In view of the global nature of the markets served by CCPs, it is necessary to ensure the ability of a CCP to apply the recovery options, where necessary, to contracts or assets governed by the law of a third country or to entities based in third countries. The CCP's operating rules should therefore include contractual provisions ensuring this ability.*

(25) Where a CCP does not present an adequate recovery plan, competent authorities should be able to require the CCP to take measures necessary to redress the material deficiencies of the plan in order to strengthen the business of the CCP and ensure that the CCP can restore its capital or match its book in case of failure. That power should allow competent authorities to take preventive action to the extent that it is necessary to address any deficiencies and therefore to meet the objectives of financial stability.

- (25a) *Where a CCP in recovery has applied position and loss allocation tools, which go beyond the waterfall in Regulation (EU) No 648/2012, on non-defaulting clearing members and their clients and has not entered into resolution as a result, the competent authority should be able, once a matched book has been restored, either to require the CCP to recompense the participants for their loss through cash payments or, where appropriate, to require the CCP to issue instruments of ownership in future profits of the CCP.*
- (26) Resolution planning is an essential component of effective resolution. The plans should be drawn up by the resolution authority of the CCP and jointly agreed by the relevant authorities of the resolution college. Authorities should have all the information necessary to identify and ensure the continuance of critical functions. The *operating rules of the CCP that are agreed contractually with clearing members should contain provisions to ensure the enforceability of resolution measures by resolution authorities, including a resolution cash call.*
- (27) Resolution authorities, on the basis of the assessment of resolvability, should have the power to require changes to the *legal* structure and organisation of CCPs directly or indirectly through the competent authority, to take measures which are necessary and proportionate to reduce or remove material impediments to the use of resolution tools and ensure the resolvability of the entities concerned.
- (28) Resolution plans and resolvability assessments constitute areas where day-to-day supervisory considerations are *outweighed* by the need to expedite and ensure swift restructuring actions in order to secure a CCP's critical functions and safeguard financial stability. In the event of disagreement between the different members of the resolution college on decisions to be taken with regard to the CCP's resolution plan, the assessment of the CCP's resolvability and the decision to remove any impediments thereto, ESMA should play a mediation role in accordance with Article 19 of Regulation (EU) No 1095/2010. Such binding mediation by ESMA should nonetheless be prepared for its consideration by an ESMA internal committee, in view of the competences of ESMA members to ensure financial stability and to oversee clearing members in several Member States. Certain competent authorities under the EBA Regulation should be invited to participate as observers to that ESMA internal committee in view of the fact that such authorities carry out similar tasks under Directive 2014/59/EU. Such binding mediation should not prevent non-binding mediation in accordance with Article 31 of Regulation (EU) No 1095/2010 in other cases.

- (29) ■ Depending on the structure of the group to which the CCP belongs, it can be necessary that the recovery plan of the CCP sets out the conditions under which the provision of *voluntarily agreed contractual or other binding relations such as parental guarantees or control and profit and loss transfer agreements* or other forms of operational support from a parent undertaking or another group-entity to a CCP within the same group would be triggered. Transparency on such arrangements would mitigate risks to the liquidity and solvency of the group entity providing support to a CCP facing financial distress. Any change to such arrangements should be considered to be a material change for the purpose of reviewing the recovery plan.
- (30) Given the sensitivity of the information contained in the recovery and resolution plans, those plans should be subject to appropriate confidentiality provisions.
- (31) Competent authorities should transmit the recovery plans and any changes thereto to the relevant resolution authorities, and the latter should transmit the resolution plans and any changes thereto to competent authorities, thus permanently keeping every relevant authority fully informed.
- (32) In order to preserve financial stability, it is necessary that competent authorities are able to remedy the deterioration of a CCP's financial and economic situation before that CCP reaches a point at which authorities have no other alternative but to resolve it or to direct the CCP to change course where its actions could be detrimental for overall financial stability. Therefore, competent authorities should be granted early intervention powers to avoid or minimise adverse effects on financial stability or in the interests of clients that could result from the CCP's implementation of certain measures. The early intervention powers should be conferred on competent authorities in addition to their powers provided for in the national law of Member States or under Regulation (EU) No 648/2012 for circumstances other than those considered to be early intervention. *Early intervention rights shall include the power to restrict or prohibit any remuneration of equity and instruments treated as equity to the fullest extent possible without triggering outright default, including dividend payments and buybacks by the CCP and it may restrict, prohibit or freeze any payments of variable remuneration as per Directive 2013/36/EU and EBA Guidelines EBA/GL/2015/22, discretionary pension benefits or severance packages to management.*
- (33) During the recovery and early intervention phases, shareholders should retain their rights in full. They *lose* such rights once the CCP has been put under resolution. *Any remuneration*

*of equity and instruments treated as equity, including dividend payments and buybacks by the CCP, should be restricted or prohibited, to the extent possible, in recovery.*

- (34) The resolution framework should provide for timely entry into resolution before a CCP is insolvent. A CCP should be considered to be failing or likely to fail when it infringes or is likely in the near future to infringe the requirements for continuing authorisation, when its recovery has failed to restore its viability, when the assets of the CCP are or are likely in the near future to be less than its liabilities, when the CCP is or is likely in the near future to be unable to pay its debts as they fall due, or when the CCP requires public financial support. However, the fact that a CCP does not comply with all the requirements for authorisation should not justify by itself the entry into resolution. ***In order to allow for timely entry into resolution, a decision taken by a resolution authority to accelerate transition from recovery to resolution may only be challenged on substantive grounds on the basis that this decision was arbitrary and unreasonable at the time of the decision, based on the information then readily available.***
- (35) The provision for emergency liquidity assistance from a central bank – where such a facility is available – should not be a condition that demonstrates that a CCP is or will be, in the near future, unable to pay its liabilities as they fall due. In order to preserve financial stability, in particular in the case of a systemic liquidity shortage, State guarantees on liquidity facilities provided by central banks or State guarantees of newly issued liabilities to remedy a serious disturbance in the economy of a Member State should not trigger the resolution framework provided that a number of conditions are met.
- (36) Where a CCP meets the conditions for resolution, the resolution authority of the CCP should have at its disposal a harmonised set of resolution tools and powers. Their exercise should be subject to common conditions, objectives, and general principles. The use of additional tools and powers by resolution authorities should be consistent with the resolution principles and objectives. In particular, the use of such tools or powers should not impinge on the effective resolution of cross-border groups. ***In view of the objective to prevent as far as possible the use of public funds and considering the difficulty in predicting the exact nature of a severe crisis in which the resolution authority would have to take action, no resolution tools should be excluded ex-ante. To address moral hazard and protect taxpayers more effectively, competent authorities should lay down clear and comprehensive measures in advance for recovering those funds from clearing participants to the extent possible.***

- (37) The prime objectives of resolution should be to ensure the continuity of critical functions, to avoid adverse effects on financial stability, and to protect public funds ■ .
- (38) The critical functions of a failing CCP should be maintained, albeit re-structured with changes to the management where appropriate, through the use of resolution tools as a going concern with the use, to the **largest** extent possible, of private funds. ***This objective*** could be achieved either through ***the sale of the CCP*** to or ***its*** merger with a solvent third party, or ***by restructuring or writing*** down the contracts and liabilities of the CCP via the allocation of losses and ***the transfer of*** positions ***from the defaulting member to non-defaulting members, or by effecting*** a recapitalisation ***of the CCP through writing down its shares or writing down and converting its debt to equity***. In line with ***the objective of maintaining the critical functions of the CCP and*** prior to ***taking the*** actions ***described above***, the resolution authority should consider enforcing any existing and outstanding contractual obligations of the CCP, ***including in particular any contractual obligations by clearing members to meet cash calls or to take on positions of defaulting clearing members, whether through an auction or other agreed means in the CCP's operating rules, as well as any existing and outstanding contractual obligation committing parties other than clearing members to any forms of financial support. Contractual obligations should be enforced by the resolution authority*** in line with ***the way in which*** they would be called in under normal insolvency proceedings.
- (39) Rapid and decisive action is necessary to sustain market confidence and minimise contagion. Once the conditions for resolution have been met, the resolution authority of the CCP should not delay in taking appropriate and coordinated resolution action in the public interest. The failure of a CCP can occur under circumstances requiring an immediate reaction by the relevant resolution authority. That authority should therefore be allowed to take resolution action notwithstanding the exercise of recovery measures by the CCP or without imposing an obligation to first use the early intervention powers.
- (40) When taking resolution actions, the resolution authority of the CCP should take into account and follow the measures provided for in the resolution plans developed within the resolution college, unless the resolution authority considers, taking into account circumstances of the case, that resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans. The resolution authority should promptly inform the resolution college of the resolution actions they plan to undertake, in particular where such action deviates from the plan.



- (41) Interference with property rights should be proportionate to the financial stability risk. Resolution tools should therefore be applied only to those CCPs that meet the conditions for resolution, specifically where it is necessary to pursue the objective of financial stability in the public interest. Given that resolution tools and powers may disrupt the rights of shareholders, clearing *members, their clients and wider* creditors, resolution action should be taken only where necessary in the public interest and any interference with those rights should be compatible with the Charter. In particular, where creditors within the same class are treated differently in the context of resolution action, such distinctions should be justified in the public interest and proportionate to the risks being addressed and should be neither directly nor indirectly discriminatory on the grounds of nationality.
- (42) Affected shareholders, clearing *members* and creditors should not incur losses greater than those which they would have incurred if the resolution authority would not have taken resolution action in relation to the CCP and they would instead have been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or the CCP had been wound up in normal insolvency proceedings. In the event of a partial transfer of assets of a CCP under resolution to a private purchaser or to a bridge CCP, the residual part of the CCP under resolution should be wound up under normal insolvency proceedings.
- (43) For the purpose of protecting the right of shareholders, creditors, *clearing members and their clients*, clear obligations should be laid down concerning the valuation of the assets and liabilities of the CCP and the valuation of the treatment that *those parties* would have received if the resolution authority would not have taken resolution action. It should be possible to commence a valuation already during the recovery phase. Before any resolution action is taken, a fair and realistic valuation of the assets and liabilities of the CCP should be carried out *including the price at which any termination of contracts in the CCP would be undertaken which should take into account market volatility and liquidity at the time of the resolution*. Such a valuation should be subject to a right of appeal only together with the resolution decision. In addition, in certain cases, an ex-post comparison between the treatment that shareholders creditors, *clearing members and their clients*, have actually been afforded and the treatment they would have received if the resolution authority had not taken resolution action in relation to the CCP and if they had instead been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or under normal insolvency proceedings, *properly taking into account any*

*plausible adverse effects of systemic instability and market turmoil*, should be carried out after resolution tools have been used. Where shareholders, creditors, *clearing members and their clients*, have received, in payment of, or compensation for, their claims, less than the amount that they would have received if the resolution authority had not taken resolution action in relation to the CCP and if they had instead been possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or under normal insolvency proceedings, *properly taking into account any plausible adverse effects of systemic instability and market turmoil*, they should in certain cases be entitled to the payment of the difference. *The calculation of the amount that they would have received should not assume provision of public financial support*. As opposed to the valuation prior to the resolution action, it should be possible to challenge that comparison separately from the resolution decision. Member States should be free to decide on the procedure as to how to pay any difference of treatment that has been determined to shareholders, creditors, *clearing members and their clients*.

- (44) To ensure an effective resolution, the valuation process should determine as accurately as possible any losses that need to be allocated for the CCP to re-establish a matched book of outstanding positions and to meet ongoing payment obligations. The valuation of assets and liabilities of failing CCP should be based on fair, prudent and realistic assumptions at the moment when the resolution tools are used. The value of liabilities should not, however, be affected in the valuation by the financial state of the CCP. It should be possible, for reasons of urgency, that resolution authorities make a rapid valuation of the assets or the liabilities of a failing CCP. That valuation should be provisional and should apply until an independent valuation is carried out.
- (45) Upon entry into resolution, *the resolution authority should ensure that* any outstanding contractual obligations *of the CCP, of clearing members and of other counterparties* set out in the operating rules of the CCP, including outstanding recovery measures, *are* honoured except where the exercise of another resolution power or tool is more appropriate to *mitigate* adverse effects for financial stability or to secure the critical functions of the CCP in a timely manner. Losses should be absorbed by regulatory capital instruments and should be allocated to shareholders up to their capacity either through the cancellation or transfer of instruments of ownership or through severe dilution, *taking into account any losses that are to be absorbed by the enforcement of any outstanding obligation towards the CCP*. Where those instruments are not sufficient, resolution authorities should have the

power to write down unsecured debt and unsecured liabilities, to the extent necessary, without jeopardising broader financial stability, in accordance with their ranking under applicable national insolvency law.

- (46) In case the exercise by the CCP of its recovery measures has not succeeded in stemming losses, restoring it to a balanced position in terms of having a matched book of outstanding positions or replenishing pre-funded resources comprehensively, or where the resolution authority has determined that the exercise of these actions by the CCP would be detrimental for financial stability, the exercise of loss and position allocation powers by the authority should be aimed at allocating the outstanding losses, ensuring the return of the CCP to a balanced position and replenishing the required pre-funded resources either through the continued exercise of the tools in the CCP's operating rules or through other actions.
- (47) Resolution authorities should also ensure that the costs of the resolution of the CCP are minimised and that creditors of the same class are treated in an equitable manner. Where creditors within the same class are treated differently in the context of resolution action, those distinctions should be justified in the public interest and should be neither directly nor indirectly discriminatory on the basis of nationality or any other ground.
- (48) The *recovery and* resolution tools should be used to the fullest extent possible before any public sector injection of capital or equivalent public financial support to a CCP. The use of public financial support to assist in the resolution of failing institutions should comply with the relevant State aid provisions *and should be treated as a tool of absolute last resort*.
- (49) An effective resolution regime should minimise the costs of the resolution of a failing CCP borne by the taxpayers. It should ensure that CCPs can be resolved without jeopardising financial stability. The loss and position allocation tools *should* achieve that objective by ensuring that shareholders and counterparties who are among the creditors of the failing CCP suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the CCP. The loss and position allocation tools *should* therefore give shareholders and counterparties of CCPs a stronger incentive to monitor the health of a CCP during normal circumstances in accordance with the recommendations of the Financial Stability Board<sup>21</sup>.
- (50) In order to ensure that resolution authorities have the necessary flexibility to allocate losses and positions to counterparties in a range of circumstances, it is appropriate that those authorities are able to *firstly* apply the loss and position allocation tools both where the

objective is to maintain the *critical clearing services within CCP under resolution and subsequently, should this be necessary, transfer such* critical services to a bridge CCP or a third party *leaving* the residual part of the CCP *to cease operation and be* wound up.

- (51) Where the loss and position allocation tools are applied with the objective of restoring the viability of the failing CCP to enable it to continue to operate as a going concern, the resolution should be accompanied by replacement of management, ■ and a subsequent restructuring of the CCP and its activities in a way that addresses the reasons for its failure. That restructuring should be achieved through the implementation of a business reorganisation plan ■ .
- (52) The loss and position allocation tools should be exercised with a view to re-matching the CCP's book, stemming any further losses and obtaining additional resources to help recapitalise the CCP and replenish its prefunded resources. In order to ensure that they are effective and achieve their objective, they should be able to apply to as wide a range *as possible* of contracts giving rise to unsecured liabilities or creating an unmatched book for the failing CCP. They should provide for the possibility to auction defaulters' positions among remaining clearing members, haircut outgoing variation margin payments *to such members and their clients*, exercise any outstanding cash calls set out in recovery plans, exercise additional *resolution* cash calls specifically earmarked for the resolution authority *in the CCP operating rules* and write-down of capital and debt instruments issued by the CCP or other unsecured liabilities and a conversion of any debt instruments into shares. *If deemed necessary to achieve the resolution objectives in a timely manner, whilst minimising risks to financial stability and avoiding the use of public funds, the resolution authorities should be able to partially or fully tear up the contracts of defaulted clearing members, of product lines and of the CCP.*
- (53) *With due respect for the impact on financial stability and as a last resort*, resolution authorities should *consider only* partially *including* some contracts from loss allocation in a number of circumstances. Where those *tools are exercised only partially*, the level of loss or exposure applied to other contracts may be *modified* subject to the "no creditor worse off principle" being respected.
- (54) Where the resolution tools have been used to transfer the critical functions or viable business of a CCP to a sound entity such as a private sector purchaser or bridge CCP, the residual part of the CCP should be liquidated within an appropriate time frame having regard to any need

for the failing CCP to provide services or support to enable the purchaser or bridge CCP to carry out the activities or provide the services acquired by virtue of that transfer.

- (55) The sale of business tool should enable authorities to sell the CCP or parts of its business to one or more purchasers without the consent of shareholders. When applying the sale of business tool, authorities should make arrangements for the marketing of that CCP or part of its business in an open, transparent and non-discriminatory process, while aiming to maximise, as far as possible, the sale price.
- (56) Any net proceeds from the transfer of assets or liabilities of the CCP under resolution when applying the sale of business tool should benefit the entity left in the winding up proceedings. Any net proceeds from the transfer of instruments of ownership issued by the CCP under resolution when applying the sale of business tool should benefit the shareholders. Proceeds should be calculated net of the costs arisen from the failure of the CCP and from the resolution process.
- (57) In order to perform the sale of business in a timely manner and protect financial stability, the assessment of the buyer of a qualifying holding should be carried out in a timely manner that does not delay the application of the sale of business tool
- (58) Information concerning the marketing of a failing CCP and the negotiations with potential acquirers prior to the application of the sale-of-business tool is likely to be of systemic importance. In order to ensure financial stability, it is important that the disclosure to the public of such information required by Regulation (EU) No 596/2014 of the European Parliament and of the Council<sup>9</sup> may be delayed for the time necessary to plan and structure the resolution of the CCP in accordance with delays permitted under the market abuse regime.
- (59) As a CCP which is wholly or partially owned by one or more public authorities or controlled by the resolution authority, a bridge CCP should have as its main purpose ensuring that essential financial services continue to be provided to the clearing members and clients of the CCP that had been placed under resolution and that essential financial activities continue to be performed. The bridge CCP should be operated as a viable going concern entity and be put back on the market when conditions are appropriate or wound up if not longer viable.

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<sup>9</sup> Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

- (60) Should all other options be practically unavailable or be demonstrably insufficient to safeguard financial stability, government participation in the shape of equity support or temporary public ownership should be possible, in accordance with applicable rules on State aid, including a restructuring of the operations of the CCP, and enable the deployed funds to be recouped *over time* from the *clearing participants, which benefit from the financial support*. The use of government stabilisation tools is notwithstanding the role of *any* central banks in providing liquidity to the financial system even in times of stress, *that is subject to their discretion, and should not be assumed likely to occur. It should be temporary in nature. Therefore, comprehensive and credible arrangements enabling the recoupment over an appropriate period of time of the public funds provided should be established.*
- (61) To ensure the ability of a *resolution* authority to apply the loss and position allocation tools to contracts with entities based in third countries, recognition of that possibility should be included in the operating rules of the CCP.
- (62) Resolution authorities should have all the necessary legal powers that, in different combinations, could be exercised when using the resolution tools. They should include the power to transfer instruments of ownership, assets, rights, obligations or liabilities of a failing CCP to another entity such as another CCP or a bridge CCP, the power to write down or cancel instruments of ownership, or write down or convert liabilities of a failing CCP, the power to write down variation margin, the power to enforce any outstanding obligations of third parties in relation to the CCP including *recovery and resolution* cash calls *including those set out in the CCP's operating rules* and position allocations, the power to tear up contracts of the CCP partially and fully, the power to replace the management and the power to impose a temporary moratorium on the payment of claims. The CCP and the members of its board and senior management should remain liable, subject to Member State law, under civil or criminal law for their responsibility for the failure of the CCP.
- (63) The resolution framework should include procedural requirements to ensure that resolution actions are properly notified and made public. However, as information obtained by resolution authorities and their professional advisers during the resolution process is likely to be sensitive, before the resolution decision is made public, it should be subject to an effective confidentiality regime. The fact that information on the contents and details of recovery and resolution plans and the result of any assessment of those plans may have far-reaching effects, in particular on the undertakings concerned, must be taken into account. Any information provided in respect of a decision before it is taken, be it on whether the

conditions for resolution are satisfied, on the use of a specific tool or of any action during the proceedings, must be presumed to have effects on the public and private interests concerned by the action. However, information that the resolution authority is examining a specific CCP could be enough for there to be negative effects on that CCP. It is therefore necessary to ensure that there are appropriate mechanisms for maintaining the confidentiality of such information, such as the content and details of recovery and resolution plans and the result of any assessment carried out in that context.

- (64) Resolution authorities should have ancillary powers to ensure the effectiveness of the transfer of instruments of ownership or debt instruments and assets, rights and liabilities. Subject to the safeguards, those powers should include the power to remove third parties rights from the transferred instruments or assets and the power to enforce contracts and to provide for the continuity of arrangements vis-à-vis the recipient of the transferred assets and instruments of ownership. However, the rights of employees to terminate a contract of employment should not be affected. The right of a party to terminate a contract with a CCP under resolution, or a group entity thereof, for reasons other than the resolution of the failing CCP should not be affected either. Resolution authorities should have the ancillary power to require the residual CCP that is being wound up under normal insolvency proceedings to provide services that are necessary to enable the CCP to which assets, contracts or instruments of ownership have been transferred by virtue of the application of the sale of business tool or the bridge CCP tool to operate its business.
- (65) In accordance with Article 47 of the Charter, the parties concerned have a right to due process and to an effective remedy against the measures affecting them. Therefore, the decisions taken by the resolution authorities should be subject to a right of appeal *on substantive grounds if the decision was arbitrary and unreasonable at the time it was taken, given the information then readily available.*
- (66) Resolution action taken by national resolution authorities may require economic assessments and a large margin of discretion. The national resolution authorities are specifically equipped with the expertise needed for making those assessments and for determining the appropriate use of the margin of discretion. Therefore, it is important to ensure that the economic assessments made by national resolution authorities in that context are used as a basis by national courts when reviewing the crisis management measures concerned.
- (67) In order to cover situations of extreme urgency, and since the suspension of any decision of the resolution authorities might impede the continuity of critical functions, it is necessary to

provide that the lodging of any appeal should not result in automatic suspension of the effects of the challenged decision and that the decision of the resolution authority should be immediately enforceable.

- (68) In addition, where necessary in order to protect third parties who have acquired assets, contracts, rights and liabilities of the CCP under resolution in good faith by virtue of the exercise of the resolution powers by the authorities and to ensure the stability of the financial markets, a right of appeal should not affect any subsequent administrative act or transaction concluded on the basis of an annulled decision. In such cases, remedies for a wrongful decision should therefore be limited to the award of compensation for the damages suffered by the affected persons.
- (69) Given that resolution action may be required to be taken urgently due to serious financial stability risks in the Member State and the Union, any procedure under national law relating to the application for ex-ante judicial approval of a crisis management measure and the court's consideration of such an application should be swift. This is without prejudice to the right that interested parties might have in making an application to the court to set aside the decision for a limited period after the resolution authority has taken the crisis management measure.
- (70) It is in the interest of an efficient resolution, and in order to avoid conflicts of jurisdiction, that no normal insolvency proceedings for the failing CCP be opened or continued whilst the resolution authority is exercising its resolution powers or using the resolution tools, except at the initiative of, or with the consent of, the resolution authority. It is useful and necessary to suspend, for a limited period, certain contractual obligations so that the resolution authority has time to put into practice the resolution tools. This should not, however, apply to obligations of a failing CCP towards systems designated under Directive 98/26/EC of the European Parliament and of the Council<sup>23</sup>, **including** other central counterparties and central banks. Directive 98/26/EC reduces the risk associated with participation in payment and securities settlement systems, in particular by reducing disruption in the event of the insolvency of a participant in such a system. To ensure that those protections apply appropriately in crisis situations, whilst maintaining appropriate certainty for operators of payment and securities systems and other market participants, a crisis prevention measure or a resolution action should not be deemed to be insolvency proceedings within the meaning of Directive 98/26/EC, provided that the substantive obligations under the contract continue



to be performed. However, the operation of a system designated under or the right to collateral security guaranteed by Directive 98/26/EC should not be undermined.

- (71) In order to ensure that resolution authorities, when transferring assets and liabilities to a private sector purchaser or bridge CCP, have an adequate period to identify contracts that need to be transferred, it might be appropriate to impose proportionate restrictions on counterparties' rights to close out, accelerate or otherwise terminate financial contracts before the transfer is made. Such a restriction would be necessary to allow authorities to obtain a true picture of the balance sheet of the failing CCP, without the changes in value and scope that extensive exercise of termination rights would entail. In order to interfere with the contractual rights of counterparties to the minimum extent necessary, the restriction on termination rights should apply only in relation to the crisis prevention measure or resolution action, including the occurrence of any event directly linked to the application of such a measure, and rights to terminate arising from any other default, including failure to pay or deliver margin, should remain.
- (72) In order to preserve legitimate capital market arrangements in the event of a transfer of some, but not all, of the assets, contracts, rights and liabilities of a failing CCP, it is appropriate to include safeguards to prevent the splitting of linked liabilities, rights and contracts, as appropriate. Such a restriction on selected practices in relation to linked contracts and related collateral should extend to contracts with the same counterparty covered by security arrangements, title transfer financial collateral arrangements, set-off arrangements, close out netting agreements, and structured finance arrangements. Where the safeguard applies, resolution authorities should seek to transfer all linked contracts within a protected arrangement, or leave them all with the residual failing CCP. Those safeguards should ensure that the regulatory capital treatment of exposures covered by a netting agreement for the purposes of Directive 2013/36/EU is affected to a minimum degree.
- (73) EU CCPs provide services to clearing members and clients located in third countries and third country CCPs provide services to clearing members and clients located in the EU. Effective resolution of internationally active CCPs requires cooperation between, Member States and third-country authorities. For that purpose ESMA should provide guidance on the relevant content of cooperation arrangements to be concluded with authorities of third countries. Those cooperation arrangements should ensure effective planning, decision-making and coordination in respect of internationally active CCPs. National resolution authorities should recognise and enforce third-country resolution proceedings in certain

circumstances. Cooperation should also take place with regard to subsidiaries of Union or third-country CCPs and their clearing members and clients.

- (74) In order to ensure consistent harmonisation and adequate protection for market participants across the Union, the Commission should adopt draft regulatory technical standards developed by ESMA by means of delegated acts pursuant to Article 290 TFEU, in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 to specify the content of the written arrangements and procedures for the functioning of the resolution colleges, the contents of resolution plans and elements relevant to the conduct of valuations.
- (75) The Commission should be able to suspend any clearing obligation established pursuant to Article 5 of Regulation (EU) No 648/2012, following a request from the resolution authority of a CCP in resolution or the competent authority of a clearing member of a CCP in resolution, and following a non-binding opinion by ESMA, for specific classes of OTC derivatives which are cleared by a CCP which is in resolution. The decision to suspend should be adopted only if it is necessary to preserve financial stability and market confidence, in particular to avoid contagion effects and to prevent counterparties and investors having high and uncertain risk exposures to a CCP. In order to adopt its decision, the Commission should take into account the resolution objectives and the criteria stated in Regulation (EU) No 648/2012 for subjecting OTC derivatives to the clearing obligation regarding those OTC derivatives for which the suspension is requested. The suspension should be of a temporary nature with a possibility of renewal. Likewise, the role of the CCP's risk committee, as set out on Article 28 of Regulation (EU) No 648/2012, should be enhanced to further encourage the CCP to manage its risks prudently and improve its resilience. Members of the risk committee should be able to inform the competent authority when the CCP does not follow the risk committee's advice, and representatives of clearing members and clients on the risk committee should be able to use information provided to monitor their exposures to the CCP, in accordance with confidentiality safeguards. Finally, resolution authorities of CCPs should also have access to all necessary information in trade repositories. Regulation (EU) No 648/2012 and Regulation (EU) 2365/2015 of the European Parliament and of the Council<sup>10</sup> should therefore be amended accordingly.

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<sup>10</sup> Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).

- (76) In order to ensure that resolution authorities of CCPs are represented in all relevant fora, and to ensure that the ESMA benefits from all expertise necessary to carry out the tasks related to the recovery and resolution of CCPs, Regulation (EU) No 1095/2010 should be amended in order to include national CCP resolution authorities in the concept of competent authorities established by that Regulation.
- (77) In order to prepare the decisions of ESMA in relation to the tasks allocated to it involving the development of draft technical standards on ex ante and ex-post valuations and on resolution colleges and plans, and of guidelines on the conditions for resolution, and on binding mediation, and to ensure the comprehensive involvement of EBA and its members in the preparation of these decisions, ESMA should create an internal Resolution Committee where relevant EBA competent authorities shall be invited to participate as observers.
- (78) This Regulation respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, and, in particular, the right to property, the right to an effective remedy and to a fair trial and the right of defence.
- (79) When taking decisions or actions under this Regulation, competent authorities and resolution authorities should always have due regard to the impact of their decisions and actions on financial stability in other *jurisdictions* and on the economic situation in other *jurisdictions* and should give consideration to the significance of any clearing member for the financial sector and the economy of the *jurisdictions* where such a clearing member is established.
- (80) Since the objective of this Regulation, namely the harmonisation of the rules and processes for the resolution of CCPs, cannot be sufficiently achieved by the Member States, but can rather, by reason of the effects of a failure of any CCPs in the whole Union, be better achieved at 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 that objective.
- (81) In order avoid inconsistencies between the provisions relating to the recovery and resolution of CCPs and the legal framework governing the recovery and resolution of credit institutions and investment firms, it is appropriate to defer the application of this Regulation until the date from which Member States are to apply the measures transposing [*PO: Please insert reference to the Directive amending Directive 2014/59/EU*].

HAVE ADOPTED THIS REGULATION:

## TITLE I

### SUBJECT MATTER AND DEFINITIONS

#### *Article 1*

##### *Subject matter*

This Regulation lays down rules and procedures relating to the recovery and resolution of central counterparties (CCPs) authorised in accordance with Regulation (EU) No 648/2012 and rules relating to the arrangements with third countries in the field of recovery and resolution of CCPs.

#### *Article 2*

##### *Definitions*

For the purposes of this Regulation the following definitions apply:

- (1) 'CCP' means a CCP as defined in point (1) of Article 2 of Regulation (EU) No 648/2012;
- (2) 'resolution college' means the college established pursuant to Article 4;
- (3) 'resolution authority' means an authority designated ■ in accordance with Article 3;
- (4) 'resolution tool' means a resolution tool referred to in Article 27(1);
- (5) 'resolution power' means a power referred to in Article 48;
- (6) 'resolution objectives' means the resolution objectives laid down in Article 21;
- (7) 'competent authority' means an authority designated ■ in accordance with Article 22 of Regulation (EU) No 648/2012;

- (7a) *'default event' means a scenario in which one or more clearing members fail to honour their financial obligations to the CCP;*
- (7b) *'non-default' means a scenario in which losses are incurred by a CCP for any reason other than a default of a clearing member, such as business, custody, investment, legal or operational failures or fraud, including failures resulting from cyber-attacks, or uncovered liquidity shortfalls;*
- (8) 'resolution plan' means a resolution plan for a CCP drawn up in accordance with Article 13;
- (9) 'resolution action' means the application of a resolution tool, or the exercise of one or more resolution powers *once the conditions for resolution set out in Article 22 are met;*
- (10) 'clearing member' means a clearing member as defined in point 14 of Article 2 of Regulation (EU) No 648/2012;
- (11) 'parent undertaking' means a parent undertaking as defined in point (15)(a) of Article 4(1) of Regulation (EU) No 575/2013;
- (12) 'third-country CCP' means a CCP, the head office of which is established in a third country;
- (13) 'set-off arrangement' means an arrangement under which two or more claims or obligations owed between the CCP under resolution and a counterparty can be set off against each other;
- (14) 'financial market infrastructure' (FMI) means a central counterparty, a central securities depository, a trade repository, a payment system or another system defined and designated by a Member State under Article 2(a) of Directive 98/26/EC;
- (15) 'client' means a client as defined in point 15 of Article 2 of Regulation (EU) No 648/2012;
- (15a) *'O-SII' means other systemically important institutions as referred to in Article 131(3) of Directive 2013/36/EU;*
- (16) *'interoperable CCP' means a CCP which has entered into an interoperability arrangement pursuant to Title V of Regulation (EU) No 648/2012;*

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- (18) 'recovery plan' means a recovery plan drawn up and maintained by a CCP in accordance with Article 9;
- (19) 'board' means the administrative or supervisory board, or both, set up pursuant to national company law in accordance with Article 27(2) of Regulation (EU) No 648/2012;
- (20) '**supervisory** college' means the college referred to in Article 18(1) of Regulation (EU) No 648/2012 **with the participation of the Single Resolution Board (SRB)**;
- (21) 'capital' means capital **as defined in point 25 of Article 2 of Regulation (EU) No 648/2012**;
- (22) 'default waterfall' means default waterfall in accordance with Article 45 of Regulation (EU) No 648/2012;
- (23) 'critical functions' means activities, services or operations provided to third parties external to the CCP the discontinuance of which is likely to lead to the disruption of services that are essential to the real economy or to disrupt financial stability in one or more Member States due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of a CCP or group, with particular regard to the substitutability of those activities, services or operations;
- (24) 'group' means a **group as defined in point 16 of Article 2 of Regulation (EU) No 648/2012**;
- (25) 'linked FMI' means **an interoperable** CCP or another FMI **or a CCP** with which the CCP has contractual arrangements;
- (26) '■ public financial support' means State aid within the meaning of Article 107(1) TFEU, or any other public financial support at supra-national level, which, if provided for at national level, would constitute State aid, that is provided in order to preserve or restore the viability, liquidity or solvency of a CCP or of a group of which such a CCP forms part;
- (27) 'financial contracts' means contracts and agreements as set out in point 100 of Article 2(1) of Directive 2014/59/EU;

- (28) 'normal insolvency proceedings' means collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to CCPs under national law and either specific to those institutions or generally applicable to any natural or legal person;
- (29) 'instruments of ownership' means shares, other instruments that confer ownership, instruments that are convertible into or give the right to acquire shares or other instruments of ownership, and instruments representing interests in shares or other instruments of ownership;
- (30) 'designated national macroprudential authority' means the authority entrusted with the conduct of macroprudential policy referred to in Recommendation B1 of the Recommendation of the European Systemic Risk Board (ESRB) of 22 December 2011 on the macroprudential mandate of national authorities (ESRB/2011/3);
- (31) 'default fund' means a default fund held by a CCP in accordance with Article 42 of Regulation (EU) No 648/2012;
- (32) 'pre-funded resources' means resources which are held by and freely available to the relevant legal person;
- (33) 'senior management' means the person or persons who effectively direct the business of the CCP, and the executive member or members of the board;
- (34) 'trade repository' means a trade repository as defined in point 2 of Article 2 of Regulation (EU) No 648/2012 or in point 1 of Article 3 of Regulation (EU) 2015/2365 of the European Parliament and of the Council<sup>11</sup>;
- (35) 'Union State aid framework' means the framework established by Articles 107, 108 and 109 of the Treaty on the Functioning of the European Union (TFEU) and regulations and all Union acts, including guidelines, communications and notices, made or adopted pursuant to Article 108(4) or Article 109 TFEU;

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<sup>11</sup> Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).

- (36) 'debt instruments' means bonds or other forms of unsecured transferable debt, instruments creating or acknowledging a debt, and instruments giving rights to acquire debt instruments;
- (37) 'resolution cash call' means a request for cash resources to be provided by clearing members to the CCP, additional to prefunded resources, based on statutory powers available to a resolution authority in accordance with Article 31 *and as laid out in the operating rules of the CCP*;
- (38) '*recovery* cash calls' means requests for cash resources to be provided by clearing members to the CCP, additional to prefunded resources, based on contractual arrangements laid out in the operating rules of the CCP;
- (39) 'transfer powers' means the powers specified in points (c) or (d) of Article 48(1) to transfer shares, other instruments of ownership, debt instruments, assets, rights, obligations or liabilities, or any combination of those items from a CCP under resolution to a recipient;
- (40) 'derivative' means a derivative as defined in point 5 of Article 2 of Regulation (EU) No 648/2012;
- (41) 'netting arrangement' means an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including 'close-out netting provisions' as defined in point (n)(i) of Article 2(1) of Directive 2002/47/EC of the European Parliament and of the Council<sup>12</sup> and 'netting' as defined in point (k) of Article 2 of Directive 98/26/EC;
- (42) 'crisis prevention measure' means the exercise of powers to require a CCP to take measures to remedy deficiencies in its recovery plan under Article 10(8) and (9), the exercise of powers to address or remove impediments to resolvability under Article 17, or the application of an early intervention measure under Article 19;

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<sup>12</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).



- (43) 'termination right' means a right to terminate a contract, a right to accelerate, close out, set-off or net obligations or any similar provision that suspends, modifies or extinguishes an obligation of a party to the contract or a provision that prevents an obligation under the contract from arising that would otherwise arise;
- (44) 'title transfer financial collateral arrangement' means a title transfer financial collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC;
- (45) 'covered bond' means an instrument as referred to in Article 52(4) of Directive 2009/65/EC of the European Parliament and of the Council<sup>13</sup>;
- (46) 'third-country resolution proceedings' means an action under the law of a third country to manage the failure of a third-country CCP that is comparable, in terms of objectives and anticipated results, to resolution actions under this Regulation;
- (47) 'relevant national authorities' means the resolution authorities, competent authorities or competent ministries designated in accordance with this Regulation or pursuant to Article 3 of Directive 2014/59/EU or other authorities in Member States with powers in relation to assets, rights, obligations or liabilities of third-country CCPs providing clearing services in their jurisdiction;
- (48) 'relevant third-country authority' means a third-country authority responsible for carrying out functions comparable to those of resolution authorities or competent authorities pursuant to this Regulation.

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<sup>13</sup> 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)

## TITLE II

### AUTHORITIES, RESOLUTION COLLEGE AND PROCEDURES

#### SECTION I

##### RESOLUTION AUTHORITIES, RESOLUTION COLLEGES AND INVOLVEMENT OF EUROPEAN SUPERVISORY AUTHORITIES

###### *Article 3*

###### *Designation of resolution authorities and competent ministries*

1. ***Member States where a CCP is established shall and Member States where no CCP is established may designate one*** resolution authority that ***is*** empowered to ***apply*** the resolution tools and exercise the resolution powers as set out in this Regulation.

Resolution authorities shall be national central banks, competent ministries, public administrative authorities or other authorities entrusted with public administrative powers.

2. Resolution authorities shall have the expertise, resources and operational capacity to apply resolution measures and exercise their powers with the speed and flexibility that are necessary to achieve the resolution objectives.
3. Where a resolution authority designated pursuant to paragraph 1 is entrusted with other functions, the ***effective*** operational independence, ***including separate staff, reporting lines and of the decision making process*** of that resolution authority, ***in particular from the competent authority designated under Article 22 of Regulation (EU) No 648/2012 and the competent and resolution authorities of the clearing members referred to in point (c) of Article 18(2) of that Regulation shall be ensured and*** all necessary arrangements ***shall be established and demonstrated to the satisfaction of ESMA*** in order to avoid conflicts of interest between the functions entrusted to the resolution authority pursuant to this Regulation and all other functions entrusted to that authority.

***The requirements expressed in the first paragraph shall not preclude either that reporting lines converge at the highest level of an organisation that subsumes different authorities or that, staff may, under predefined conditions, be seconded from one authority to another to meet temporarily high workloads.***

4. ■ The resolution authority shall adopt and make public the internal rules ensuring the structural separation referred to in the first subparagraph, including rules regarding professional secrecy and information exchanges between the different functional areas.
5. Each Member State shall designate a single ministry which is responsible for exercising the functions entrusted to the competent ministry pursuant to this Regulation.
6. ■ The resolution authority shall inform the competent ministry *in a timely manner* of the decisions taken pursuant to this Regulation.
7. Where the decisions referred to in paragraph 6 have a direct fiscal impact ■ , the resolution authority shall obtain the *necessary* approval *as* stipulated by ■ law.
8. Member States shall notify the Commission and the European Securities and Markets Authority (ESMA) of the resolution authorities designated pursuant to paragraph 1.
9. ■
10. ESMA shall publish a list of the resolution authorities and the contact authorities notified pursuant to paragraph 8.

#### *Article 4*

##### *Resolution colleges*

1. The resolution authority of the CCP shall establish, manage and chair a resolution college to carry out the tasks referred to in Articles 13, 16 and 17 and ensure cooperation and coordination with third-country resolution authorities.

Resolution colleges shall provide a framework for resolution authorities and other relevant authorities to perform the following tasks:

- (a) exchange information relevant for the development of resolution plans, *for assessing the CCP's interconnectedness and that of its participants, along with other central banks of interest*, for the application of preparatory and preventative measures and for resolution;

- (b) *assess* resolution plans pursuant to Article 13;
- (c) assess the resolvability of CCPs pursuant to Article 16;
- (d) identify, address and remove impediments to the resolvability of CCPs pursuant to Article 17;
- (e) coordinate public communication of resolution strategies and schemes;
- (ea) *exchange recovery and resolution plans of clearing members and assess potential impact and interconnectedness with the CCP;***

2. The following shall be members of the resolution college:

- (a) the resolution authority of the CCP;
- (b) the competent authority of the CCP;
- (c) the competent authorities and the resolution authorities of the clearing members referred to in point (c) of Article 18(2) of Regulation (EU) No 648/2012;
- (d) the competent authorities referred to in point (d) of Article 18(2) of Regulation (EU) No 648/2012;
- (e) the competent authorities and the resolution authorities of the CCPs referred to in point (e) of Article 18(2) of Regulation (EU) No 648/2012;
- (f) the competent authorities referred to in point (f) of Article 18(2) of Regulation (EU) No 648/2012;
- (g) the members of the ESCB referred to in point (g) of Article 18(2) of Regulation (EU) No 648/2012;
- (h) the central banks *of issue* referred to in point (h) of Article 18(2) of Regulation (EU) No 648/2012;
- (i) the competent authority of the parent undertaking, where Article 11(1) applies;
- (ia) *the competent authorities charged with supervision of O-SIIs referred to in Article 131 (3) of Directive 2013/36/EU;***

- (j) the competent ministry, where the resolution authority referred to in point (a) is not the competent ministry;
  - (k) ESMA;
  - (l) the European Banking Authority (EBA).
3. ESMA, EBA *and the competent authorities charged with the supervision of O-SIIs* shall not have voting rights in resolution colleges.
4. The competent and resolution authorities of clearing members established in third countries and the competent and resolution authorities of third-country CCPs with which the CCP has established interoperability arrangements may be invited to participate in the resolution college as observers. Their attendance shall be conditional on those authorities being subject to confidentiality requirements equivalent, in the opinion of the chair of the *resolution* college, to those laid down in Article 71.

The participation of third country authorities in the resolution college *may* be limited to the discussion of *select* cross-border enforcement issues, *which may include* the following:

- (a) effective and coordinated enforcement of resolution actions, in particular in accordance with Articles 53 and 75;
- (b) identifying and removing possible impediments to effective resolution action that may stem from divergent laws governing collateral, netting and set-off arrangements and different recovery and resolution powers or strategies;
- (c) identifying and coordinating any need for new licensing, recognition or authorisation requirements, considering the need for resolution actions to be carried out in a timely fashion;
- (d) the possible suspension of any clearing obligation for the relevant asset classes affected by the resolution of the CCP pursuant to Article 6a of Regulation (EU) No 648/2012 or to any equivalent provision under the national law of the third country concerned;
- (e) the possible influence of different time-zones on the applicable close of business hours regarding the end of trading.

5. The chair of the resolution college shall be responsible for the following tasks:
- (a) establishing written arrangements and procedures for the functioning of the resolution college, after consulting the other members of the resolution college;
  - (b) coordinating all activities of the resolution college;
  - (c) convening and chairing all meetings of the resolution college;
  - (d) keeping all members of the resolution college fully informed in advance of the organisation of meetings, of the main issues to be discussed in those meetings and of the items to be considered for the purposes of those discussions;
  - (e) deciding whether and which third-country authorities are invited to attend particular meetings of the resolution college in accordance with paragraph 4;
  - (f) coordinating the timely exchange of all relevant information between members of the resolution college;
  - (g) keeping all members of the resolution college informed, in a timely manner, of the decisions and outcomes of those meetings;
- (ga) making sure the college members exchange all relevant information in a timely manner for the exercise of their tasks under this Regulation.***
6. In order to ensure the consistent and coherent functioning of resolution colleges across the Union, ESMA shall develop draft regulatory technical standards in order to specify the content of the written arrangements and procedures for the functioning of the resolution colleges referred to in paragraph 1.

For the purposes of preparing the regulatory standards referred to in the first subparagraph, ESMA shall take into account the relevant provisions of the Commission Delegated Regulation (EU) No 876/2013<sup>14</sup>, of Section 1 of Chapter 6 of Commission Delegated

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<sup>14</sup> Commission Delegated Regulation (EU) No 876/2013 of 28 May 2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on colleges for central counterparties (OJ L 244, 13.9.2013, p. 19)

Regulation (EU) –/2016 supplementing Directive 2014/59/EU with regard to regulatory technical standards adopted on the basis of Article 88(7) of Directive 2014/59/EU<sup>15</sup>.

ESMA shall submit those draft regulatory technical standards to the Commission by [PO: insert 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 paragraph 6 in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### Article 5

##### ESMA Resolution Committee

1. ESMA shall create a resolution committee pursuant to Article 41 of Regulation (EU) No 1095/2010 for the purpose of preparing the decisions entrusted to ESMA in this Regulation, except for the decisions to be adopted pursuant to Article 12 of this Regulation.

The resolution committee shall *also* promote the development and coordination of resolution plans and *design strategies* for the resolution of failing CCPs.

2. The resolution committee shall be composed of the authorities designated pursuant to Article 3(1) of this Regulation.

Authorities referred to in points (i) and (iv) of Article 4(2) of Regulation (EU) No 1093/2010 *and the competent authorities charged with supervision of O-SIIs* shall be invited to participate in the resolution committee as observers.

- 2a. ***ESMA shall assess CCP recovery and resolution arrangements across the Union in terms of their aggregate effect on Union financial stability through regular stress-testing***

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<sup>15</sup> Commission Delegated Regulation (EU) ... of 23.3.2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges, C(2016) 1691 final [Note to Publication Office – Please introduce number of Delegated Regulation]

*and crisis simulation exercises with respect to potential system-wide stress events. In exercising this role, ESMA shall ensure consistency with the assessments of the resilience of individual CCPs carried out pursuant to Chapter XII of Commission Delegated Regulation (EU) No 153/2013 with regard to the frequency and design of the tests and shall cooperate closely with the supervisory colleges established in accordance with Article 18 of Regulation (EU) No 648/2012, the ESRB and competent authorities designated under Article 4 of Directive 2013/36/EU, including the ECB in carrying out its tasks within a single supervisory mechanism under Regulation (EU) No 1024/2013 and any national competent authorities tasked with the supervision of CCPs. In areas where these arrangements are found to be wanting as a result of these comprehensive stress tests, the responsible institution or institutions will have to address the shortcomings and resubmit their arrangements for another round of stress tests within 6 months of the previous stress tests.*

3. For the purposes of this Regulation, ESMA shall cooperate with the European Insurance and Occupational Pensions Authority (EIOPA) and EBA within the framework of the Joint Committee of the European Supervisory Authorities established in Article 54 of Regulation (EU) No 1093/2010, Article 54 of Regulation (EU) No 1094/2010 and Article 54 of Regulation (EU) No 1095/2010.
4. For the purposes of this Regulation, ESMA shall ensure structural separation between the resolution committee and other functions referred to in Regulation (EU) No 1095/2010.

#### *Article 6*

##### *Cooperation between authorities*

1. Competent authorities and resolution authorities **and ESMA** shall cooperate closely in the preparation, planning and, **to the extent possible, in the** application of resolution decisions. ***In particular, the resolution authority and other relevant authorities, including ESMA, the resolution authorities designated in accordance with Article 3 of Directive 2014/59/EU and competent authorities and authorities of linked FMIs, should cooperate and communicate effectively in recovery to enable the resolution authority to act in a timely manner.***
2. Competent authorities and resolution authorities shall cooperate with ESMA for the purposes of this Regulation in accordance with Regulation (EU) No 1095/2010.



Competent authorities and resolution authorities shall, without delay, provide ESMA with all the information necessary to carry out its duties in accordance with Article 35 of Regulation (EU) No 1095/2010.

## SECTION II

### DECISION-MAKING AND PROCEDURES

#### *Article 7*

#### *General principles regarding decision-making*

Competent authorities, resolution authorities and ESMA shall take account of all the following principles and aspects when making decisions and taking action pursuant to this Regulation:

- (a) that the ***effectiveness and*** proportionality of any decision or action in relation to an individual CCP is ensured, taking into account at least the following factors:
- i) ***the ownership, legal and organisational structure of the CCP, including whether it is part of a larger group of FMIs or other financial institutions;***
  - ii) the nature, size and complexity of the CCP's business;
  - iii) ***the nature and diversity of the CCP's clearing membership structure including clearing members, their clients and other counterparties to which those clearing members and clients provide clearing services under that CCP, where those can be identified easily and without undue delay;***
  - v) the CCP's interconnectedness with other financial market infrastructures, other financial institutions and with the financial system in general;
  - va) ***whether the CCP clears any OTC derivative contract pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation in accordance with Article 5(2) of Regulation (EU) No. 648/2012;***
  - vb) ***the availability of other CCPs that could credibly and feasibly act as a substitute for the critical functions of the CCP;***

- vi) the actual or potential consequences of the infringements referred to in Articles 19(1) and 22(2).
- (b) that the imperatives of efficacy of decision-making and of keeping costs as low as possible ***while preventing market disruption*** when taking early intervention measures or resolution action are observed ***in order to avoid the use of public funds***;
- (c) that decisions are made and action is taken in a timely manner and with due urgency when required;
- (d) that resolution authorities, competent authorities and other authorities cooperate with each other to ensure that decisions are made and action is taken in a coordinated and efficient manner;
- (e) that the roles and responsibilities of relevant authorities within each Member State are defined clearly;
- (f) that due consideration is given to the interests of the Member States where the CCP provides services and where its clearing members, their clients, and any interoperable CCPs are established, and in particular the impact of any decision or action or inaction on the financial stability or fiscal resources of those Member States and the Union as a whole;
- (g) that due consideration is given to the objectives of balancing the interests of the various clearing ***members, their clients, wider*** creditors and ***stakeholders of the CCP*** in the Member States involved and of avoiding unfairly prejudicing or unfairly protecting the interests of particular actors in some Member States, including avoiding unfair burden allocation across Member States;
- (ga) ***that public financial support is avoided to the greatest extent possible and used only as a last resort and under conditions set out in Article 45, and that no expectation of public financial support is created***;
- (h) that any obligation under this Regulation to consult an authority before any decision or action is taken implies at least an obligation to consult on those elements of the proposed decision or action which have or which are likely to have:
  - (i) an effect on the clearing members, clients or linked FMIs;

- (ii) an impact on the financial stability of the Member State where the clearing members, clients or linked FMIs are established or located;
- (i) that resolution plans referred to in Article 13 are complied with, unless deviation from those plans is necessary in order to better achieve the resolution objectives;
- (j) that transparency is ensured **towards the relevant authorities** wherever **possible, in particular where** a proposed decision or action is likely to have implications on the financial stability or fiscal resources, **and towards** any other jurisdiction, or other parties **where reasonably possible**.
- (k) that they coordinate and cooperate as closely as possible, also with the goal to lower the overall cost of resolution;
- (l) that negative economic and social effects of any decision in all the Member States and third countries where the CCP provides services, including negative impacts on financial stability, are mitigated.

#### *Article 8*

#### *Information exchange*

1. Resolution authorities, competent authorities **and ESMA** shall, on their own initiative or on request, provide each other **in a timely manner** with all the information relevant for the exercise of their tasks under this Regulation.
2. Resolution authorities shall only divulge confidential information provided by a third-country authority where that authority has given its prior written consent.

Resolution authorities shall provide the competent ministry with all information relating to decisions or measures that require notification, consultation or consent of that ministry.

## TITLE III

### PREPARATION

#### CHAPTER I

#### Recovery and resolution planning

##### SECTION 1

##### RECOVERY PLANNING

###### *Article 9*

###### *Recovery plans*

1. CCPs shall draw up and maintain a ***comprehensive and effective*** recovery plan providing for measures to be taken ***in the case of both default and non-default events and combinations of both*** in order to restore their financial position ***without any public financial support in order to enable them to continue to provide clearing services*** following a significant deterioration of their financial situation or a risk of breaching their prudential requirements under Regulation (EU) No 648/2012.
  - 1a. ***The recovery plan shall clearly distinguish, in particular wherever practicable by way of separate sections, between scenarios based on:***
    - (a) ***default events;***
    - (b) ***non-default events;***

***The recovery plan shall include arrangements on how the provisions foreseen for scenarios under points (a) and (b) are to be combined in the case that both scenarios occur at the same time.***
2. The recovery plan shall include a framework of indicators, ***based on the risk profile on the CCP***, that identify the circumstances under which measures in the recovery plan are to be taken, taking into account different scenarios. The indicators may be of either a qualitative or a quantitative nature relating to the financial position of the CCP.

CCPs shall put in place appropriate arrangements, *including close cooperation between the relevant authorities*, for the regular monitoring of the indicators. *CCPs shall report to ESMA and competent authorities on the outcome of this monitoring.*

2a. *ESMA shall, in cooperation with the ESRB, by ... [one year after the entry into force of this Regulation], issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to specify the minimum list of qualitative and quantitative indicators referred to in the first subparagraph of paragraph 2 of this Article.*

3. CCPs shall *include provisions in their operating rules outlining the procedures to be followed by them where, in order to achieve the goals of the recovery process, they propose to:*

- (a) take measures provided for in their recovery plan despite the fact that the relevant indicators have not been met; or
- (b) refrain from taking measures provided for in their recovery plan despite the fact that the relevant indicators have been met.

3a. *Any measure to be taken pursuant to paragraph 3 shall require the approval of the competent authority*

4. ■ Where a CCP intends to activate its recovery plan, it shall inform the competent authority *and ESMA* of the nature and magnitude of the problems it has identified, setting out all relevant circumstances and indicating the recovery measures or other measures it intends to take to address the situation.

Where the competent authority considers that a recovery measure that the CCP intends to take may cause significant adverse effects to the financial system, *is unlikely to be effective or may disproportionately affect the clients of the clearing members*, it may *after informing ESMA* require the CCP to refrain from taking that measure.

5. The competent authority shall promptly inform the resolution authority of any notification received in accordance with the first subparagraph of paragraph 4 and any subsequent instruction by the competent authority in accordance with the second subparagraph of paragraph 4.

*Where the competent authority is informed in accordance with the first subparagraph of paragraph 4, it shall restrict or prohibit any remuneration of equity and instruments treated as equity to the fullest extent possible without triggering outright default, including dividend payments and buybacks by the CCP and it may restrict, prohibit or freeze any payments of variable remuneration pursuant to Directive 2013/36/EU and EBA Guidelines EBA/GL/2015/22, discretionary pension benefits or severance packages to management.*

6. CCPs shall *review and* update, *where necessary*, their recovery plans at least annually and after *any* change to their legal or organisational structure or business or financial situation which could have a material effect on those plans or otherwise necessitate a change to the plans. Competent authorities may require CCPs to update their recovery plans more frequently.
7. Recovery plans shall:
  - (a) *not assume any access to or receipt of public financial support, central bank emergency liquidity assistance or central bank emergency liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms;*
  - (b) *consider the interests of all stakeholders that are likely to be affected by that plan, specifically in relation to clearing members and their clients, both direct and indirect; and*
  - (c) *ensure that clearing members do not have unlimited exposures toward the CCP.*
- 7a. *Recovery tools shall allow to:*
  - (a) *address losses from non-default events;*
  - (b) *address losses from default events;*
  - (c) *re-establish a matched book following a default event;*
  - (d) *address uncovered liquidity shortfalls; and*

- (e) *replenish the financial resources of the CCP, including its own funds, to a level sufficient in order for the CCP to meet its obligations under Regulation (EU) No 648/2012 and to support the continued and timely operation of the critical functions of the CCP.*
- 7b. *Recovery plans shall contemplate a range of extreme scenarios, including the default of clearing members beyond the largest two and of other CCPs, relevant to the CCP's specific conditions, including its product mix, business model and liquidity and risk governance framework. That range of scenarios shall include both system-wide stress events and stress events specific to the CCP, taking into account the potential impact of domestic and cross-border contagion in crises, as well as simultaneous crises in several significant markets.*
- 7c. *ESMA shall, in cooperation with the ESRB, by ... [12 months after the date of entry into force of this Regulation] issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 further specifying the range of scenarios to be considered for the purposes of paragraph 1. In issuing such guidelines, ESMA shall have regard, where appropriate, to the relevant international work carried out in the area of CCP supervisory stress testing and of CCP recovery. It shall seek to take advantage, where achievable, of synergies between supervisory stress testing and recovery scenarios modelling.*
- 7d. *Where the CCP is part of a group and contractual parental support agreements, including the financing of the CCP's capital requirements determined in accordance with Article 16 of Regulation (EU) No 648/2012 through instruments of ownership issued by its parent undertaking form part of the recovery plan, the recovery plan shall contemplate scenarios in which those agreements cannot be honoured.*
- 7e. *The recovery plan shall include the following items:*
- (a) *a summary of the key elements of the plan and a summary of overall recovery capacity;*
  - (b) *a summary of the material changes to the CCP since the most recently filed recovery plan;*

- (c) *a communication and disclosure plan outlining how the CCP intends to manage any potentially negative market reactions while acting in as transparent a manner as possible;*
- (d) *a comprehensive range of capital, loss allocation and liquidity actions required to maintain or restore the viability and financial position of the CCP including to restore its matched book and capital, and replenish pre-funded resources which are necessary for the CCP to maintain its viability as a going concern and to continue providing its critical services in accordance with Article 1(2) of Commission Delegated Regulation (EU) No 152/2013 and Articles 32(2) and 32(3) of Commission Delegated Regulation (EU) No 153/2013;*
- (e) *appropriate conditions and procedures to ensure the timely implementation of recovery actions, as well as a wide range of recovery options, including an estimation of the timeframe for executing each material aspect of the plan;*
- (f) *a detailed description of any material impediment to the effective and timely execution of the plan, including consideration of the impact on clearing members and clients including in cases where clearing members are likely to take measures in accordance with their recovery plans as referred to in Articles 5 and 7 of Directive 2014/59/EU, and where appropriate on the rest of the group;*
- (g) *identification of critical functions;*
- (h) *a detailed description of the processes for determining the value and marketability of the core business lines, operations and assets of the CCP;*
- (i) *a detailed description of how recovery planning is integrated into the corporate governance structure of the CCP, how it forms part of the operating rules of the CCP agreed to by clearing members, as well as the policies and procedures governing the approval of the recovery plan and identification of the persons in the organisation responsible for preparing and implementing the plan;*
- (j) *arrangements and measures incentivising non-defaulting clearing members to bid competitively in auctions of a defaulted members' positions;*



- (k) arrangements and measures to ensure that the CCP has adequate access to contingency funding sources, including potential liquidity sources, an assessment of available collateral and an assessment of the possibility to transfer resources or liquidity across business lines, to ensure that it can continue to carry out its operations and meet its obligations as they fall due;*
- (l) arrangements and measures:*
- (i) to reduce risk;*
  - (ii) to restructure contracts, rights, assets and liabilities including:*
    - a) to partially or fully terminate contracts*
    - b) to reduce the value of any gains payable by the CCP to non-defaulting clearing members and their clients*
  - (iii) to restructure business lines;*
  - (iv) necessary to maintain continuous access to financial markets infrastructures;*
  - (v) necessary to maintain the continuous functioning of the CCP's operational processes, including infrastructure and IT services;*
  - (vi) a description of management actions or strategies to restore financial soundness and the anticipated financial effect of those actions or strategies;*
  - (vii) preparatory measures that the CCP has taken or plans to take in order to facilitate the implementation of the recovery plan, including those necessary to enable the timely recapitalisation of the CCP, restoring its matched book and replenishment of its pre-funded resources, as well as to ensure its enforceability across borders; this shall include arrangements for non-defaulting clearing members to make a minimum contribution in cash to the*

*CCP up to an amount equivalent to their contribution to the CCP's default fund.*

*(viii) a framework of indicators which identifies the points at which appropriate actions referred to in the plan may be taken.*

*(ix) where applicable, an analysis of how and when the CCP may apply, in the conditions addressed in the plan, for the use of central bank facilities and identify those assets that would be expected to qualify as collateral under the terms of the central bank facility;*

*(x) taking into account the provisions of Article 49(1) of Regulation (EU) 648/2012, a range of extreme scenarios of stress relevant to the CCP's specific conditions, including system-wide events and stress specific to the legal entity and any group to which it belongs and specific stress to the individual clearing members of the CCP or, where appropriate, a linked FMI;*

*(xi) taking into account the provisions of Article 34 and Article 49(1) of Regulation (EU) 648/2012, scenarios caused both by the stress or default of one or more of its members and by other reasons including losses from the CCP's investment activities or from operational problems (including severe external threats to a CCP's operations due to an external disruption, shock or cyber-related incident);*

*7f. Following a default event, a CCP shall use an additional amount of dedicated own resources equivalent to the amount required to be used in accordance with Article 45(4) of Regulation (EU) 648/2012, prior to the use of the tools referred to in paragraph 7e(l) of this Article. Where the competent authority deems the risks leading to the loss to have been under the control of the CCP, it may require the CCP to use a higher amount of dedicated own resources to be defined by the competent authority.*

*7g. Following a non-default event, a CCP shall use dedicated own resources equivalent to three times the amount required to be used in accordance with Article 45(4) of Regulation (EU) 648/2012, prior to the use of the tools referred to in paragraph 7e(l) of this Article*

*and, to maintain a strictly incentivised process, CCPs shall not use the default fund and the default waterfall. Where the competent authority deems the risks leading up to the loss to have been outside the control of the CCP, it may allow the CCP to use a lower amount of dedicated own resources to be defined by the competent authority.*

- 7h. A CCP shall, in agreement with the competent authority, use the tools referred to in paragraph 7e (l)(ii) only after cash calls of a minimum amount equivalent to the CCP's default fund have been carried out under the conditions referred to in paragraph 7e(l)(vii).*
- 7i. Competent authorities may require CCPs to include additional information in their recovery plans.*
8. The board of the CCP shall assess, taking into account the advice of the risk committee in accordance with Article 28(3) of Regulation (EU) No 648/2012, and approve the recovery plan before submitting it to the competent authority **and to ESMA**.
9. Recovery plans shall be considered as part of the operating rules of CCPs and CCPs **and their clearing members in the case of provisions related to their clients** shall ensure that the measures set out in the recovery plans are enforceable at all times.
- 9a. CCPs shall make the items listed at points (a) to (g) of paragraph 7e publicly available. The items listed at points (h) to (l) of that paragraph should be publicly available to the extent there is public interest in transparency of these items. Clearing members shall ensure that any provisions affecting their clients are adequately communicated to them.*
- 9b. National insolvency law rules relating to the voidability or unenforceability of legal acts detrimental to creditors shall not apply to measures taken by a CCP in accordance with its recovery plan established under this Regulation.*

#### Article 10

##### Assessment of recovery plans

1. CCPs █ shall submit their recovery plans to the competent authority █ .

2. The competent authority shall transmit each plan to the *supervisory* college and to the resolution authority without undue delay.

Within six months of the submission of each plan, and in coordination with the *supervisory* college in accordance with the procedure in Article 12, the competent authority shall review the recovery plan and assess the extent to which it satisfies the requirements set out in Article 9.

3. When assessing the recovery plan, the competent authority shall *consult the ESRB* and take into consideration the CCP's capital structure, its default waterfall, the level of complexity of the organisational structure and the risk profile of the CCP, *including in terms of financial, operational and cyber risks, the substitutability of its activities*, and the impact that the implementation of the recovery plan would have on clearing members, their clients, financial markets served by the CCP and on the financial system as a whole *The competent authority shall take into due consideration whether the recovery plan will ensure appropriate incentives for the CCP's owners and clearing members and their clients to control the amount of risk that they bring to or incur in the system. The competent authority shall encourage monitoring of the CCP's risk-taking and risk management activities, and encourage as full participation as possible in the CCP's default management process.*
- 3a. *When assessing the recovery plan, the competent authority shall only take parental support agreements into consideration as valid parts of the recovery plan where those agreements are contractually binding.*
4. The resolution authority shall examine the recovery plan in order to identify any measures which may adversely impact the resolvability of the CCP. *Where any such matters are identified*, the resolution authority shall *bring them to the attention of the competent authority and* make recommendations to the competent authority *on ways to address the adverse impact of those measures on the resolvability of the CCP.*
5. Where the competent authority decides not to act on the recommendations of the resolution authority pursuant to paragraph 4, it shall justify that decision in full to the resolution authority.

6. Where the competent authority agrees with the recommendations of the resolution authority, or otherwise considers that there are material deficiencies in the recovery plan or material impediments to its implementation, it shall notify the CCP or its parent undertaking and shall give the CCP the opportunity to submit its views.
7. The competent authority, taking into account the CCP's views, may require the CCP or the parent undertaking to submit, within two months, extendable by one month with the competent authority's approval, a revised plan demonstrating how those deficiencies or impediments are addressed. The revised plan shall be assessed in accordance with the second subparagraph of paragraph 2.
8. Where the competent authority considers that the deficiencies and impediments have not been adequately addressed by the revised plan, or where the CCP or parent undertaking has not submitted a revised plan, it shall require the CCP or the parent undertaking to make specific changes to the plan.
9. Where it is not possible to adequately remedy the deficiencies or impediments through specific changes to the plan, the competent authority shall require the CCP or the parent undertaking to identify within a reasonable timeframe any changes to be made to its business in order to address the deficiencies in or impediments to the implementation of the recovery plan.

Where the CCP or parent undertaking fails to identify such changes within the timeframe set by the competent authority, or where the competent authority considers that the actions proposed would not adequately address the deficiencies or impediments to the implementation of the recovery plan, *or improve the resolvability of the CCP*, the competent authority shall require the CCP or parent undertaking, *within a reasonable period of time specified by the competent authority*, to take any of the following measures, taking into account the seriousness of the deficiencies and impediments, the effect of the measures on the CCP's business *and the ability of the CCP to remain in compliance with Regulation (EU) No 648/2012*:

- (a) to reduce the risk profile of the CCP;
- (b) to enhance the CCP's ability to be recapitalised in a timely manner to meet its prudential requirements;

- (c) to review the CCP's strategy and structure;
  - (d) to make changes to the default waterfall, recovery measures and other loss allocation arrangements so as to improve resolvability and the resilience of critical functions;
  - (e) to make changes to the governance structure of the CCP.
10. The request referred to in the second subparagraph of paragraph 9 shall be reasoned and be notified in writing to the CCP.
- 10a. ESMA shall develop draft regulatory technical standards specifying the minimum criteria that the competent authority is to assess for the purposes of the assessment of paragraph 2 of this Article and of Article 11(1).**

*ESMA shall submit those draft regulatory technical standards to the Commission by ... [12 months after the entry into force of this regulation].*

*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 11*

##### *Recovery plans for CCPs that belong to a group*

1. Where the parent undertaking of the group to which a CCP belongs is an institution as defined in point 23 of Article 2(1) of Directive 2014/59/EU or an entity referred to in point (c) or (d) of Article 1(1) of that Directive, the competent authority, as referred to in point 21 of Article 2(1) of that Directive, shall require the parent undertaking to submit a recovery plan for the group in accordance with that Directive. That competent authority shall submit the recovery plan for the group to the competent authority of the CCP.

Where the parent undertaking of the group to which a CCP belongs is not an institution or entity referred to in the first subparagraph and where **necessary** in order to **assess all elements** of Section A of the Annex, competent authorities may **■** in accordance with the procedure laid down in Article 10 of this Regulation, require the **CCP** to submit a plan for the recovery of the CCP **taking into account all relevant elements related to** the group

*structure. Such a* request shall be reasoned and shall be notified in writing to the CCP and its parent undertaking.

2. Where the parent undertaking submits the recovery plan in accordance with *the first subparagraph of* paragraph 1, the provisions on the recovery of the CCP shall constitute a distinct part of that recovery plan and shall comply with the requirements of this Regulation and the CCP *may* not be required to prepare an individual recovery plan.
3. The competent authority of the CCP shall assess in accordance with Article 10 the provisions on the recovery of the CCP, and, where relevant, shall consult the competent authority of the group.

## *Article 12*

### *Coordination procedure for recovery plans*

1. The *supervisory* college shall reach a joint decision on all of the following issues:
  - (a) the review and assessment of the recovery plan;
  - (b) the application of the measures referred to in Article 9(6), (7), (8) and (9);
  - (c) whether a recovery plan is to be drawn up by parent undertakings in accordance with Article 11(1).
2. The college shall reach a joint decision on the issues referred to in points (a) and (b) within four months of the date of the transmission of the recovery plan by the competent authority.

The college shall reach a joint decision on the issue referred to in point (c) within four months of the date that the competent authority decides to request the parent undertaking to prepare a group plan.

ESMA may, at the request of a competent authority within the supervisory college, assist the *supervisory* college in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1095/2010.

3. Where, after four months from the date of transmission of the recovery plan, the supervisory college has failed to reach a joint decision on the issues referred to in points (a) and (b) of paragraph 1, the competent authority of the CCP shall make its own decision.

The competent authority of the CCP shall make the decision referred to in the first subparagraph taking into account the views of the other college members expressed during the four-month period. The competent authority of the CCP shall notify in writing that decision to the CCP, to its parent undertaking, where relevant, and to the other members of the supervisory college.

4. Where, by the end of that four-month period, *any group of members* of the supervisory college *representing a simple majority of the members of this college*, has referred to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010 a matter in relation to the assessment of recovery plans and implementation of the measures pursuant to points (a), (b) and (d) of Article 10(9) of this Regulation, the competent authority of the CCP shall await the decision taken by ESMA in accordance with Article 19(3) of Regulation (EU) No 1095/2010 and decide in accordance with the decision of ESMA.
5. The four-month period shall be deemed to be the conciliation phase within the meaning of Regulation (EU) No 1095/2010. ESMA shall take its decision within one month from the referral of the matter to it. The matter shall not be referred to ESMA after the end of the four month time period or after a joint decision has been reached. In the absence of an ESMA decision within one month, the decision of the competent authority of the CCP shall apply.

## SECTION 2

### RESOLUTION PLANNING

#### *Article 13*

#### *Resolution plans*

1. The resolution authority of the CCP shall, after consultation with the competent authority *and ESMA* and in coordination with the resolution college, in accordance with the procedure set out in Article 15, draw up a resolution plan for each CCP.



2. The resolution plan shall provide for the resolution actions that the resolution authority may take where the CCP meets the conditions for resolution referred to in Article 22.
  3. The resolution plan shall take into consideration at least the following:
    - (a) the CCP's failure due to:
      - i. *default events*;
      - ii. *non-default events*;
      - iii. broader financial instability or system wide events;
    - (b) the impact that the implementation of the resolution plan would have on clearing members and their clients including where clearing members are likely to be subject to recovery measures or resolution actions in accordance with Directive [2014/59/EU](#), on any linked FMIs, financial markets served by the CCP and the financial system as a whole;
    - (c) the manner and the circumstances under which a CCP may apply for the use of central bank facilities and the identification of the assets that would be expected to qualify as collateral.
  4. The resolution plan shall not assume any of the following:
    - (a) public financial support;
    - (b) central bank emergency liquidity assistance;
    - (c) central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.
- 4a. *The resolution plan shall make prudent assumptions regarding the financial resources available as resolution tools that may be required to achieve the resolution objectives and the resources that it expects to be available in accordance with the CCPs rules and***

*arrangements at the time of entering into resolution. Those prudent assumptions shall be based on the findings of latest stress tests carried out in accordance with Article 5(2a) and still be valid in scenarios of extreme market conditions compounded by the recovery or resolution of one or more other CCPs, including the default of one or several additional clearing members beyond the two clearing members to which the CCP has the largest exposures.*

5. Resolution authorities shall review resolution plans and where appropriate update them, at least annually and in any case after changes to the legal or organisational structure of the CCP, its business or financial situation or any other change that materially affects the effectiveness of the plan.

The CCPs and the competent authorities shall promptly inform the resolution authorities of any such change.

- 5a. The resolution plan shall clearly distinguish, in particular wherever practicable by way of separate sections, between scenarios based on the circumstances referred to in, respectively, points i), ii) and iii) of point a) of paragraph 3.*

6. The resolution plan shall specify the circumstances and different scenarios for using the resolution tools and exercising the resolution powers. The resolution plan shall include the following, quantified whenever appropriate and possible:

- (a) a summary of the key elements of the plan differentiating between default events, non-default events and a combination of the two;
- (b) a summary of the material changes to the CCP that have occurred since the resolution plan was last updated;
- (c) a demonstration of how the CCP's critical functions could be legally and economically separated, to the extent necessary, from its other functions so as to ensure their continuity upon entry into all possible forms of resolution, including failure, of the CCP;

- (d) an estimation of the timeframe for *carrying out* each material aspect of the plan, *including for replenishing the CCP's financial resources*;
- (e) a detailed description of the assessment of resolvability carried out in accordance with Article 16;
- (f) a description of any measures required pursuant to Article 17 to address or remove impediments to resolvability identified as a result of the assessment carried out in accordance with Article 16;
- (g) a description of the processes for determining the value and marketability of the critical functions and assets of the CCP;
- (h) a detailed description of the arrangements for ensuring that the information required pursuant to Article 14 is up to date and available to the resolution authorities at all times;
- (i) an explanation as to how resolution actions could be financed without the assumption of the elements referred to in paragraph 4;
- (j) a detailed description of the different resolution strategies that could be applied according to the different possible scenarios and their related timeframes;
- (k) a description of critical interdependencies between the CCP and other market participants, *including intragroup interdependencies, interoperability arrangements and links with other FMI, together with the ways of addressing such interdependencies*;
- (l) a description of the different options to ensure:
  - i. access to payments and clearing services and other infrastructures;
  - ii. timely settlement of obligations due to clearing members and their clients and any linked FMIs;

- iii. access of clearing members and their clients to securities or cash accounts provided by the CCP and securities or cash collateral posted to and held by the CCP that is owed to such participants on a transparent and non-discriminatory basis;
  - iv. continuity in the operations of links between the CCP and other FMIs;
  - v. the portability of the assets and positions of the clients **and indirect clients** of clearing members, as **set out** in Article 39 of Regulation (EU) No 648/2012.;
  - vi. preservation of the licenses, authorisations, recognitions and legal designations of a CCP where necessary for the continued performance of the CCP's critical functions including its recognition for the purposes of the application of the relevant settlement finality rules and the participation in or links with other FMIs;
- (la) a description of the approach that the resolution authority plans to follow in order to determine the scope and value of any contracts to be terminated in accordance with Article 29;**
- (m) an analysis of the impact of the plan on the employees of the CCP, including an assessment of any associated costs, and a description of envisaged procedures to consult with staff during the resolution process, taking into account any national rules and systems for dialogue with social partners;
- (n) a plan for communicating with the media and the public **so as to be as transparent as possible;**
- (o) a description of essential operations and systems for maintaining the continuous functioning of the CCP's operational processes.
- (oa) a description of the arrangements for exchanging information within the resolution college prior to and during resolution, in line with the written arrangements and procedures for the functioning of the resolution colleges referred to in paragraph 1 of Article 4.**

The information referred to in point (a) of paragraph 6 shall be disclosed to the CCP concerned. The CCP may express its opinion in writing on the resolution plan to the resolution authority. That opinion shall be included in the plan.

7. Resolution authorities may require CCPs to provide them with detailed records of the contracts referred to in Article 29 of Regulation (EU) No 648/2012 to which it is a party. Resolution authorities may specify a time limit to provide those records and may specify different time limits for different types of contracts.

**7a. *The Resolution Authority of the CCP shall cooperate closely with the Resolution Authorities of the CCP's Clearing Member's with the aim of ensuring that there are no impediments to resolution.***

8. ESMA, after consulting with the ESRB and taking into account the relevant provisions of Commission Delegated Regulation (EU) -2016 supplementing Directive 2014/59/EU with regard to regulatory technical standards adopted on the basis of Article 10(9) of Directive 2014/59/EU, ***and respecting the principle of proportionality*** shall develop draft regulatory technical standards further specifying the contents of the Resolution Plan in accordance with paragraph 6.

***When developing the draft regulatory technical standards, ESMA shall take into due consideration the level of differentiation between national legal frameworks, in particular in the area of insolvency law, across the Union, as well the differing sizes and nature of CCPs established in the Union.***

ESMA shall submit those draft regulatory technical standards to the Commission by [PO: please, insert date: twelve months from the date of entry into force of this Regulation].

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*

### *CCPs' duty to cooperate and provide information*

CCPs shall cooperate as necessary in the drawing up of resolution plans and provide the resolution authorities, either directly or through the competent authority, with all the information necessary to draw up and implement those plans, including the information and analysis specified in Section B of the Annex.

Competent authorities shall provide resolution authorities with any information referred to in the first subparagraph which is already available to them.

***A CCP shall exchange information on a timely manner with competent authorities and ESMA in order to facilitate the assessment of the risk profiles of the CCP and the interconnectedness with other financial market infrastructures, other financial institutions and with the financial system in general as defined in Articles 9 and 10 of this Regulation.***

## *Article 15*

### *Coordination procedure for resolution plans*

1. The resolution college shall reach a joint decision regarding the resolution plan and any changes thereto within a period of four months of the date of the transmission of that plan by the resolution authority as referred to in paragraph 2.
2. The resolution authority shall transmit to the resolution college a draft resolution plan, the information provided in accordance with Article 14 and any additional information relevant to the resolution college.

The resolution authority shall ensure that ESMA is provided with all the information that is relevant to its role in accordance with this Article.

3. The resolution authority may decide to involve third country authorities in the drawing up and review of the resolution plan, provided that they meet the confidentiality requirements laid down in Article 71 and are from jurisdictions in which any of the following entities are established:
  - i. the CCP's parent undertaking, where applicable;

- ii. clearing members *to which* the CCP *has significant exposure*;
- iii. the CCP's subsidiaries, where applicable;
- iv. other providers of critical services to the CCP;

*iva. a CCP with interoperable arrangements with the CCP.*

4. ESMA may, at the request of a resolution authority, assist the resolution college in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1095/2010.
5. Where, after four months from the date of transmission of the resolution plan, the **resolution** college has failed to reach a joint decision, the resolution authority shall make its own decision on the resolution plan. The resolution authority shall make its decision taking into account the views of the other **resolution** college members expressed during the four-month period. The resolution authority shall notify in writing the decision to the CCP, to its parent undertaking where relevant, and to the other members of the **resolution** college.
6. Where, by the end of that four-month period, *any group of members* of the supervisory college *representing a simple majority of the members of this college*, has referred to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010 a matter in relation to the resolution plan, the resolution authority of the CCP shall await any decision that ESMA may take in accordance with Article 19(3) of that Regulation and take its decision in accordance with the decision of ESMA.

The four-month time period shall be deemed to be the conciliation phase within the meaning of Regulation (EU) No 1095/2010. ESMA shall take its decision within one month from the referral of the matter to it. The matter shall not be referred to ESMA after the end of the four month time period or after a joint decision has been reached. In the absence of an ESMA decision within one month, the decision of the resolution authority shall apply.

7. Where a joint decision is taken pursuant to paragraph 1 and any resolution authority considers under paragraph 6 that the subject matter of the disagreement impinges on the

fiscal responsibilities of its Member State, the resolution authority of the CCP shall initiate a reassessment of the resolution plan.

## CHAPTER II

### *Resolvability*

#### *Article 16*

#### *Assessment of resolvability*

1. The resolution authority, in cooperation with the resolution college in accordance with Article 17, shall assess the extent to which a CCP is resolvable without assuming any of the following:
  - (a) public financial support;
  - (b) central bank emergency liquidity assistance;
  - (c) central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.
2. A CCP shall be deemed resolvable where the resolution authority considers it feasible and credible to either liquidate it under normal insolvency proceedings or to resolve it using the resolution tools and exercising the resolution powers while ensuring the continuity of the CCP's critical functions and avoiding ***any use of public funds and*** to the maximum extent possible any significant adverse effect on the financial system.

The adverse effects referred to in the first subparagraph shall include broader financial instability or system wide events in any Member State.

The resolution authority shall notify ESMA in a timely manner where it considers a CCP not to be resolvable.

3. Upon request by the resolution authority, a CCP shall demonstrate that:
  - (a) there are no impediments to the reduction of the value of instruments of ownership following the exercise of resolution powers, regardless of whether outstanding



contractual arrangements or other measures in the CCP's recovery plan have been fully exhausted;

(b) the contracts of the CCP with clearing members or third parties do not enable those clearing members or third parties to successfully challenge the exercise of resolution powers by a resolution authority or otherwise avoid being subject to those powers.

4. For the purposes of the assessment of resolvability referred to in paragraph 1, the resolution authority shall, as relevant, examine the matters specified in Section C of the Annex.

**4a. *ESMA shall adopt guidelines to promote the convergence of supervisory and resolution practices regarding the application of section C of the Annex by ... [18 months after the entry into force of this Regulation].***

5. The resolution authority ***in cooperation with the resolution college*** shall make the resolvability assessment at the same time as drawing up and updating the resolution plan in accordance with Article 13.

#### *Article 17*

##### *Addressing or removing impediments to resolvability*

1. Where, following the assessment in Article 16 ***and after consulting the resolution college***, the resolution authority ***concludes*** that there are substantive impediments to the resolvability of a CCP, the resolution authority, in cooperation with the competent authority, shall prepare and submit a report to the CCP and to the resolution college.

The report referred to in the first subparagraph shall analyse the ■ impediments to the effective use of the resolution tools and the exercise of the resolution powers in relation to the CCP, consider their impact on the business model of the CCP and recommend targeted measures to remove those ■ ***where possible***.

2. The requirement for resolution colleges to reach a joint decision on resolution plans laid down in Article 15 shall be suspended following the submission of the report referred to in paragraph 1 until the measures to remove the substantive impediments to resolvability have been accepted by the resolution authority pursuant to paragraph 3 of this Article or alternative measures have been decided pursuant to paragraph 4 of this Article.

3. Within four months of the date of receipt of the report submitted in accordance with paragraph 1, the CCP shall propose to the resolution authority possible measures to address or remove the substantive impediments identified in the report. The resolution authority shall communicate to the resolution college any measure proposed by the CCP. The resolution authority and resolution college shall assess, in accordance with point (b) of Article 18(1), whether those measures effectively address or remove those impediments.
4. Where the resolution authority, ***taking into account the opinion of*** the resolution college, ***concludes*** that the measures proposed by a CCP in accordance with paragraph 3 would not effectively reduce or remove the impediments identified in the report, the resolution authority shall identify alternative measures which it shall communicate to the resolution college for joint decision in accordance with Article 18.

The alternative measures referred to in the first subparagraph shall take into account the following:

- (a) the threat to financial stability of those impediments to the resolvability of a CCP;
- (b) the effect of the alternative measures on the particular CCP, its clearing members and their clients, any linked FMI and the internal market;
- (ba) the effects on the provision of integrated clearing services for different products and portfolio margining across asset classes.***

For the purposes of point (b) of the second subparagraph, the resolution authority shall consult the competent authority, ***the supervisory college*** and the resolution college and, where appropriate, the ***ESRB***.

5. The resolution authority shall, in accordance with Article 18, notify the CCP in writing, either directly or indirectly through the competent authority, of the alternative measures to take in order to achieve the objective of removing impediments to resolvability. The resolution authority shall justify why the measures proposed by the CCP would not be able to remove the impediments to resolvability and how the alternative measures would be effective in doing so.
6. The CCP shall propose within one month a plan ***of how it intends to implement*** the alternative measures ***within the period of time established by the resolution authority***.

7. **Only** for the purposes of paragraph 4, the resolution authority *in coordination with the competent authority* may:
- (a) require the CCP to revise or draw up service agreements, whether intra-group or with third parties, to cover the provision of critical functions;
  - (b) require the CCP to limit its maximum individual and aggregate uncovered exposures;
  - (c) require the CCP to make changes to how it collects and holds margin pursuant to Article 41 of Regulation (EU) No 648/2012;
  - (d) require the CCP to make changes to the composition and number of its default funds referred to in Article 42 of Regulation (EU) No 648/2012;
  - (e) impose on the CCP specific or regular additional information requirements;
  - (f) require the CCP to divest *itself of* specific assets;
  - (g) require the CCP to limit or cease specific existing or proposed activities;
  - (h) require the CCP to make changes to its recovery plan, ***operating rules and other contractual arrangements***;
  - (i) restrict or prevent the development of new or existing business lines or provision of new or existing services;
  - (j) require changes to legal or operational structures of the CCP or any group entity directly or indirectly under its control to ensure that critical functions may be legally and operationally separated from other functions through the application of resolutions tools;
  - (k) require the CCP to set up a parent financial holding company in a Member State or a Union parent financial holding company;
  - (l) require the CCP **■** to issue liabilities that can be written down and converted or to set aside other resources to increase the capacity for loss absorption, recapitalisation and the replenishment of pre-funded resources;

- (m) require the CCP █ to take other steps to enable capital, other liabilities and contracts to be able to absorb losses, to recapitalise the CCP or to replenish pre-funded resources. *Actions considered may include* in particular *attempting* to renegotiate any liability *the CCP* has issued or to revise contractual terms, with a view to ensuring that any decision of the resolution authority to write down, convert or restructure that liability, instrument or contract would be effected under the law of the jurisdiction governing that liability or instrument;
- (n) █
- (na) *restrict or suspend interoperability links of the CCP where such a restriction or suspension is necessary in order to prevent the adverse effect that the application of the recovery tools and the exercise of the resolution powers could have on interoperable CCPs.*

#### *Article 18*

##### *Coordination procedure to address or remove impediments to resolvability*

1. The resolution college shall reach a joint decision regarding:
  - (a) the identification of the material impediments to resolvability pursuant to Article 16(1);
  - (b) the assessment of the measures proposed by the CCP pursuant to Article 17(3), as necessary;
  - (c) the alternative measures required pursuant to Article 17(4).
2. The joint decision on the identification of material impediments to resolvability referred to in point (a) of paragraph 1 shall be adopted within four months of the submission of the report referred to in Article 17(1) to the resolution college.

The joint decision referred to in points (b) and (c) of paragraph 1 shall be adopted within four months of submission of the CCP's proposed measures to remove impediments to resolvability.

The joint decisions referred to in paragraph 1 shall be reasoned and notified in writing by the resolution authority to the CCP and, where relevant, its parent undertaking.

ESMA may, at the request of the resolution authority, assist the resolution college in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1095/2010.

3. Where, after four months from the date of transmission of the report provided for in Article 17(1), the **resolution** college has failed to adopt a joint decision, the resolution authority shall take its own decision on the appropriate measures to be taken in accordance with Article 17(5). The resolution authority shall take its decision having taken into account the views of the other **resolution** college members expressed during the four-month period.

The resolution authority shall notify the decision to the CCP, to its parent undertaking where relevant, and to the other members of the **resolution** college in writing.

4. Where, by the end of that four-month period, **any group of members** of the supervisory college **representing a simple majority of the members of this college**, has referred to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010 a matter referred to in points (j), (k) or (n) of Article 17(7), the resolution authority of the CCP shall defer its decision and await any decision that ESMA may take in accordance with Article 19(3) of that Regulation. In that case, the resolution authority shall take its decision in accordance with the decision of ESMA.

The four-month time period shall be deemed to be the conciliation phase within the meaning of Regulation (EU) No 1095/2010. ESMA shall take its decision within one month from the referral of the matter to it. The matter shall not be referred to ESMA after the end of the four month time period or after a joint decision has been reached. In the absence of an ESMA decision within one month, the decision of the resolution authority shall apply.

**TITLE IV**  
**EARLY INTERVENTION**

*Article 19*

*Early intervention measures*

1. Where a CCP infringes or is likely to infringe the prudential requirements of Regulation (EU) No 648/2012, ***or poses a risk to the financial stability of the global financial system, the Union financial system, or parts of either thereof***, or where the competent authority has determined that there are other indications of ***developments*** that could affect the operations of the CCP, in particular, its ability to provide clearing services, the competent authority may:
  - (a) require the CCP to update the recovery plan in accordance with Article 9, where the circumstances that required early intervention are different from the assumptions set out in the initial recovery plan;
  - (b) require the CCP to implement one or more of the arrangements or measures set out in the recovery plan within a specific timeframe. Where the plan is updated pursuant to point (a), those arrangements or measures shall include any updated arrangements or measures;
  - (c) require the CCP to identify the causes of the infringement or likely infringement as mentioned in paragraph 1 and draw up an action programme, including suitable measures and timeframes;
  - (d) require the CCP to convene a meeting of its shareholders or, if the CCP fails to comply with that requirement, convene the meeting itself. In both cases the competent authority shall set the agenda, including the decisions to be considered for adoption by the shareholders;
  - (e) require one or more members of the board or senior management to be removed or replaced where any of those persons is found unfit to perform their duties pursuant to Article 27 of Regulation (EU) No 648/2012;
  - (f) require changes to the business strategy of the CCP;

- (g) require changes to the legal or operational structures of the CCP;
- (h) provide the resolution authority with all the information necessary to update the CCP's resolution plan in order to prepare for the possible resolution of the CCP and the valuation of its assets and liabilities in accordance with Article 24, including any information required through on-site inspections;
- (i) require, where necessary and in accordance with paragraph 4, the implementation of the CCP's recovery measures;
- (j) require the CCP to abstain from the implementation of certain recovery measures where the competent authority has determined that the implementation of those measures may have an adverse effect on financial stability *or unduly harm the interests of clients*;
- (k) require the CCP to replenish its financial resources in a timely manner;
- (ka) *exceptionally and on a one-off basis allow clients of clearing members to participate directly in auctions, while waiving prudential requirements pursuant to Chapter 3 of Title IV of Regulation (EU) 648/2012 other than margin requirements as set out in Article 41 of Regulation (EU) 648/2012 for those clients. The clients' clearing members shall inform clients comprehensively about the auction and facilitate the bidding process for clients. Required margin payments by the clients shall be passed through a non-defaulting clearing member;***
- (kb) *restrict or prohibit any remuneration of equity and instruments treated as equity to the fullest extent possible without triggering outright default, including dividend payments and buybacks by the CCP, and it may restrict, prohibit or freeze any payments of variable remuneration under Directive 2013/36/EU and EBA Guidelines EBA/GL/2015/22, of discretionary pension benefits or of severance packages to management.***

2. For each of those measures, the competent authority shall set an appropriate deadline and evaluate the effectiveness of those measures once they have been taken.

**2a. National insolvency law rules relating to the voidability or unenforceability of legal acts detrimental to creditors shall not apply to early intervention measures taken by the competent authority in accordance with this Regulation.**

3. The competent authority may only apply the measures in points (a) to (k) of paragraph 1 after taking account of the impact of those measures in other Member States where the CCP operates or provides services, in particular where the CCP's operations are critical or important for local financial markets, including the places in which clearing members linked trading venues and FMIs are established.

4. The competent authority may only apply the measure in point (i) of paragraph 1 where that measure is in the public interest and is necessary to achieve any of the following objectives:

(a) maintain the financial stability of the Union;

(b) maintain the continuity of the critical *functions* of the CCP ***on a transparent and non-discriminatory basis***;

(c) maintain and enhance the financial resilience of the CCP.

The competent authority shall not apply the measure in point (i) of paragraph 1 in relation to measures involving the transfer of property, rights or liabilities of another CCP.

5. Where a CCP has initiated its default waterfall in accordance with Article 45 of Regulation (EU) No 648/2012, it shall inform the competent authority ***and the resolution authority*** without undue delay and explain whether that event reflects weaknesses or problems of that CCP.

6. Where the conditions referred to in paragraph 1 are met, the competent authority shall notify ESMA and the resolution authority and consult the *supervisory* college.

Following those notifications and the consultation of the *supervisory* college, the competent authority shall decide whether to apply any of the measures provided for in paragraph 1. The competent authority shall notify the decision on the measures to be taken to the *supervisory* college, the resolution authority and ESMA.



7. The resolution authority, following the notification of the first subparagraph of paragraph 6, may require the CCP to contact potential purchasers in order to prepare for its resolution, subject to the conditions laid down in Article 41 and the confidentiality provisions laid down in Article 71 *as well as to the framework on market soundings laid down in Article 11 of Regulation (EU) No 596/2014 and in relevant delegated and implementing legislation.*

#### *Article 20*

##### *Removal of senior management and board*

Where there is a significant deterioration in the financial situation of a CCP, or the CCP infringes its legal requirements, including its operating rules, and other measures taken in accordance with Article 19 are not sufficient to reverse that situation, competent authorities may require total or partial removal of the senior management or board of the CCP.

The appointment of the new senior management or board shall be done in accordance with Article 27 of Regulation (EU) No 648/2012 and be subject to the approval or consent of the competent authority.

### **TITLE IVA**

#### **RECOUPMENT OF LOSSES**

##### *Article 20a*

*Issuance of instruments of ownerships in future profits to clearing members and clients that have suffered losses*

1. *Where a CCP in Recovery, caused by a non-default event has applied the arrangements and measures to reduce the value of any gains payable by the CCP to non-defaulting clearing members and their clients set out in its recovery plan pursuant to point (l)(ii)(b) of Article 9(7b) which go beyond the default waterfall set out in Article 45 of Regulation (EU) 648/2012, on non-defaulting clearing members and their clients, and has not entered Resolution as a result, the Competent Authority of the CCP may, once a matched book has been restored, require the CCP to recompense the participants for their loss,*

*either through cash payments or, where appropriate, may require the CCP to issue instruments of ownership in future profits of the CCP.*

*The value of instruments of ownership in future profits of the CCP issued to each affected non-defaulting clearing member, which must be passed on to clients in a suitable form, shall be proportionate to its loss and shall be based on a valuation conducted in accordance with Article 24(3). These instruments of ownership shall entitle the possessor to receive payments from the CCP on an annual basis until the loss has been recouped in full up to an appropriate maximum number of years from the date of issuance. An appropriate maximum share of the CCP's annual profits shall be used towards payments relating to these instruments of ownership.*

- 2. This Article does not diminish the responsibility of clearing members to take losses which go beyond the default waterfall.*
- 3. ESMA shall develop draft regulatory technical standards to specify the order in which recompense must be paid, the appropriate maximum number of years and the appropriate maximum share of the CCP's annual profits referred to in the second subparagraph of paragraph 1.*

*ESMA shall submit those draft regulatory technical standards to the Commission by [XXX after entry into force of this Regulation].*

*The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.*

## TITLE V

### RESOLUTION

#### CHAPTER I

#### Objectives, conditions and general principles

##### *Article 21*

##### *Resolution objectives*

1. When using the resolution tools and exercising the resolution powers, the resolution authority shall have regard to all the following resolution objectives and shall balance them as appropriate to the nature and circumstances of each case:
  - (a) to ensure the continuity of the CCP's critical functions, in particular:
    - (i) the timely settlement of the CCP's obligations to its clearing members and their clients;
    - (ii) continuous access of clearing members to securities or cash accounts provided by the CCP and securities or cash collateral held by the CCP on behalf of those clearing members;
  - (b) to ensure the continuity of the links with other FMIs which, if disrupted, would have a material negative impact on financial stability or the timely completion of payment, clearing, settlement and ***record-keeping*** functions;
  - (c) to avoid a significant adverse effect on the financial system, in particular by preventing contagion of financial distress ***to the CCP's clearing members, their clients or to the wider financial system, including other FMIs, and by maintaining market and public confidence;***
  - (d) to protect public funds by minimising reliance on public financial support ***and potential losses for taxpayers;***

- (e) to minimise the cost of resolution on all affected stakeholders and avoid destruction of the CCP's value, ***unless such destruction is necessary to achieve the resolution objectives.***
2. The board and senior management of a CCP under resolution shall provide the resolution authority with all necessary assistance for the achievement of the resolution objectives.

*Article 22*

*Conditions for resolution*

1. The resolution authority shall take a resolution action in relation to a CCP provided that all of the following conditions are met:
- (a) the CCP is failing or is likely to fail as determined by any of the following:
    - i) the competent authority, after consulting the resolution authority;
    - ii) the resolution authority after consulting the competent authority, where the resolution authority has the necessary tools for reaching that conclusion;
  - (b) there is no reasonable prospect that any alternative private sector measures or supervisory action, including early intervention measures taken, would prevent the failure of the CCP within a reasonable timeframe, having regard to all relevant circumstances; ***and***
  - (c) a resolution action is necessary in the public interest to achieve the resolution objectives ***where implementing the CCP's contractual loss-allocation arrangements or, where such arrangements are not comprehensive and*** winding down the CCP under normal insolvency proceedings would not meet those objectives to the same extent.

For the purposes of point (a)(ii), the competent authority shall provide ***the resolution authority*** without delay and ***on its own initiative with*** any information that ***may give an indication that the CCP is failing or likely to fail. The competent authority shall also***

*provide* the resolution authority, *upon request* with *any other information needed* in order to perform its assessment.

2. For the purposes of point (a) of paragraph 1, a CCP shall be deemed to be failing or likely to fail where one or more of the following circumstances apply:
- (a) the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of Regulation (EU) No 648/2012;
  - (b) the CCP is unable, or is likely to be unable, to provide a critical function;
  - (c) the CCP is unable, or is likely to be unable, to restore its viability through the implementation of its recovery measures;
  - (d) the CCP is unable, or is likely to be unable, to pay its debts or other liabilities as they fall due;
  - (e) the CCP requires ■ public financial support.

For the purposes of point (e) *a measure shall not be considered to be* public financial support *where* all of the following conditions *are met*:

- i) it takes the form of a State guarantee to back liquidity facilities provided by a central bank according to the central bank's conditions, or the form of a State guarantee of newly issued liabilities;
- ia) none of the circumstances referred to in points (a), (b), (c) or (d) of this paragraph is present at the time the public financial support is granted*
- ib) the State guarantees referred to in point (i) are required to remedy a serious disturbance in the economy of a Member State and preserve financial stability*

- ii) the State guarantees referred to in point (i) are *confined to solvent CCPs*, conditional on final approval under the Union State aid framework, are *of a precautionary and temporary nature*, proportionate to remedy the consequences of the serious disturbance *referred to in paragraph ib)* and are not used to offset losses that the CCP has incurred or is likely to incur in the future;

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3. The resolution authority may also take a resolution action where it considers that the CCP applies or intends to apply recovery measures which could prevent the CCP's failure but cause significant adverse effects to the financial system.

**3a. *The decision taken by a resolution authority deeming a CCP failing or likely to may only be challenged on the basis that this decision was arbitrary and unreasonable at the time of the decision, based on the information then readily available.***

4. ESMA shall adopt guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail by *[PO, please insert date 12 months from entry into force of this Regulation]*, ***if and where appropriate taking into consideration the differing sizes and nature of CCPs established in the Union.***

***When adopting those guidelines***, ESMA shall take into account the guidelines issued in accordance with Article 32(6) of Directive 2014/59/EU.

### *Article 23*

#### *General principles regarding resolution*

The resolution authority shall take all appropriate measures to use the resolution tools referred to in Article 27 and exercise the resolution powers referred to in Article 48 in accordance with the following principles:

- (a) all contractual obligations and other arrangements in the CCP's recovery plan are enforced **■**, to the extent that they have not been exhausted before entry into resolution, unless, *in extreme circumstances*, the resolution authority determines that the use of resolution tools or the exercise of resolution powers is more appropriate to achieve the resolution objectives in a timely manner;
- (b) the shareholders of the CCP under resolution bear first losses following the enforcement of all obligations and arrangements referred to in point (a) in accordance with that point;
- (c) creditors of the CCP under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings, save as expressly provided otherwise in this Regulation;
- (d) the CCP's creditors of the same class are treated in an equitable manner;
- (e) none of the CCP's *shareholders*, creditors *and clearing members or their clients* incur higher losses than they would have incurred *in accordance with Article 60*;

**■**

- (f) the board and senior management of the CCP under resolution are replaced, except where the resolution authority considers that the retention of the board and senior management, in whole or in part, is necessary for the achievement of the resolution objectives;
- (g) resolution authorities inform and consult employee representatives in accordance with their national laws or practice;
- (h) where a CCP is part of a group, resolution authorities take account of the impact on other group entities and on the group as a whole.

## CHAPTER II

### Valuation

#### *Article 24*

#### *Objectives of valuation*

1. Resolution authorities shall ensure that any resolution action is taken on the basis of a valuation ensuring a fair, prudent and realistic assessment of the assets, liabilities, rights and obligations of the CCP.
2. Before the resolution authority places a CCP under resolution, it shall ensure that a first valuation is carried out to determine whether the conditions for resolution under Article 22(1) are met.
3. After the resolution authority has decided to place a CCP under resolution, it shall ensure that a second valuation is carried out to:
  - (a) inform the decision on the appropriate resolution action to be taken;
  - (b) ensure that any losses on the assets and rights of the CCP are fully recognised at the moment the resolution tools are used;
  - (c) inform the decision on the extent of the cancellation or dilution of instruments of ownership and the decision on the value and number of instruments of ownership issued or transferred as a result of the exercise of resolution powers;
  - (d) inform the decision on the extent of the write down or conversion of any unsecured liabilities, including debt instruments;
  - (e) where the loss and position allocation tools are used, inform the decision on the extent of losses to be applied against affected creditors' claims, outstanding obligations or positions in relation to the CCP *and on the extent and necessity of a resolution cash call*;
  - (f) where the bridge CCP tool is used, inform the decision on the assets, liabilities, rights and obligations or instruments of ownership that may be transferred to the bridge CCP and the decision on the value of any consideration that may be paid to the CCP under resolution or, where relevant, to the holders of the instruments of ownership;
  - (g) where the sale of business tool is used, inform the decision on the assets, liabilities, rights and obligations or instruments of ownership that may be transferred to the third party purchaser and to inform the resolution authority's understanding of what constitutes commercial terms for the purposes of Article 40;



*(ga) the price of any termination of contracts by the resolution authority shall be based, insofar as possible, upon a fair market price determined on the basis of the CCP's rules and arrangements, and only substituted for another price discovery method if deemed essential by the resolution authority.*

For the purposes of point (d), the valuation shall take into account any losses that would be absorbed by the enforcement of any outstanding obligations of the clearing members or other third parties owed to the CCP and the level of conversion to be applied to debt instruments.

4. The valuations referred to in paragraphs 2 and 3 may be subject to an appeal in accordance with Article 72 only together with the decision to use a resolution tool or to exercise a resolution power.

#### *Article 25*

##### *Requirements for valuation*

1. The resolution authority shall ensure that the valuations referred to in Article 24 are carried out:
  - (a) by a person independent from any public authority and from the CCP;
  - (b) by the resolution authority, where those valuations cannot be carried out by a person as referred to in point (a).
2. The valuations referred to in Article 24 shall be considered definitive where they are carried out by the person referred to in point (a) of paragraph 1 and all the requirements laid down in this Article are fulfilled.
3. Without prejudice to the Union State aid framework, where applicable, a definitive valuation shall be based on prudent assumptions and shall not assume any potential provision of ■ public financial support, any central bank emergency liquidity assistance or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms to the CCP from the point in time at which resolution action is taken. The valuation shall also take account of the potential recovery of any reasonable expenses incurred by the CCP under resolution in accordance with Article 27(9).

4. A definitive valuation shall be supplemented by the following information held by the CCP:
- (a) an updated balance sheet and a report on the financial position of the CCP, including the remaining available prefunded resources and outstanding financial commitments;
  - (b) the records of cleared contracts as referred to in Article 29 of Regulation (EU) No 648/2012;
  - (c) any information on the market and accounting values of its assets, liabilities and positions, including relevant claims and outstanding obligations owed or due to the CCP.
5. A definitive valuation shall indicate the subdivision of the creditors in classes in accordance with their priority levels under the applicable insolvency law. It shall also include an estimate of the treatment that each class of shareholders and creditors would have been expected to receive in application of the principle specified in point (e) of Article 23.

The estimate referred to in the first subparagraph shall not prejudice the valuation referred to in Article 61.

6. ESMA, taking into account any regulatory technical standards drafted in accordance with Article 36(14) and (15) of Directive 2014/59/EU, shall develop draft regulatory technical standards to specify:
- (a) the circumstances in which a person is deemed to be independent from both the resolution authority and from the CCP for the purposes of paragraph 1 of this Article;
  - (b) the methodology for assessing the value of the assets and liabilities of the CCP;
  - (c) the separation of the valuations under Articles 24 and 61.

ESMA shall submit those draft regulatory technical standards to the Commission by *[PO: insert date: within 12 months of the entry into force of this Regulation]*.

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 26*

### *Provisional valuation*

1. The valuations referred to in Article 24 that do not meet the requirements laid down in Article 25(2) shall be considered to be provisional valuations.

Provisional valuations shall include a buffer for additional losses and an appropriate justification for that buffer.

2. Where resolution authorities take resolution action on the basis of a provisional valuation, they shall ensure that a definitive valuation is carried out as soon as practicable.

The resolution authority shall ensure that the definitive valuation referred to in the first subparagraph:

- (a) allows for full recognition of any losses of the CCP in its books;
- (b) informs a decision to write back creditors' claims or to increase the value of the consideration paid, in accordance with paragraph 3.

3. Where the definitive valuation's estimate of the net asset value of the CCP is higher than the provisional valuation's estimate of the net asset value of the CCP, the resolution authority may:

- (a) increase the value of the claims of affected creditors which have been written down or restructured;
- (b) require a bridge CCP to make a further payment of consideration in respect of the assets, liabilities, rights and obligations to the CCP under resolution or, as the case may be, in respect of the instruments of ownership to the owners of those instruments.

4. ESMA, taking into account any regulatory technical standards drafted in accordance with Article 36(15) of Directive 2014/59/EU, shall develop draft regulatory technical standards to specify, for the purposes of paragraph 1 of this Article, the methodology for calculating the buffer for additional losses to be included in provisional valuations.

ESMA shall submit those draft regulatory technical standards to the Commission by [*PO: insert date: within 12 months of the entry into force of this Regulation*].

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.

## **CHAPTER III**

### **Resolution tools**

#### **SECTION 1**

#### **GENERAL PRINCIPLES**

##### *Article 27*

##### *General provisions on resolution tools*

1. Resolution authorities shall take resolution actions referred to in Article 21 by using any of the following resolution tools individually or in any combination:
  - (a) the position and loss allocation tools;
  - (b) the write-down and conversion tool;
  - (c) the sale of business tool;
  - (d) the bridge CCP tool;
  - (e) any other resolution tool consistent with Articles 21 and 23.
  
2. In the event of a systemic crisis, the resolution authority may also provide public financial support by using government stabilisation tools in accordance with Articles 45, 46 and 47 on the condition of prior and final approval under the Union State aid framework

*and of the design of comprehensive and credible arrangements for the recovery of the funds provided over an appropriate period of time.*

3. Prior to the use of the tools referred to in paragraph 1, the resolution authority shall enforce:
  - (a) any existing and outstanding rights of the CCP, including any contractual obligations by clearing members to meet cash calls, to provide additional resources to the CCP, or to take on positions of defaulting clearing members, whether through an auction or other agreed means in the CCP's operating rules;
  - (b) any existing and outstanding contractual obligation committing parties other than clearing members to any forms of financial support.

The resolution authority may partially enforce the contractual obligations referred to in points (a) and (b) where it is not possible to enforce those contractual obligations in full within a reasonable timeframe.

4. By way of derogation from paragraph 3, the resolution authority may refrain from enforcing the relevant existing and outstanding obligations either partially or in full to avoid significant adverse effects on the financial system or widespread contagion, or where the use of the tools referred to in paragraph 1 is more appropriate in order to achieve the resolution objectives in a timely manner.
6. Where the use of a resolution tool other than the write-down and conversion tool results in losses being borne by clearing members, the resolution authority shall exercise the power to write down and convert any instruments of ownership and debt instruments or other unsecured liabilities immediately before or together with the use of the resolution tool.
7. Where only the resolution tools referred to in point (c) and (d) of paragraph 1 are used, and only part of the assets, rights, obligations or liabilities of the CCP under resolution are transferred in accordance with Articles 40 and 42, the residual part of that CCP shall be wound up in accordance with normal insolvency proceedings.
8. National insolvency law rules relating to the voidability or unenforceability of legal acts detrimental to creditors shall not apply to transfers of assets, rights, obligations or

liabilities from a CCP in relation to which resolution tools or government financial stabilisation tools are used.

9. The resolution authority *shall* recover *over an appropriate period of time* any reasonable expenses, *including an appropriate risk premium*, incurred in connection with the use of the resolution tools or powers or *in connection with the use of the* government financial stabilisation tools in any of the following ways:
- (a) from the CCP under resolution, as a preferred creditor;
  - (b) from any consideration paid by the purchaser where the sale of business tool has been used;
  - (c) from any proceeds generated as a result of the termination of the bridge CCP, as a preferred creditor;
  - (ca) *from any clearing member, to the extent that a clearing member does not incur greater losses than it would have incurred if the resolution authority would not have taken resolution action in relation to the CCP and they would instead have been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or the CCP had been wound up under normal insolvency proceedings;*
  - (cb) *from any revenues from the use of the government stabilisation tools, including the proceeds from the sale of the instruments of ownership referred to in Article 46 and from the sale of a CCP subject to temporary public ownership as referred to in Article 47.*
- 9a. *In determining the amounts to be recouped pursuant to the previous paragraph, the resolution authority shall take into account the amount that the clients and members of the CCP would otherwise have been required to contribute, both under the CCP rules and arrangements and in resolution, had public support not been granted by the authorities.*
10. When using the resolution tools, resolution authorities shall ensure, on the basis of a valuation that complies with Article 25, the full allocation of losses, the *restoration of*

*matched book, the* replenishment of the prefunded resources of the CCP or the bridge CCP, and the recapitalisation of the CCP or the bridge CCP.

#### *Article 27a*

*The possibility to compensate CCP participants shall not apply to their contractually committed losses in the default management or recovery phases.*

## SECTION 2

### POSITION ALLOCATION AND LOSS ALLOCATION TOOLS

#### *Article 28*

*Objective and scope of the position and loss allocation tools*

1. Resolution authorities shall use the position allocation tool in accordance with Article 29 and the loss allocation tools in accordance with Articles 30 and 31.
2. The tools referred to in paragraph 1 *may* be used in respect of all contracts relating to clearing services and the collateral related to those services posted to the CCP.
3. Resolution authorities shall use the position allocation tool referred to in Article 29 in order to rematch the book of the CCP or bridge CCP where relevant.

Resolution authorities shall use the loss allocation tools referred to in Articles 30 and 31 for any of the following purposes:

- (a) to cover the losses of the CCP assessed in accordance with Article 27(10);
- (b) to restore the ability of the CCP to meet payment obligations as they fall due;
- (ba) to facilitate the restoration of a matched book;**
- (c) to **facilitate restoration of a matched book by providing the CCP with funds to meet an auction bid which enables the CCP to allocate the defaulter's positions or to make payments on the contracts terminated pursuant to Article 29;**
- (d) to achieve the outcome referred to in points (a), (b) and (c) in relation to a bridge CCP;

- (e) to support the transfer of the CCP's business by way of the sale of business tool to a solvent third party.

*Article 29*

*Termination of contracts – partial or full*

1. The resolution authority may terminate certain or all of the following contracts :
  - (a) the contracts of the clearing member in default;
  - (b) the contracts of the affected clearing service or asset class;
  - (c) the contracts of the CCP in resolution.

***1a. When using the power under paragraph 1, the resolution authority shall terminate contracts referred to under points (a), (b) and (c) of that paragraph in a similar way, without discriminating between counterparties to those contracts, with the exception of those contractual obligations that cannot be enforced in a reasonable timeframe.***
2. The resolution authority may only terminate the contracts referred to in point (a) of paragraph 1 where the transfer of the assets and positions resulting from those contracts has not taken place within the meaning of Article 48(5) and (6) of Regulation (EU) No 648/2012.
3. The resolution authority shall give notice to all relevant clearing members of the date on which any contract referred to in paragraph 1 is terminated.
4. Prior to the termination of any of the contracts referred to in paragraph 1, the resolution authority shall take the following steps:
  - (a) require the CCP under resolution to value each contract and update the account balances of each clearing member;
  - (b) determine the net amount payable by or to each clearing member, taking account of any due but unpaid variation margin, including variation margin due as a result of the contract valuations referred to in point (a);



- (c) notify each clearing member of the determined net amounts and collect them accordingly.

*Once the contract has been terminated, the resolution authority shall notify, in a timely manner, the competent authority of any client designated as an O-SII whose contract has been terminated.*

- 4a. *The price of any termination of contracts by the resolution authority under this article shall be based upon a fair market price determined on the basis of the CCP's rules and arrangements, or, should the use of such alternative method be deemed necessary by the resolution authority, determined using any other appropriate price discovery method.*
5. Where a non-defaulting clearing member is unable to pay the net amount determined in accordance with paragraph 4, the resolution authority may require the CCP to place the non-defaulting clearing member in default and use its initial margin and default fund contribution in accordance with Article 45 of Regulation (EU) No 648/2012.
6. Where the resolution authority has terminated one or more contracts of the types referred to in points (a), (b) and (c) of paragraph 1, it shall **temporarily** prevent the CCP from clearing any new contract of the same type as the one terminated.

The resolution authority may allow the CCP to resume the clearing of those types of contracts only where the following conditions are met:

- (a) the CCP complies with the requirements of Regulation (EU) No 648/2012;
- (b) the resolution authority issues and publishes a notice to that effect using the means referred to in Article 70(3).

### *Article 30*

#### *Reduction of the value of any gains payable*

##### *by the CCP to non-defaulting clearing members and their clients*

1. The resolution authority may reduce the value **amount** of the CCP's payment obligations to non-defaulting clearing members **and their clients** where those obligations arise from gains due in accordance with the CCP's processes for paying variation margin or an

economically *equivalent* payment. *Clearing members shall inform their clients without delay about the use of the resolution tool and the way in which such use affects them.*

2. The resolution authority shall calculate any reduction in payment obligations referred to in paragraph 1 using an equitable allocation mechanism determined in the valuation conducted in accordance with Article 24(3) and communicated to the clearing members as soon as the resolution tool is used. The total net gains to be reduced for each clearing member shall be proportional to the amounts due from the CCP.
  3. The reduction in the value of gains payable shall take effect and shall be immediately binding on the CCP and affected clearing members from the moment at which the resolution authority takes the resolution action.
- 3a. *Any use of the powers referred to in this article that affect the positions of a client designated as an O-SII shall be notified to the competent authority of that client in a timely manner. 4. A non-defaulting clearing member shall not have any claim in any subsequent proceedings against the CCP, or its successor entity, arising from the reduction in payment obligations referred to in paragraph 1.*

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5. Where a resolution authority reduces only in part the value of gains payable, the residual outstanding payable amount shall still be owed to the non-defaulting clearing member.
- 5a. *The CCP shall include in its operating rules reference to the power to reduce payment obligations referred to in paragraph 1 in addition to any similar arrangements provided for in those operating rules at the recovery stage. The CCP shall ensure that contractual arrangements are concluded to allow the Resolution Authority to exercise its powers under this article.*

#### Article 31

#### Resolution cash call

1. The resolution authority may require non-defaulting clearing members to make *contributions* in cash to the CCP. *The amount of those cash contributions shall be*

*determined by the resolution authority so as to best achieve the resolution objectives referred to in Article 21(1).*

Where the CCP operates multiple default funds, the amount of the contribution in cash referred to in the first subparagraph shall refer to the clearing member's contribution to the default fund or default funds of the affected clearing service or asset class.

The resolution authority may exercise the resolution cash call regardless of whether all contractual obligations requiring cash contributions from non-defaulting clearing members have been exhausted.

The resolution authority shall determine the amount of each non-defaulting clearing member's cash contribution in proportion to the clearing member's contribution to the default fund.

2. If a non-defaulting clearing member does not pay the required amount, the resolution authority may require the CCP to place that clearing member in default and use the clearing member's initial margin and default fund contribution in accordance with Article 45 of Regulation (EU) No 648/2012.
- 2a. ***The CCP shall include reference to the resolution cash call in addition to the recovery cash calls in its operating rules and ensure that contractual arrangements are concluded to allow the resolution authority to exercise its powers under this Article.***
- 2b. ***The resolution authority shall define the amount of the resolution cash call to be included in the operating rules, which shall at the minimum be equivalent to the clearing member's contribution to the default fund.***
- 2c. ***The resolution authority shall define the amount of the resolution cash call to be included in the operating rules.***

### SECTION 3

#### WRITE DOWN AND CONVERSION OF INSTRUMENTS OF OWNERSHIP AND DEBT INSTRUMENTS OR OTHER UNSECURED LIABILITIES

##### *Article 32*

##### *Requirement to write down and convert instruments of ownership and debt instruments or other unsecured liabilities*

1. The resolution authority shall use the write-down and conversion tool in accordance with Article 33 in respect of instruments of ownership and debt instruments issued by the CCP in resolution or other unsecured liabilities in order to absorb losses, recapitalise that CCP or a bridge CCP, or to support the use of the sale of business tool.
2. Based on the valuation carried out in accordance with Article 24(3), the resolution authority shall determine the following:
  - (a) the amount by which the instruments of ownership and debt instruments or other unsecured liabilities must be written down taking into account any losses that are to be absorbed by the enforcement of any outstanding obligations of the clearing members or other third parties owed to the CCP;
  - (b) the amount by which debt instruments or other unsecured liabilities must be converted into instruments of ownership in order to restore the prudential requirements of the CCP or the bridge CCP.

##### *Article 33*

##### *Provisions governing the write-down or conversion of instruments of ownership and debt instruments or other unsecured liabilities*

1. The resolution authority shall use the write-down and conversion tool in accordance with the priority of claims applicable under normal insolvency proceedings.
2. Prior to reducing or converting the principal amount of debt instruments or other unsecured liabilities, the resolution authority shall reduce the notional **value** of instruments of ownership in proportion to the losses and up to their full value, where necessary.

Where, in accordance with the valuation carried out pursuant to Article 24(3), the CCP maintains a positive net value after the reduction of *the value of* instruments of ownership, the resolution authority shall cancel or dilute, as the case may be, those instruments of ownership.

3. The resolution authority shall reduce, convert, or both, the principal amount of debt instruments or other unsecured liabilities to the extent required to achieve the resolution objectives, and up to the full value of those instruments or liabilities, where necessary.
4. The resolution authority shall not use the write-down and conversion tools in respect of the following liabilities:
  - (a) liabilities to employees, in relation to accrued salary, pension benefits or other fixed remuneration, except for the variable component of remuneration that is not regulated by a collective bargaining agreement;
  - (b) liabilities to commercial or trade creditors arising from the provision to the CCP of goods or services that are critical to the daily functioning of its operations, including IT services, utilities and the rental, servicing and upkeep of premises;
  - (c) liabilities to tax and social security authorities, provided that those liabilities are preferred liabilities under the applicable insolvency law;
  - (d) liabilities owed to systems or operators of systems designated according to Directive 98/26/EC.
5. Where the notional amount of an instrument of ownership or the principal amount of a debt instrument or other unsecured liabilities is reduced, the following conditions shall apply:
  - (a) that reduction shall be permanent;
  - (b) the holder of the instrument shall have no claim in connection with that reduction, except for any liability already accrued, any liability for damages that may arise as a result of an appeal challenging the legality of that reduction and any claim based on instruments of ownership issued or transferred pursuant to paragraph 6;

- (c) where that reduction is only partial, the agreement that created the original liability shall continue to apply in respect of the residual amount subject to any necessary amendments of the terms of that agreement due to the reduction.

Point (a) shall not prevent resolution authorities from applying a write-up mechanism to reimburse holders of debt instruments or other unsecured liabilities and then holders of instruments of ownership, where the level of write-down based on the provisional valuation is found to exceed required amounts when assessed against the definitive valuation referred to in Article 26(2).

- 6. Where converting debt instruments or other unsecured liabilities pursuant to paragraph 3, the resolution authority may require CCPs or their parent undertakings to issue or to transfer instruments of ownership to the holders of the debt instruments or other unsecured liabilities.
- 7. The resolution authority shall only convert debt instruments or other unsecured liabilities pursuant to paragraph 3 where the following conditions are met:
  - (a) the resolution authority has obtained the agreement of the competent authority of the parent undertaking where the parent undertaking is required to issue the instruments of ownership;
  - (b) the instruments of ownership are issued prior to any issuance of instruments of ownership by the CCP for the purposes of provision of own funds by the State or a government entity;
  - (c) the conversion rate represents appropriate compensation to the affected debt holders, in line with their treatment under normal insolvency proceedings.

Following any conversion of debt instruments or other unsecured liabilities to instruments of ownership, the latter shall be subscribed or transferred without delay after the conversion.

- 8. For the purposes of paragraph 7, the resolution authority shall ensure, in the context of the development and maintenance of the CCP's resolution plan and as part of the powers to remove impediments to the resolvability of the CCP, that the CCP may issue at all times the necessary number of instruments of ownership.

## Article 34

### *Effect of write-down and conversion*

The resolution authority shall complete or require the completion of all the administrative and procedural tasks necessary to give effect to the use of the write-down and conversion tool, including:

- (a) the amendment of all relevant registers;
- (b) the delisting or removal from trading of instruments of ownership or debt instruments;
- (c) the listing or admission to trading of new instruments of ownership;
- (d) the relisting or readmission of any debt instruments which have been written down, without the requirement for the issuing of a prospectus in accordance with Directive 2003/71/EC of the European Parliament and of the Council<sup>16</sup>.

## Article 35

### *Removal of procedural obstacles for write-down and conversion*

Where the second subparagraph of Article 32(1) is applied, the competent authority shall require CCPs, or their parent undertakings, to maintain at all times a sufficient amount of instruments of ownership to ensure that those CCPs or their parent undertakings may issue sufficient new instruments of ownership and that the issuance of or conversion into instruments of ownership could be carried out effectively.

The resolution authority shall use the write down and conversion tool regardless of any provisions in the CCP's instruments of incorporation or statutes, including with respect to pre-emption rights for shareholders or requirements for the consent of shareholders to an increase of capital.

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<sup>16</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

## Article 36

### *Submission of a business reorganisation plan*

1. CCPs shall, within one month after the use of the tools referred to in Article 32, **conduct a review of the causes of its failure** and submit **it** to the resolution authority **alongside** a business reorganisation plan in accordance with Article 37. Where the Union State aid framework is applicable, that plan shall be compatible with the restructuring plan that the CCP is required to submit to the Commission in accordance with that framework.

Where necessary for achieving the resolution objectives, the resolution authority may extend the period referred to in the first subparagraph up to a maximum of two months.

2. Where a restructuring plan is required to be notified within the Union State aid framework, the submission of the business reorganisation plan shall be without prejudice to the deadline laid down by the Union State aid framework for the submission of that restructuring plan.
3. The resolution authority shall submit the **review and** business reorganisation plan, and any revision thereof in accordance with Article 38, to the competent authority and to the resolution college.

## Article 37

### *Content of the business reorganisation plan*

1. The business reorganisation plan referred to in Article 36 shall set out measures aiming to restore the long-term viability of the CCP or parts of its business within a reasonable timeframe. Those measures shall be based on realistic assumptions as to the economic and financial market conditions under which the CCP will operate.

The business reorganisation plan shall take account of the current and potential states of the financial markets and reflect best-case and worst-case assumptions, including a combination of events to identify the CCP's main vulnerabilities. Assumptions shall be compared with appropriate sector-wide benchmarks.

2. The business reorganisation plan shall include at least the following elements:



- (a) a detailed analysis of the factors and circumstances that caused the CCP to fail or to be likely to fail;
- (b) a description of the measures to be adopted to restore the CCP's long-term viability;
- (c) a timetable for the implementation of those measures.

3. Measures aiming to restore the long-term viability of a CCP may include:

- (a) the reorganisation and restructuring of the activities of the CCP;
- (b) changes to the CCP's operational systems and infrastructure;
- (c) the sale of assets or of business lines.

**3a. *In the case where the Union State Aid framework is applied in accordance with Article 36(1) and (2), the resolution authority, the competent authority and the Commission should coordinate the assessment of the measures provided to restore the CCP's long-term viability, any request for a resubmission of an amended plan by the CCP and the final adoption of the business reorganisation or restructuring plan.***

**3b. *ESMA shall by ... [18 months after the entry into force of this Regulation] issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to specify further the minimum elements that should be included in a business reorganisation plan pursuant to paragraph 2.***

**3c. *Taking into account, where appropriate, experience acquired in the application of the guidelines referred to in paragraph 3a, ESMA may develop draft regulatory technical standards to specify further the minimum elements that should be included in a business reorganisation plan pursuant to paragraph 2.***

***Power is conferred on 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 38*

*Assessment and adoption of the business reorganisation plan*

1. Within one month of the submission of the business reorganisation plan by the CCP pursuant to Article 36(1), the resolution authority and the competent authority shall assess whether the measures provided for in that plan would reliably restore the long-term viability of the CCP.

Where the resolution authority and the competent authority are satisfied that the plan would restore the CCP's long-term viability, the resolution authority shall approve the plan.

2. Where the resolution authority and the competent authority are not satisfied that the measures provided for in the plan would restore the CCP's long-term viability, the resolution authority shall notify the CCP of their concerns and require it to resubmit an amended plan addressing those concerns within two weeks of the notification.

3. The resolution authority and the competent authority shall assess the resubmitted plan and shall notify the CCP within one week of the reception of that plan whether the concerns are appropriately addressed or whether further amendments are required.

**3a. *ESMA shall by ... [18 months after the entry into force of this Regulation] issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to specify further the minimum criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to paragraph 1.***

**3b. *Taking into account, where appropriate, experience acquired in the application of the guidelines referred to in paragraph 3a, ESMA may develop draft regulatory technical standards to specify further the minimum criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to paragraph 1s.***

***Power is conferred on 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 39*

#### *Implementation and monitoring of the business reorganisation plan*

1. The CCP shall implement the business reorganisation plan and shall submit a report to the resolution authority and the competent authority as requested and, at least, every six months on its progress in implementing the plan.
2. The resolution authority, in agreement with the competent authority, may require the CCP to revise the plan where necessary to achieve the aim referred to in 37(1).

The CCP shall submit the revision referred to in the first subparagraph to the resolution authority for assessment in accordance with Article 38(3). ***The resolution authority, in the event that the Union State aid framework applies, shall coordinate this assessment with the Commission.***

## SECTION 4

### THE SALE OF BUSINESS TOOL

### *Article 40*

#### *The sale of business tool*

1. The resolution authority may transfer the following to a purchaser that is not a bridge CCP:
  - (a) instruments of ownership issued by a CCP under resolution;
  - (b) any assets, rights, obligations or liabilities of a CCP under resolution.

The transfer referred to in the first subparagraph shall take place without obtaining the consent of the shareholders of the CCP or any third party other than the purchaser and without complying with any procedural requirements under company or securities law other than those provided for in Article 41.

2. A transfer made pursuant to paragraph 1 shall be made on commercial terms, having regard to the circumstances, and in accordance with the Union State aid framework.

For the purposes of the first subparagraph, the resolution authority shall take all reasonable steps to obtain commercial terms that conform to the valuation conducted under Article 24(3).

3. Unless otherwise provided for in this Regulation, any consideration paid by the purchaser shall benefit:
  - (a) the owners of the instruments of ownership where the sale of business has been effected by transferring instruments of ownership issued by the CCP from the holders of those instruments to the purchaser;
  - (b) the CCP, where the sale of business has been effected by transferring some or all of the assets or liabilities of the CCP to the purchaser;
  - (c) any non-defaulting clearing members that have suffered losses prior to resolution.

The allocation of any consideration paid by the purchaser shall be carried out in accordance with the CCP's default waterfall as set out in Articles 43 and 45 of Regulation (EU) No 648/2012 and the priority of claims under normal insolvency proceedings.

4. The resolution authority may exercise the transfer power referred to in paragraph 1 more than once in order to make supplemental transfers of instruments of ownership issued by the CCP or, as the case may be, the CCP's assets, rights, obligations, or liabilities.
5. The resolution authority may, with the consent of the purchaser, transfer the assets, rights, obligations or liabilities that had been transferred to the purchaser back to the CCP, or the instruments of ownership back to their original owners.

Where the resolution authority uses the transfer power referred to in the first subparagraph, the CCP or original owners shall take back any such assets, rights, obligations or liabilities, or instruments of ownership.

6. Any transfer made pursuant to in paragraph 1 shall take place irrespective of whether the purchaser is authorised to provide the services and carry out the activities resulting from the acquisition.

Where the purchaser is not authorised to provide the services and carry out the activities resulting from the acquisition, the resolution authority, in consultation with the competent authority, shall conduct an appropriate due diligence of the purchaser and ensure that the purchaser applies for authorisation as soon as practicable and, at the latest, within one month of the use of the sale of business tool. The competent authority shall ensure that any such application for authorisation is considered in an expedited manner.

7. Where the transfer of instruments of ownership referred to in paragraph 1 results in the acquisition of or increase in a qualifying holding referred to in Article 31(2) of Regulation (EU) No 648/2012, the competent authority shall carry out the assessment referred to in that Article within a period of time that neither delays the application of the sale of business tool nor prevents the resolution action from achieving the relevant resolution objectives.
8. Where the competent authority has not completed the assessment referred to in paragraph 7 by the date on which the transfer of instruments of ownership takes effect, the following shall apply:
  - (a) the transfer of instruments of ownership shall have immediate legal effect from the date on which they are transferred;
  - (b) during the assessment period and during any divestment period provided for in point (f), the purchaser's voting rights attached to those instruments of ownership shall be suspended and vested solely in the resolution authority, which shall have no obligation to exercise them and shall not be liable for exercising or refraining from exercising them;
  - (c) during the assessment period and during any divestment period provided for in point (f), any penalties or measures for infringing the requirements for acquisitions or disposals of qualifying holdings envisaged in Article 12 of Regulation (EU) No 648/2012 shall not apply to that transfer;
  - (d) the competent authority shall notify the resolution authority and the purchaser in writing of the result of its assessment in accordance with Article 32 of Regulation (EU) No 648/2012 promptly after completing its assessment;

- (e) where the competent authority does not oppose the transfer, the voting rights attached to those instruments of ownership shall be deemed to be fully vested in the purchaser as from the notification referred to in point (d);
- (f) where the competent authority opposes the transfer of instruments of ownership, point (b) shall continue to apply and the resolution authority may, having taken into account market conditions, establish a divestment period within which the purchaser shall divest such instruments of ownership.

9. For the purposes of exercising its right to provide services in accordance with Regulation (EU) No 648/2012, the purchaser shall be considered to be a continuation of the CCP under resolution, and may continue to exercise any such right that was exercised by the CCP under resolution in respect of the assets, rights, obligations or liabilities transferred.
10. The purchaser referred to in paragraph 1 shall not be prevented from exercising the CCP's rights of membership and accessing the payment and settlement systems or any other financial market infrastructure provided that the purchaser meets the criteria for membership or participation in those systems or infrastructures.

Where the purchaser does not meet the criteria referred to in the first subparagraph, the purchaser may continue to exercise the CCP's rights of membership and accessing those systems and infrastructures ***subject to approval*** by the resolution authority. ***Such approval shall be granted only for a period of time not exceeding 12 months.***

11. ***For a period of 12 months***, the purchaser shall not be denied access to payment and settlement systems or any other financial market infrastructure on the ground that the purchaser does not possess a rating from a credit rating agency, or that that rating is below the rating levels required to be granted access to those systems or infrastructures.
12. Unless otherwise provided for in this Regulation, shareholders, creditors, clearing members and clients of the CCP under resolution and other third parties whose assets, rights, obligations or liabilities are not transferred shall have no rights over, or in relation to, the assets, rights, obligations or liabilities transferred.

*Article 41*

*Sale of business tool: procedural requirements*

1. Where using the sale of business tool in relation to a CCP, the resolution authority shall advertise the availability, or make arrangements for the marketing, of the assets, rights, obligations, liabilities, or the instruments of ownership intended to be transferred. Pools of rights, assets, obligations and liabilities may be marketed separately.
2. Without prejudice to the Union State aid framework, where applicable, the marketing referred to in paragraph 1 shall be carried out in accordance with the following criteria:
  - (a) it shall be as transparent as possible and shall not materially misrepresent the assets, rights, obligations, liabilities, or instruments of ownership of the CCP, having regard to the circumstances and in particular the need to maintain financial stability;
  - (b) it shall not unduly favour or discriminate between potential purchasers;
  - (c) it shall be free from any conflict of interest;
  - (d) it shall take account of the need to effect a rapid resolution action;
  - (e) it shall aim at maximising, as far as possible, the sale price for the instruments of ownership, assets, rights, obligations or liabilities involved.

The criteria referred to in the first subparagraph shall not prevent the resolution authority from soliciting particular potential purchasers.

3. By way of derogation from paragraph 1, the resolution authority may market the assets, rights, obligations, liabilities or the instruments of ownership without complying with the criteria referred to in paragraph 2 where compliance with those criteria would be likely to undermine one or more of the resolution objectives.

**SECTION 5**  
**THE BRIDGE CCP TOOL**

*Article 42*  
*Bridge CCP tool*

1. The resolution authority may transfer to a bridge CCP the following:

- (a) the instruments of ownership issued by a CCP under resolution;
- (b) any assets, rights, obligations or liabilities of the CCP under resolution.

The transfer referred to in the first subparagraph may take place without obtaining the consent of the shareholders of the CCP under resolution or any third party other than the bridge CCP and without complying with any procedural requirements under company or securities law other than those provided for in Article 43.

2. The bridge CCP shall be a legal person that meets all of the following requirements:

- (a) it is controlled by the resolution authority and it is wholly or partially owned by one or more public authorities which may include the resolution authority;
- (b) it is created for the purpose of receiving and holding some or all of the instruments of ownership issued by a CCP under resolution or some or all of the assets, rights, obligations and liabilities of the CCP with a view to maintaining the critical functions of the CCP and subsequently selling the CCP.

3. When applying the bridge CCP tool, the resolution authority shall ensure that the total value of liabilities and obligations transferred to the bridge CCP does not exceed the total value of the rights and assets transferred from the CCP under resolution.

4. Unless otherwise provided for in this Regulation, any consideration paid by the bridge CCP shall benefit:

- (a) the owners of the instruments of ownership, where the transfer to the bridge CCP has been effected by transferring instruments of ownership issued by the CCP under resolution from the holders of those instruments to the bridge CCP;



(b) the CCP under resolution, where the transfer to the bridge CCP has been effected by transferring some or all of the assets or liabilities of that CCP to the bridge CCP.

5. The resolution authority may exercise the transfer power referred to in paragraph 1 more than once in order to make supplemental transfers of instruments of ownership issued by a CCP or of its assets, rights, obligations or liabilities.
6. The resolution authority may transfer the rights, obligations, assets or liabilities that had been transferred to the bridge CCP back to the CCP under resolution, or the instruments of ownership back to their original owners where that transfer is expressly provided for in the instrument by which the transfer referred to in paragraph 1 is made.

Where the resolution authority uses the transfer power referred to in the first subparagraph, the CCP under resolution or original owners shall be obliged to take back any such assets, rights, obligations or liabilities, or instruments of ownership, provided that the conditions in the first subparagraph of this paragraph or in paragraph 7 are met.

7. Where the specific instruments of ownership, assets, rights, obligations or liabilities do not fall within the classes of, or meet the conditions for transfer of, instruments of ownership, assets, rights, obligations or liabilities specified in the instrument by which the transfer was made, the resolution authority may transfer them from the bridge CCP back to the CCP under resolution or the original owners.
8. A transfer referred to in paragraphs 6 and 7 may be made at any time, and shall comply with any other conditions stated in the instrument by which the transfer was made for the relevant purpose.
9. The resolution authority may transfer instruments of ownership or assets, rights, obligations or liabilities from the bridge CCP to a third party.
10. For the purposes of exercising its right to provide services in accordance with Regulation (EU) No 648/2012, a bridge CCP shall be considered to be a continuation of the CCP under resolution and may continue to exercise any such right that was exercised by the CCP under resolution in respect of the assets, rights, obligations or liabilities transferred.

For any other purposes, resolution authorities may require that a bridge CCP be considered to be a continuation of the CCP under resolution, and be able to continue to exercise any

right that was exercised by the CCP under resolution in respect of the assets, rights, obligations or liabilities transferred.

11. The bridge CCP shall not be prevented from exercising the rights of membership and accessing payment and settlement systems and other FMIs of the CCP under resolution, provided that it meets the criteria for membership and participation in those systems and infrastructures.

Where the bridge CCP does not meet the criteria referred to in the first subparagraph, the bridge CCP may continue to exercise the CCP's rights of membership and accessing those systems and infrastructures for a period of time specified by the resolution authority. That period of time shall not exceed 12 months.

12. The bridge CCP shall not be denied access to payment and settlement systems or any other FMI on the ground that the bridge CCP does not possess a rating from a credit rating agency, or that that rating is below the rating levels required to be granted access to those systems or infrastructures.
13. Shareholders or creditors of the CCP under resolution and other third parties whose assets, rights, obligations or liabilities are not transferred to the bridge CCP, shall have no claims over or in relation to the assets, rights, obligations or liabilities transferred to the bridge CCP, or against its board or senior management.
14. The bridge CCP shall have no duty or responsibility to shareholders or creditors of the CCP under resolution, and the board or senior management of the bridge CCP shall have no liability to those shareholders or creditors for acts and omissions in the discharge of their duties, unless the act or omission is due to gross negligence or serious misconduct in accordance with applicable national law.

### *Article 43*

#### *Bridge CCP: procedural requirements*

1. The bridge CCP shall comply with all of the following requirements:
  - (a) the bridge CCP shall seek the approval of the resolution authority for all of the following:

- (i) the rules of incorporation of the bridge CCP;
  - (ii) the members of the bridge CCP's board, where those members are not directly appointed by the resolution authority;
  - (iii) the responsibilities and remuneration of the members of the bridge CCP's board, where the remuneration and the responsibilities are not determined by the resolution authority;
  - (iv) the strategy and risk profile of the bridge CCP;
- (b) the bridge CCP shall ***take over the authorisations of the CCP under resolution*** to provide the services or carry out the activities resulting from the transfer referred to in Article 42(1) in accordance with Regulation (EU) No 648/2012.

Where the bridge CCP is not authorised as required pursuant to point (b) of paragraph 1, the resolution authority shall seek the approval of the competent authority for carrying out the transfer referred to in Article 42(1). Where the competent authority approves that transfer, it shall indicate the period for which the bridge CCP's obligation to comply with the requirements of Regulation (EU) No 648/2012 is waived.

***The prudential requirements under Chapter 3 of Title IV of Regulation (EU) No 648/2012 shall only be waived for a period of a maximum of three months, while all other provisions of Regulation (EU) No 648/2012 can be waived for a period of a maximum of 12 months.***

2. Subject to any restrictions imposed in accordance with Union or national competition rules, the management of the bridge CCP shall operate the bridge CCP with the objective of maintaining access by stakeholders to the bridge CCP's critical functions and selling the bridge CCP or any of its assets, rights, obligations and liabilities to one or more private sector purchasers. That sale shall take place when market conditions are appropriate, and within the period specified in paragraphs 5 and, where applicable, 6 of this Article.
3. The resolution authority shall terminate the bridge CCP in any of the following cases:
  - (a) the resolution objectives are fulfilled;

- (b) the bridge CCP merges with another entity;
- (c) the bridge CCP ceases to meet the requirements laid down in Article 42(2);
- (d) the bridge CCP or substantially all of its assets, rights, obligations or liabilities have been sold in accordance with paragraph 4;
- (e) the period specified in paragraph 5 expires;
- (f) the contracts cleared by the bridge CCP have been settled, have expired or have been closed out and the CCP's rights and obligations relating to those contracts are thereby completely discharged.

4. Before selling the bridge CCP or its assets, rights, obligations or liabilities, the resolution authority shall advertise the availability of the elements intended to be sold, and shall ensure that they are marketed openly and transparently, and that they are not materially misrepresented.

The resolution authority shall carry out the sale referred to in the first subparagraph on commercial terms and shall not unduly favour or discriminate between potential purchasers.

5. The resolution authority shall terminate the operation of a bridge CCP two years after the date on which the last transfer from the CCP under resolution is made.

Where the resolution authority terminates the operation of a bridge CCP, it shall request the competent authority to withdraw the bridge CCP's authorisation.

6. The resolution authority may extend the period referred to in paragraph 5 for one or more additional one-year periods where the extension is necessary to terminate the bridge CCP as referred to in points (a) to (d) of paragraph 3.

The decision to extend the period referred to in paragraph 5 shall be reasoned and shall contain a detailed assessment of the bridge CCP's situation in relation to relevant market conditions and market outlook.

7. Where a bridge CCP is terminated in the circumstances referred to in point (d) or (e) of paragraph 3, the bridge CCP shall be wound up under normal insolvency proceedings.

Unless otherwise provided for in this Regulation, any proceeds generated as a result of the termination of the bridge CCP shall benefit its shareholders.

Where a bridge CCP is used for the purpose of transferring assets and liabilities of more than one CCP under resolution, the proceeds referred to in the second subparagraph shall be attributed by reference to the assets and liabilities transferred from each of the CCPs under resolution.

## SECTION 6

### ADDITIONAL FINANCING ARRANGEMENTS

#### *Article 44*

#### *Alternative funding means*

The resolution authority may enter into contracts to borrow or obtain other forms of financial support, including from pre-funded resources available in any non-depleted default funds in the CCP under resolution, where necessary to ensure the effective use of the resolution tools.

## SECTION 7

### GOVERNMENT STABILISATION TOOLS

#### *Article 45*

#### *Government financial stabilisation tools*

1. The resolution authority may use the government stabilisation tools in accordance with Articles 46 and 47 for the purpose of resolving a CCP **only** where the following conditions are met:
- (a) the financial support is necessary to meet the resolution objectives;
  - (b) the financial support is used as a last resort after having assessed and exploited the other resolution tools to the maximum extent practicable whilst maintaining financial

stability, as determined by the competent ministry or the government after consulting the resolution authority;

(c) the financial support complies with the Union State aid framework;

*(ca) the financial support is used for a limited period of time;*

(d) ■

*(d a) the resolution authority has, in advance, defined comprehensive and credible arrangements for recovering, over a suitable period of time, the public funds deployed from participants benefitting from the public support, unless such funds have been already recovered through the sale to a private purchaser pursuant to either Article 46(3) or Article 47(2).*

2. To give effect to the government financial stabilisation tools, competent ministries or governments shall have the relevant resolution powers specified in Articles 48 to 59, and shall ensure that Articles 52, 54 and 70 are complied with.

3. Government financial stabilisation tools shall be deemed to be used as a last resort for the purposes of point (b) of paragraph 1, where, at least, any of the following conditions are met:

(a) the competent ministry or government and the resolution authority, after consulting the central bank and the competent authority, determine that the use of the resolution tools would not suffice to avoid a significant adverse effect on the financial system;

(b) the competent ministry or government and the resolution authority determine that the use of the resolution tools would not suffice to protect the public interest, where extraordinary liquidity assistance from the central bank has previously been given to the CCP;

(c) in respect of the temporary public ownership tool, the competent ministry or government, after consulting the competent authority and the resolution authority, determines that the use of the resolution tools would not suffice to protect the public interest, where public equity support through the equity support tool has previously been given to the CCP.

## Article 46

### *Public equity support tool*

1. Public financial support may be provided for the recapitalisation of a CCP in exchange for instruments of ownership.
2. CCPs subject to the public equity support tool shall be managed on a commercial and professional basis.
3. The instruments of ownership referred to in paragraph 1 shall be sold to a private purchaser as soon as commercial and financial circumstances allow.

## Article 47

### *Temporary public ownership tool*

1. A CCP may be taken into temporary public ownership by means of one or more transfer orders of instruments of ownership executed by a Member State to a transferee which is either of the following:
  - (a) a nominee of the Member State;
  - (b) a company wholly owned by the Member State.
2. CCPs subject to the temporary public ownership tool shall be managed on a commercial and professional basis and shall be sold to a private purchaser as soon as commercial and financial circumstances allow, ***also considering the possibility to recover the cost of resolution.***

## CHAPTER IV

### **Resolution powers**

## Article 48

### *General powers*

1. The resolution authority shall have all the powers necessary to use the resolution tools effectively, including all the following powers:

- (a) the power to require any person to provide the resolution authority with any information it requires to decide upon and prepare a resolution action, including updates and additional information to that provided in the resolution plan or required through on-site inspections;
- (b) the power to take control of a CCP under resolution and exercise all the rights and powers conferred upon holders of instruments of ownership and the CCP's board;
- (ba) *the power to modify or amend the operating rules of the CCP, including as regards its terms of participation, where such changes are necessary to remove impediments to resolvability;***
- (bb) *the power to refrain from enforcing certain contractual obligations under the CCP's rules and arrangements or otherwise depart from the CCP's rules and arrangements where necessary to achieve the resolution objectives and to avoid significant adverse effects on the financial system;***
- (c) the power to transfer instruments of ownership issued by a CCP under resolution;
- (d) the power to transfer to another entity, with its consent, the CCP's rights, assets, obligations or liabilities;
- (e) the power to reduce, including to reduce to zero, the principal amount of or outstanding amount due in respect of debt instruments or other unsecured liabilities of a CCP under resolution;
- (f) the power to convert debt instruments or other unsecured liabilities of a CCP under resolution into instruments of ownership of that CCP or of a bridge CCP to which assets, rights, obligations or liabilities of the CCP under resolution have been transferred;
- (g) the power to cancel debt instruments issued by a CCP under resolution;
- (h) the power to reduce, including to reduce to zero, the nominal amount of instruments of ownership of a CCP under resolution and to cancel such instruments of ownership;
- (i) the power to require a CCP under resolution ■ to issue new instruments of ownership, including preference shares and contingent convertible instruments;



- (j) with regards to debt instruments and other liabilities of the CCP, the power to amend or alter their maturity, amend the amount of interest payable, or amend the date on which interest becomes payable, including by suspending payment for a temporary period;
- (k) the power to close out and terminate financial contracts;
- (l) the power to remove or replace the board and senior management of a CCP under resolution;
- (m) the power to require the competent authority to assess the buyer of a qualifying holding in a timely manner by way of derogation from the time-limits laid down in Article 31 of Regulation (EU) No 648/2012;
- (n) the power to reduce, including to reduce to zero, the amount of variation margin due to a clearing *member* of a CCP under resolution, *or to a client of that clearing member, subject to the conditions set out in Article 30*;
- (o) the power to transfer open positions and any related assets, including relevant title transfer and security financial collateral arrangements, set-off arrangements, and netting arrangements, from the account of a defaulting clearing member to a non-defaulting clearing member in a manner consistent with Article 48 of Regulation (EU) No 648/2012;
- (p) the power to enforce any existing and outstanding contractual obligations of the participants of the CCP under resolution;
- (q) the power to enforce any existing and outstanding obligations of the parent undertaking of the CCP under resolution including to provide the CCP with financial support by way of guarantees or credit lines;
- (r) the power to require clearing members to provide further contributions in cash.

Resolution authorities may exercise the powers referred to in the first subparagraph individually or in any combination.

2. Unless otherwise provided for in this Regulation and the Union State aid framework, the resolution authority shall not be subject to any of the following requirements where it exercises the powers referred to in paragraph 1:
- (a) requirement to obtain approval or consent from any public or private person;
  - (b) requirements relating to the transfer of financial instruments, rights, obligations, assets or liabilities of a CCP under resolution or a bridge CCP;
  - (c) requirement to notify any public or private person;
  - (d) requirement to publish any notice or prospectus;
  - (e) requirement to file or register any document with any other authority.

*Article 49*

*Ancillary powers*

1. Where a power referred to in Article 48(1) is exercised, the resolution authority may also exercise any of the following ancillary powers:
- (a) subject to Article 65, provide for a transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, obligations, assets or liabilities transferred;
  - (b) remove rights to acquire further instruments of ownership;
  - (c) require the relevant authority to discontinue or suspend the admission to trading on a regulated market, or the official listing, of any financial instruments issued by the CCP pursuant to Directive 2001/34/EC of the European Parliament and of the Council<sup>17</sup>;
  - (d) provide for the purchaser or bridge CCP, pursuant to Articles 40 and 42 respectively, to be treated as if it were the CCP under resolution, for the purposes of any rights or

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<sup>17</sup> Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L 184, 6.7.2001, p. 1).

obligations of, or actions taken by, the CCP under resolution, including any rights or obligations relating to participation in a market infrastructure;

- (e) require the CCP under resolution or the purchaser or bridge CCP, where relevant, to provide the other with information and assistance;
- (f) provide for the clearing member which is a recipient of any positions allocated to it by way of the powers in points (o) and (p) of Article 48(1) to assume any rights or obligations relating to participation in the CCP in relation to those positions;
- (g) cancel or modify the terms of a contract to which the CCP under resolution is a party or substitute the purchaser or bridge CCP, in place of the CCP under resolution, as a party;
- (h) modify or amend the operating rules of the CCP under resolution **■** ;
- (i) transfer the membership of a clearing member from the CCP under resolution to a purchaser of the CCP or a bridge CCP.

Any right of compensation provided for in this Regulation shall not be considered to be a liability or an encumbrance for the purposes of point (a) of the first subparagraph.

2. The resolution authority may provide for continuity arrangements necessary to ensure that the resolution action is effective and that the business transferred may be operated by the purchaser or bridge CCP. Those continuity arrangements may include:

- (a) the continuity of contracts entered into by the CCP under resolution, in order for the purchaser or bridge CCP to assume the rights and liabilities of the CCP under resolution relating to any financial instrument, right, obligation, asset or liability that has been transferred and to replace the CCP under resolution, expressly or implicitly, in all relevant contractual documents;
- (b) the replacement of the CCP under resolution by the purchaser or bridge CCP in any legal proceedings relating to any financial instrument, right, obligation, asset or liability that has been transferred.

3. The powers provided for in point (d) of paragraph 1 and point (b) of paragraph 2 shall not affect:

- (a) the right of an employee of the CCP to terminate a contract of employment;
- (b) subject to Articles 55, 56 and 57, the exercise of contractual rights of a party to a contract , including the right to terminate, where provided for in the terms of the contract, due to an act or omission by the CCP prior to the transfer, or by the purchaser or bridge CCP after the transfer.

*Article 50*

*Special management*

1. The resolution authority may appoint **one or more** special **managers** to replace the board of a CCP under resolution. The special manager shall be of sufficiently good repute and shall have adequate expertise in financial services, risk management and clearing services in accordance with the second subparagraph of Article 27(2) of Regulation (EU) No 648/2012.
2. The special manager shall have all the powers of the shareholders and the board of the CCP. The special manager may only exercise those powers under the control of the resolution authority. The resolution authority may limit the actions of the special manager or require prior consent for certain acts.

The resolution authority shall make public the appointment referred to in paragraph 1 and the terms and conditions attached to that appointment.

3. The special manager shall be appointed for no more than one year. The resolution authority may renew that period where necessary to achieve the resolution objectives.
4. The special manager shall take all the measures necessary to promote the resolution objectives and implement resolution actions taken by the resolution authority. In case of inconsistency or conflict, that statutory duty shall override any other duty of management in accordance with the statutes of the CCP or national law.
5. The special manager shall draw up reports for the appointing resolution authority at regular intervals set by the resolution authority and at the beginning and the end of the mandate. Those reports shall describe in detail the financial situation of the CCP and state the reasons for the measures taken.

6. The resolution authority may remove the special manager at any time. It shall in any case remove the special manager in the following cases:
- (a) where the special manager is failing to perform its duties in accordance with the terms and conditions set out by the resolution authority;
  - (b) where the objectives of resolution would be better achieved by removing or replacing that special manager;
  - (c) where the conditions for the appointment are no longer fulfilled.
7. Where national insolvency law provides for the appointment of an insolvency management, the special manager appointed pursuant to paragraph 1 may also be appointed as insolvency manager *or vice versa*.

*Article 51*

*Power to require the provision of services and facilities*

1. The resolution authority may require a CCP under resolution, or any of its group entities or clearing members, to provide any services or facilities that are necessary to enable a purchaser or bridge CCP to operate effectively the business transferred to it.
- The first subparagraph shall apply regardless of whether an entity in the same group as the CCP or one of the CCP's clearing members has entered into normal insolvency proceedings or is itself under resolution.
2. The resolution authority may enforce obligations imposed, pursuant to paragraph 1, by resolution authorities in other Member States where those powers are exercised in relation to entities belonging to the same group as the CCP under resolution, or of the clearing members of that CCP.
3. The services and facilities referred to in paragraph 1 shall not include any form of financial support.
4. The services and facilities provided pursuant to paragraph 1 shall be provided:

- (a) on the same commercial terms on which they were provided to the CCP immediately before the resolution action was taken, where an agreement for those purposes exists;
- (b) on reasonable commercial terms, where there is no agreement for those purposes or where that agreement has expired.

*Article 52*

*Power to enforce resolution actions*

*or crisis prevention measures by other Member States*

1. Where instruments of ownership, assets, rights, obligations or liabilities of a CCP under resolution are located in, or governed by the law of a Member State other than the Member State of the resolution authority, any transfer *or resolution action in respect* of those instruments, assets, rights, obligations or liabilities shall have effect in accordance with the law of that other Member State.
2. The resolution authority of a Member State shall be provided with all necessary assistance by the authorities of other relevant Member States to ensure that any instruments of ownership, assets, rights, obligations or liabilities are transferred to the purchaser or bridge CCP *or any other resolution action becomes effective* in accordance with the applicable national law.
3. Shareholders, creditors and third parties that are affected by the transfer of instruments of ownership, assets, rights, obligations or liabilities referred to in paragraph 1 shall not be entitled to prevent, challenge, or set aside that transfer under the law of the Member State that governs that transfer.
4. Where the resolution authority of a Member State uses the resolution tools referred to in Articles 28 or 32, and the contracts, liabilities, instruments of ownership or debt instruments of the CCP under resolution include instruments, contracts or liabilities that are governed by the law of another Member State, or liabilities owed to creditors and contracts in respect of clearing *members or their clients* located in that other Member State, the relevant authorities in that other Member State shall ensure that any action resulting from those resolution tools takes effect.

For the purposes of the first subparagraph, shareholders, creditors and clearing *members or their clients* affected by those resolution tools shall not be entitled to challenge the reduction of the principal or payable amount of the instrument or liability or its conversion or restructuring.

5. The following rights and safeguards shall be determined in accordance with the law of the Member State of the resolution authority:
  - (a) the right for shareholders, creditors and third parties to appeal pursuant to Article 72 against the transfer of instruments of ownership, assets, rights, obligations or liabilities referred to in paragraph 1 of this Article;
  - (b) the right for affected creditors to appeal pursuant to Article 72 against the reduction of the principal or payable amount or the conversion or restructuring of an instrument, liability or contract covered by paragraph 4 of this Article;
  - (c) the safeguards for partial transfers, as referred to in Chapter V, in relation to assets, rights, obligations or liabilities referred to in paragraph 1 of this Article.

### *Article 53*

*Power in respect of assets, contracts, rights, liabilities, obligations  
and instruments of ownership of persons located in or governed by the law of third countries*

1. Where a resolution action concerns assets or contracts of persons located in a third country or instruments of ownership, rights, obligations or liabilities governed by the law of a third country, the resolution authority may require that:
  - (a) the CCP under resolution and the recipient of those assets, contracts, instruments of ownership, rights, obligations or liabilities take all necessary steps to ensure that the action becomes effective;
  - (b) the CCP under resolution holds the instruments of ownership, assets or rights or discharges the liabilities or obligations on behalf of the recipient until the action becomes effective;

- (c) the reasonable expenses of the recipient properly incurred in carrying out any action required under points (a) and (b) of this paragraph are reimbursed in any of the ways referred to in Article 27(9).
2. For the purposes of paragraph 1, the resolution authority may require the CCP to ensure the inclusion of a provision in its contracts and other agreements with clearing members and holders of instruments of ownership and debt instruments or other liabilities located in ***or governed by the law of*** third countries by which they agree to be bound by any action in respect of their assets, contracts, rights, obligations and liabilities taken by the resolution authority, including the application of Articles 55, 56 and 57. ***The resolution authority may require the CCP to provide it with a legal opinion relating to the legal enforceability and effectiveness of such provisions.***
3. Where the resolution action referred to in paragraph 1 does not become effective, that action shall be void in relation to the instruments of ownership, assets, rights, obligations or liabilities concerned.

#### *Article 54*

##### *Exclusion of certain contractual terms in early intervention and resolution*

1. A crisis prevention measure or a resolution action taken in accordance with this Regulation, or any event directly linked to the application of that action, shall not be deemed an enforcement or insolvency event within the meaning of Directive 2002/47/EC and Directive 98/26/EC provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed.

For the purposes of the first subparagraph, third-country resolution proceedings recognised pursuant to Article 75, or otherwise where the resolution authority so decides, shall be considered a resolution action taken in accordance with this Regulation.

2. A crisis prevention measure or a resolution action referred to in paragraph 1 shall not be used to:
- (a) exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by any entity of the group to which the



CCP belongs which includes cross-default provisions or obligations which are guaranteed or otherwise supported by any group entity;

- (b) obtain possession, exercise control or enforce any security over any property of the CCP concerned or any group entity in relation to a contract which includes cross-default provisions;
- (c) affect any contractual rights of the CCP concerned or any group entity in relation to a contract which includes cross-default provisions.

#### *Article 55*

##### *Power to suspend certain obligations*

1. The resolution authority may suspend any payment or delivery obligations of both counterparties to any contract entered into by a CCP under resolution from the publication of the notice of suspension in accordance with Article 70 until the end of the working day which follows that publication.

For the purposes of the first subparagraph, the end of the working day shall mean midnight in the Member State of the resolution authority.

2. Where a payment or delivery obligation would have been due during the suspension period, the payment or delivery obligation shall be due immediately upon expiry of the suspension period.
3. The resolution authority shall not exercise the power referred to in paragraph 1 to payment and delivery obligations owed to systems or operators of systems designated for the purposes of Directive 98/26/EC, including other central counterparties, and central banks.

#### *Article 56*

##### *Power to restrict the enforcement of security interests*

1. The resolution authority may prevent secured creditors of a CCP under resolution from enforcing security interests in relation to any assets of that CCP under resolution from the publication of the notice of the restriction in accordance with Article 70 until the end of the working day which follows that publication.

For the purposes of the first subparagraph, the end of the working day shall mean midnight in the Member State of the resolution authority.

2. The resolution authority shall not exercise the power referred to in paragraph 1 in relation to any security interest of systems or operators of systems designated for the purposes of Directive 98/26/EC, including other central counterparties, and central banks over assets pledged or provided by way of margin or collateral by the CCP under resolution.

#### *Article 57*

##### *Power to temporarily suspend termination rights*

1. The resolution authority may suspend the termination rights of any party to a contract with a CCP under resolution from the publication of the notice of the termination in accordance with Article 70 until the end of the working day which follows that publication, provided that the payment and delivery obligations and the provision of collateral continue to be performed.

For the purposes of the first subparagraph, the end of the working day shall mean midnight in the Member State of the resolution.

2. The resolution authority shall not exercise the power referred to in paragraph 1 in relation to systems or operators of systems designated for the purposes of Directive 98/26/EC, including other central counterparties and central banks.
3. A party to a contract may exercise a termination right under that contract before the end of the period referred to in paragraph 1 where that party receives notice from the resolution authority that the rights and liabilities covered by the contract shall not be:
  - (a) transferred to another entity;
  - (b) subject to write-down, conversion, or the use of a resolution tool to allocate losses or positions.
4. Where the notice referred to in paragraph 3 has not been given, termination rights may be exercised on the expiry of the period of suspension, subject to Article 54, as follows:
  - (a) where the rights and liabilities covered by the contract have been transferred to another entity, a counterparty may exercise termination rights in accordance with the

terms of that contract only if the recipient entity causes the enforcement event to occur or continue;

- (b) where the rights and liabilities covered by the contract remain with the CCP, termination rights *apply* in accordance with the *conditions for termination as set out in the contract between the CCP and the relevant counterparty only if the enforcement event occurs or continues after the expiry of the suspension period*.

#### *Article 58*

##### *Power to exercise control over the CCP*

1. The resolution authority may exercise control over the CCP under resolution to:
  - (a) manage the activities and services of the CCP, exercising the powers of its shareholders and board and to consult the risk committee;
  - (b) manage and dispose of the assets and property of the CCP under resolution.

The control referred to in the first subparagraph may be exercised directly by the resolution authority or indirectly by a person or persons appointed by the resolution authority.

2. Where the resolution authority exercises control over the CCP, the resolution authority shall not be deemed to be a shadow director or de facto director under national law.

#### *Article 59*

##### *Exercise of powers by the resolution authorities*

Subject to Article 72, resolution authorities shall take resolution actions through executive order in accordance with national administrative competences and procedures.

## CHAPTER V

### Safeguards

#### *Article 60*

#### *No Creditor Worse Off principle*

Where the resolution authority uses one or more resolution tools, it ***should aim to*** ensure that shareholders, creditors, ***clearing members and their clients*** do not incur greater losses than they would have incurred had the resolution authority not taken resolution action in relation to the CCP at the time the resolution authority considered that the conditions for resolution pursuant to Article 22(1) were met and had instead been subject to all possible outstanding obligations pursuant to the CCP's recovery plan ***and all*** other contractual arrangements in its operating rules ***for either a default or a non-default event and the CCP is a gone concern with no residual franchise value and*** wound up under normal insolvency proceedings, ***properly taking into account any plausible adverse effects of systemic instability and market turmoil.***

(a) █

(b) █

***Plausible adverse effects of systemic instability and market turmoil referred to in the first subparagraph shall not be taken into account as long as the regulatory technical standards referred to in paragraph 5 of Article 61 does not allow for their valuation.***

***Once the regulatory technical standards referred to in paragraph 5 of Article 61 have entered into force, the resolution authorities shall take into account plausible adverse effects of systemic instability and market turmoil for the purpose of the first subparagraph.***

#### *Article 61*

#### *Valuation for the application of the No Creditor Worse Off principle*

1. ***For the purpose of informing stakeholders exposed to the CCP, the CCP shall produce an estimate of how losses would affect each category of creditor under extreme but plausible scenarios for a default and non-default event leading to the insolvency of the CCP and shall be updated annually.***

*This estimate shall fully reflect the contractual arrangements governing the CCP's loss waterfall and be consistent with the margining and stress testing methodology used to fulfil the CCP's obligations under Regulation (EU) No 648/2012.*

- 1a. *For the purposes of assessing compliance with the no creditor worse off principle as laid down in Article 60, the resolution authority shall ensure that a valuation is carried out by an independent person as soon as possible after the resolution actions have been effected.*
2. The valuation referred to in paragraph 1 shall include:
  - (a) the treatment that shareholders, creditors *and clearing members or their clients* would have received had the resolution authority not taken resolution action in relation to the CCP the resolution authority considered that the conditions for resolution pursuant to Article 22(1) were met, and they had instead been subject to the enforcement of possible outstanding obligations pursuant to the CCP's recovery plan *and* other arrangements in its operating rules and the CCP had been wound up under normal insolvency proceedings *as a gone concern with no residual franchise value, properly taking into account any plausible adverse effects of systemic instability and market turmoil,*
  - (b) the actual treatment that shareholders, creditors *and clearing members or their clients* have received, in the resolution of the CCP;
  - (c) whether there is any difference between the treatment referred to in point (a) and the treatment referred to in point (b).
3. For the purposes of calculating the treatments referred to in paragraph 2(a), the valuation referred to in paragraph 1 shall disregard any provision of extraordinary public financial support to the CCP under resolution *and the CCP's own pricing methodology shall be disregarded should this methodology fail to reflect the effective market conditions.*
4. The valuation referred to in paragraph 1 shall be distinct from the valuation carried out under Article 24(3).
5. ESMA, taking into account any regulatory technical standards developed in accordance with Article 74(4) of Directive 2014/59/EU, shall develop draft regulatory technical

standards specifying the methodology for carrying out the valuation referred to in paragraph 1, ***including, if or when technically possible, the valuation of plausible adverse effects of systemic instability and market turmoil.***

ESMA shall submit those draft regulatory standards to the Commission by [*PO please insert the date 12 months from entry into force of the Regulation*].

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 62*

##### *Safeguard for shareholders, creditors and clearing members and clients of clearing members*

Where, in accordance with the valuation carried out under Article 61, any shareholder, creditor, clearing ***member or client of a clearing member*** has incurred greater losses than it would have incurred if the resolution authority would not have taken resolution action in relation to the CCP and they would instead have been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or the CCP had been wound up under normal insolvency proceedings, that shareholder, creditor or clearing participant shall be entitled to the payment of the difference.

#### *Article 62a*

##### *Recoupment of payments*

***The resolution authority shall recover any reasonable expenses incurred in connection with a payment as referred to in Article 62 in any of the following ways:***

- (a) from the CCP under resolution, as a preferred creditor;***
- (b) from any consideration paid by the purchaser where the sale of business tool has been used;***
- (c) from any proceeds generated as a result of the termination of the bridge CCP, as a preferred creditor;***

- (d) *from any clearing member, to the extent that a clearing member does not incur greater losses than it would have incurred if the resolution authority would not have taken resolution action in relation to the CCP and they would instead have been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or the CCP had been wound up under normal insolvency proceedings.*

#### *Article 63*

##### *Safeguard for counterparties in partial transfers*

The protections provided for in Articles 64, 65 and 66 shall apply in the following circumstances:

- (a) where the resolution authority transfers some but not all of the assets, rights, obligations or liabilities of a CCP under resolution, or a bridge CCP, to a purchaser;
- (b) where the resolution authority exercises the powers referred to in point (g) of Article 49(1).

#### *Article 64*

##### *Protection for financial collateral, set off and netting agreements*

The resolution authority shall ensure that the use of a resolution tool does not result in transferring some, but not all, of the rights and liabilities under a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement between a CCP under resolution and other parties to the arrangements, or in modifying or terminating the rights and liabilities under those arrangements through the use of ancillary powers.

The arrangements referred to in the first subparagraph shall include any arrangement to which the parties are entitled to set-off or net those rights and liabilities.

## *Article 65*

### *Protection for security arrangements*

***Without prejudice to the use of position allocation tools in Article 29***, the resolution authority shall ensure that the use of a resolution tool does not result in any of the following with respect to security arrangements between a CCP under resolution and other parties to those arrangements:

- (a) the transfer of assets against which the liability is secured unless that liability and benefit of the security are also transferred;
- (b) the transfer of a secured liability unless the benefit of the security is also transferred;
- (c) the transfer of the benefit of the security unless the secured liability is also transferred;
- (d) the modification or termination of a security arrangement through the use of ancillary powers, if the effect of that modification or termination is that the liability ceases to be secured.

## *Article 66*

### *Protection for structured finance arrangements and covered bonds*

The resolution authority shall ensure that the use of a resolution tool does not result in any of the following with respect to structured finance arrangements, including covered bonds:

- (a) the transfer of some, but not all, of the assets, rights and liabilities which constitute or form part of a structured finance arrangement to which the **CCP** under resolution is a party;
- (b) the termination or modification through the use of ancillary powers of the assets, rights and liabilities which constitute or form part of a structured finance arrangement to which the **CCP** under resolution is a party.

For the purposes of the first subparagraph, structured finance arrangements shall include securitisations and instruments used for hedging purposes which form an integral part of the cover pool and which according to national law are secured in a way similar to the covered bonds, which involve the granting and holding of security by a party to the arrangement or a trustee, agent or nominee.



## *Article 67*

### *Partial transfers: protection of trading, clearing and settlement systems*

1. The resolution authority shall ensure that the use of a resolution tool does not affect the operation of systems and rules of systems covered by Directive 98/26/EC, where the resolution authority:
  - (a) transfers some but not all of the assets, rights, obligations or liabilities of a CCP under resolution to a purchaser;
  - (b) cancels or amends the terms of a contract to which the CCP under resolution is a party or to substitute a purchaser or bridge CCP as a party.
2. For the purposes of paragraph 1, the resolution authority shall ensure that the use of a resolution tool does not result in any of the following outcomes:
  - (a) revoking a transfer order in accordance with Article 5 of Directive 98/26/EC;
  - (b) affecting the enforceability of transfer orders and netting as required by Articles 3 and 5 of Directive 98/26/EC;
  - (c) affecting the use of funds, securities or credit facilities as required by Article 4 of Directive 98/26/EC;
  - (d) affecting the protection of collateral security as required by Article 9 of Directive 98/26/EC.

## **CHAPTER VI**

### ***Procedural obligations***

## *Article 68*

### *Notification requirements*

1. The CCP shall notify the competent authority where it considers that it is failing or likely to fail as referred to in Article 22(2).

2. The competent authority shall inform the resolution authority of any notifications received under paragraph 1, and of any recovery or other measures in accordance with Title IV that the competent authority requires the CCP to take.

The competent authority shall inform the resolution authority of any emergency situation referred to in Article 24 of Regulation (EU) No 648/2012 relating to a CCP and of any notification received in accordance with Article 48 of that Regulation.

3. Where a competent authority or resolution authority determines that the conditions referred to in points (a) and (b) of Article 22(1) are met in relation to a CCP, it shall notify the following authorities *in a timely manner*:

- (a) the competent authority or resolution authority for that CCP;
- (b) the competent authority for the parent undertaking of the CCP;

***(b a) the supervisory college for that CCP;***

***(bb) the resolution college for that CCP;***

- (c) the central bank;
- (d) the competent ministry;
- (e) the ESRB and the designated national macro-prudential authority.

#### *Article 69*

##### *Decision of the resolution authority*

1. After a notification from the competent authority pursuant to Article 68(3), the resolution authority shall determine whether any resolution action is needed.
2. The decision whether or not to take resolution action in relation to a CCP shall contain information on the following:
  - (a) the resolution authority's assessment of whether the CCP meets the conditions for resolution;

- (b) any action that the resolution authority intends to take, including the decision to apply for winding up, the appointment of an administrator or any other measure under applicable normal insolvency proceedings or, subject to point (e) of Article 27(1), under national law.

## *Article 70*

### *Procedural obligations of resolution authorities*

1. As soon as practicable after taking a resolution action, the resolution authority shall notify all of the following:
  - (a) the CCP under resolution;
  - (b) the resolution college;
  - (c) the designated national macroprudential authority and the ESRB;
  - (d) the Commission, the European Central Bank, and EIOPA;
  - (e) the operators of the systems covered by Directive 98/26/EC in which the CCP under resolution participates.
2. The notification referred to in paragraph 1 shall include a copy of any order or instrument by which the relevant action is taken and indicate the date from which the resolution action is effective.

The notification to the resolution college pursuant to point (b) of paragraph (1) shall also indicate whether the resolution action deviates from the resolution plan and provide reasons for any such deviation.

3. A copy of the order or instrument by which the resolution action is taken, or a notice summarising the effects of the resolution action and, if applicable, the terms and period of suspension or restriction referred to in Articles 55, 56 and 57, shall be published at all of the following:
  - (a) the website of the resolution authority;

- (b) the website of the competent authority, if different from the resolution authority, and the website of ESMA;
  - (c) the website of the CCP under resolution;
  - (d) where the instruments of ownership or debt instruments of the CCP under resolution are admitted to trading on a regulated market, the means used for the disclosure of regulated information concerning the CCP under resolution in accordance with Article 21(1) of Directive 2004/109/EC of the European Parliament and of the Council<sup>18</sup>.
4. Where the instruments of ownership or debt instruments are not admitted to trading on a regulated market, the resolution authority shall ensure that the documents providing proof of the order referred to in paragraph 3 are sent to the holders of the instruments of ownership and creditors of the CCP under resolution that are known through the registers or databases of the CCP under resolution which are available to the resolution authority.

#### *Article 71*

#### *Confidentiality*

1. The requirements of professional secrecy shall be binding in respect of the following persons:
- (a) resolution authorities;
  - (b) competent authorities, ESMA and EBA;
  - (c) competent ministries;
  - (d) special managers or temporary administrators appointed under this Regulation;
  - (e) potential acquirers that are contacted by the competent authorities or solicited by the resolution authorities, irrespective of whether that contact or solicitation was made as preparation for the use of the sale of business tool, and irrespective of whether the solicitation resulted in an acquisition;

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<sup>18</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

- (f) auditors, accountants, legal and professional advisors, valuers and other experts directly or indirectly engaged by the resolution authorities, competent authorities, competent ministries or by the potential acquirers referred to in point (e);
- (g) central banks and other authorities involved in the resolution process;
- (h) a bridge CCP;
- (i) any other persons who provide or have provided services directly or indirectly, permanently or occasionally, to persons referred to in points (a) to (k);
- (j) the senior management and members of the board of the CCP, and employees of the bodies or entities referred to in points (a) to (k) before, during and after their appointment;
- (k) all other members of the resolution college not referred to in points (a), (b), (c) and (g).

2. With a view to ensuring that the confidentiality requirements laid down in paragraphs 1 and 3 are complied with, the persons referred to in points (a), (b), (c), (g), (h) and (k) of paragraph 1 shall ensure that there are internal rules in place, including rules to secure secrecy of information between persons directly involved in the resolution process.

3. The persons referred to in paragraph 1 shall be prohibited from disclosing confidential information received during the course of their professional activities or from a competent authority or resolution authority in connection with their functions under this Regulation, to any person or authority unless it is in the exercise of their functions under this Regulation or in summary or aggregate form such that individual CCPs cannot be identified or with the express and prior consent of the authority or the CCP which provided the information.

Before disclosing any type of information, the persons referred to in paragraph 1 shall assess the effects that the disclosure may have on the public interest as regards financial, monetary or economic policy, on the commercial interests of natural and legal persons, on the purpose of inspections, on investigations and on audits.

The procedure for checking the effects of disclosing information shall include a specific assessment of the effects of any disclosure of the contents and details of recovery and

resolution plans as referred to in Articles 9 and 13 and the result of any assessment carried out under Articles 10 and 16.

Any person or entity referred to in paragraph 1 shall be subject to civil liability in the event of an infringement of this Article, in accordance with national law.

4. By way of derogation from paragraph 3, the persons referred to in paragraph 1 may exchange confidential information with any of the following provided that confidentiality agreements are in place for the purposes of that exchange:
  - (a) any other person where necessary for the purposes of planning or carrying out a resolution action;
  - (b) parliamentary enquiry committees in their Member State, courts of auditors in their Member State and other entities in charge of enquiries in their Member State;
  - (c) national authorities responsible for overseeing payment systems, the authorities responsible for normal insolvency proceedings, the authorities entrusted with the public duty of supervising other financial sector entities, the authorities responsible for the supervision of financial markets and insurance undertakings and inspectors acting on their behalf, the authorities responsible for maintaining the stability of the financial system in Member States through the use of macroprudential rules, the authorities responsible for protecting the stability of the financial system, and persons charged carrying out statutory audits.
  
5. This Article shall not prevent:
  - (a) employees and experts of the bodies or entities referred to in points (a) to (g) and in point (k) of paragraph 1 from sharing information among themselves within each body or entity;
  - (b) resolution authorities and competent authorities, including their employees and experts, from sharing information with each other and with other Union resolution authorities, other Union competent authorities, competent ministries, central banks, authorities responsible for normal insolvency proceedings, authorities responsible for maintaining the stability of the financial system in Member States through the use of macroprudential rules, persons charged with carrying out statutory audits of

accounts, EBA, ESMA, or, subject to Article 78, third-country authorities that carry out equivalent functions to resolution authorities, or, subject to strict confidentiality requirements, to a potential acquirer for the purposes of planning or carrying out a resolution action.

6. This Article shall be without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases.

## CHAPTER VII

### *Right of appeal and exclusion of other actions*

#### *Article 72*

##### *Ex-ante judicial approval and rights of appeal*

1. **2.** All persons affected by a decision to take a crisis prevention measure or a decision to exercise any power, other than a resolution action, shall have the right of appeal against that decision.
  3. All persons affected by a decision to take a resolution action shall have the right of appeal against that decision.
  4. The right of appeal referred to in paragraph 3 shall be subject to the following conditions:
    - (a) the decision of the resolution authority shall be immediately enforceable and it shall give rise to a rebuttable presumption that a suspension of its enforcement would be against the public interest;
    - (b) the procedure relating to the appeal shall be expeditious;
    - (c) the court shall use the economic assessments of the facts carried out by the resolution authority as a basis for its own assessment.
- 4a.** *A decision of the Resolution Authority to take a Resolution action, a crisis prevention measure or a decision to exercise any power, other than a Resolution action, shall be annulled on substantive grounds only if it was arbitrary and unreasonable at the time of the decision, based on the information then readily available.*

**4b. *The lodging of an appeal shall not entail any automatic suspension of the effects of the challenged decision.***

5. Where necessary to protect the interests of third parties acting in good faith who have acquired instruments of ownership, assets, rights, obligations or liabilities of a CCP under resolution by virtue of a resolution action, the annulment of a decision of a resolution authority shall not affect any subsequent administrative acts or transactions concluded by the resolution authority concerned which were based on the annulled decision.

For the purposes of the first subparagraph, the remedies available to the applicant where a decision of the resolution authority is annulled shall be limited to compensation for the loss suffered as a result of that decision.

### *Article 73*

#### *Restrictions on other proceedings*

1. Normal insolvency proceedings shall not be commenced in relation to a CCP except at the initiative of the resolution authority or with its consent in accordance with paragraph 3.
2. Competent authorities and resolution authorities shall be notified without delay of any application for the opening of normal insolvency proceedings in relation to a CCP, irrespective of whether the CCP is under resolution or a decision has been made public in accordance with Article 70(3).
3. The authorities responsible for normal insolvency proceedings may only commence those proceedings after the resolution authority has notified them of its decision not to take any resolution action in relation to the CCP or where no notification has been received within seven days of the notification referred to in paragraph 2.

Where necessary for the effective use of the resolution tools and powers, resolution authorities may request the court to apply a stay for an appropriate period of time in accordance with the objective pursued, on any judicial action or proceeding in which a CCP under resolution is or may become a party.



**TITLE VI**  
**RELATIONS WITH THIRD COUNTRIES**

*Article 74*

*Agreements with third countries*

1. In accordance with Article 218 TFEU, the Commission may submit to the Council recommendations for the negotiation of agreements with one or more third countries regarding the means of cooperation between the resolution authorities and the relevant third country authorities in connection with recovery and resolution planning in relation to CCPs and third country CCPs, with regard to the following situations:
  - (a) where a third country CCP provides services or has subsidiaries in one or more Member States;
  - (b) where a CCP established in a Member State provides services or has one or more subsidiaries in a third country;
  - (ba) where a significant number of clearing members of a CCP are established in that third country;**
  - (bb) where a third country CCP has a significant number of clearing members that are established in the Union.**
  
2. The agreements referred to in paragraph 1 shall, in particular, seek to ensure the establishment of processes and arrangements for cooperation in carrying out the tasks and exercising the powers indicated in Article 77, including the exchange of information necessary for those purposes.

*Article 75*

*Recognition and enforcement of third-country resolution proceedings*

1. This Article shall apply in respect of third-country resolution proceedings unless and until an international agreement as referred to in Article 74(1) enters into force with the relevant third country. It shall also apply following the entry into force of an international agreement as referred to in Article 74(1) with the relevant third country to the extent that

recognition and enforcement of third-country resolution proceedings is not governed by that agreement.

2. Relevant national authorities shall recognise third-country resolution proceedings relating to a third-country CCP in any of the following cases:
  - (a) the third-country CCP provides services in or has subsidiaries established in one or more Member States;
  - (b) the third-country CCP has assets, rights, obligations or liabilities located in one or more Member States or are governed by the law of those Member States.

Relevant national authorities shall ensure the enforcement of the recognised third-country resolution proceedings in accordance with their national law.

3. The relevant national authorities shall at least have the power to do the following:
  - (a) exercise the resolution powers in relation to the following:
    - (i) assets of a third-country CCP that are located in their Member State or governed by the law of their Member State;
    - (ii) rights or liabilities of a third-country CCP that are booked in their Member State or governed by the law of their Member State, or where claims in relation to such rights and liabilities are enforceable in their Member State;
  - (b) perfect, including to require another person to take action to perfect, a transfer of instruments of ownership in a subsidiary established in the designating Member State;
  - (c) exercise the powers in Article 55, 56 and 57 in relation to the rights of any party to a contract with an entity referred to in paragraph 2 of this Article, where such powers are necessary in order to enforce third-country resolution proceedings;
  - (d) render unenforceable any right to terminate, liquidate or accelerate contracts, or affect the contractual rights, of entities referred to in paragraph 2 and other group entities, where such a right arises from resolution action taken in respect of the third-country CCP, whether by the third-country resolution authority itself or otherwise pursuant to legal or regulatory requirements as to resolution arrangements

in that country, provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed.

4. The recognition and enforcement of third-country resolution proceedings shall be without prejudice to any normal insolvency proceedings under national law applicable.

#### *Article 76*

##### *Right to refuse recognition or enforcement of third-country resolution proceedings*

By way of derogation from Article 75(2), the relevant national authorities may refuse to recognise or to enforce third-country resolution proceedings in any of the following cases:

- (a) the third-country resolution proceedings would have adverse effects on financial stability in their Member State;
- (b) creditors or clearing ***members or their clients of those clearing members*** located in their Member State would not receive the same treatment as third-country creditors or clearing ***members or their clients of those clearing members*** with similar legal rights under the third-country home resolution proceedings;
- (c) recognition or enforcement of the third-country resolution proceedings would have material fiscal implications for their Member State;
- (d) the recognition or enforcement would be contrary to national law.

#### *Article 77*

##### *Cooperation with third-country authorities*

1. This Article shall apply in respect of cooperation with a third country unless and until an international agreement as referred to in Article 74(1) enters into force with the relevant third country. It shall also apply following the entry into force of an international agreement provided for in Article 74(1) with the relevant third country to the extent that the subject matter of this Article is not governed by that agreement.
2. Competent authorities or resolution authorities, where appropriate, shall conclude cooperation arrangements with the following relevant third-country authorities, taking into

account existing cooperation arrangements established pursuant to Article 25(7) of Regulation (EU) No 648/2012:

- (a) where a third country CCP provides services or has subsidiaries in one or more Member States, the relevant authorities of the third country where the CCP is established;
  - (b) where a CCP provides services in or has one or more third-country subsidiaries, the relevant authorities of the third countries where those services are provided or where the subsidiaries are established.
3. The cooperation arrangements referred to in paragraph 2 shall establish processes and arrangements between the participating authorities for sharing the necessary information for and cooperating in carrying out the following tasks and exercising the following powers in relation to CCPs referred to in points (a) and (b) of paragraph 2 or groups including such CCPs:
  - (a) the development of resolution plans in accordance with Article 13 and similar requirements under the law of the relevant third countries;
  - (b) the assessment of the resolvability of such institutions and groups, in accordance with Article 16 and similar requirements under the law of the relevant third countries;
  - (c) the application of powers to address or remove impediments to resolvability pursuant to Article 17 and any similar powers under the law of the relevant third countries;
  - (d) the application of early intervention measures pursuant to Article 19 and similar powers under the law of the relevant third countries;
  - (e) the use of resolution tools and exercise of resolution powers and similar powers conferred upon the relevant third-country authorities.
4. Cooperation arrangements concluded between resolution authorities and competent authorities of Member States and third countries pursuant to paragraph 2 may include provisions on the following matters:

- (a) the exchange of information necessary for the preparation and maintenance of resolution plans;
- (b) consultation and cooperation in the development of resolution plans, including principles for the exercise of powers under Article 75 and similar powers under the law of the relevant third countries;
- (c) the exchange of information necessary for the use of resolution tools and exercise of resolution powers and similar powers under the law of the relevant third countries;
- (d) early warning to or consultation of parties to the cooperation arrangement before taking any significant action under this Regulation or relevant third-country law affecting the CCP or group to which the arrangement relates;
- (e) the coordination of public communication in the case of joint resolution actions;
- (f) procedures and arrangements for the exchange of information and cooperation under points (a) to (e), including, where appropriate, through the establishment and operation of crisis management groups.

In order to ensure the common, uniform and consistent application of paragraph 3, ESMA shall issue guidelines on the types and content of the provisions referred to in paragraph 4 by [*PO please insert the date 18 months from entry into force of the Regulation*].

5. Resolution authorities and competent authorities shall notify ESMA of any cooperation agreements that they have concluded in accordance with this Article.

#### *Article 78*

##### *Exchange of confidential information*

1. Resolution authorities, competent authorities, competent ministries and, where applicable, other relevant national authorities shall exchange confidential information, including recovery plans, with relevant third-country authorities only if the following conditions are met:

- (a) those third-country authorities are subject to requirements and standards of professional secrecy at least considered to be equivalent, in the opinion of all the authorities concerned, to those imposed by Article 71;
  - (b) the information is necessary for the performance by the relevant third-country authorities of their functions under national law that are comparable to those under this Regulation and is not used for any other purposes.
2. In so far as the exchange of information relates to personal data, the handling and transmission of such personal data to third-country authorities shall be governed by the applicable Union and national data protection law.
3. Where confidential information originates in another Member State, resolution authorities, competent authorities and competent ministries shall not disclose that information to relevant third-country authorities unless the following conditions are met:
  - (a) the relevant authority of the Member State where the information originated agrees to that disclosure;
  - (b) the information is disclosed only for the purposes permitted by the authority referred to in point (a).
4. For the purposes of this Article, information is deemed to be confidential if it is subject to confidentiality requirements under Union law.

#### *Article 78a*

##### *Administrative penalties and other administrative measures*

1. ***Without prejudice to the right of Member States to provide for and impose criminal penalties, Member States shall lay down rules on administrative penalties and other administrative measures applicable where the provisions of this Regulation have not been complied with, and shall take all measures necessary to ensure that they are implemented. Where Member States decide not to lay down rules for administrative penalties for infringements which are subject to national criminal law they shall communicate to the Commission the relevant criminal law provisions. The***

*administrative penalties and other administrative measures shall be effective, proportionate and dissuasive.*

2. *Member States shall ensure that, where obligations referred to in the first paragraph apply to CCPs, clearing members of CCPs or parent undertakings, in the event of an infringement, administrative penalties can be applied, subject to the conditions laid down in national law, to the members of the board of the CCP and to other natural persons who under national law are responsible for the infringement.*
3. *The powers to impose administrative penalties provided for in this Regulation shall be attributed to resolution authorities or, where different, to competent authorities, depending on the type of infringement. Resolution authorities and competent authorities shall have all information-gathering and investigatory powers that are necessary for the exercise of their respective functions. In the exercise of their powers to impose penalties, resolution authorities and competent authorities shall cooperate closely to ensure that administrative penalties or other administrative measures produce the desired results and coordinate their action when dealing with cross-border cases.*
4. *Resolution authorities and competent authorities shall exercise their administrative powers to impose penalties in accordance with this Regulation and national law in any of the following ways:*
  - (a) *directly;*
  - (b) *in collaboration with other authorities;*
  - (c) *under their responsibility by delegation to such authorities;*
  - (d) *by application to the competent judicial authorities.*

## Article 78b

### Specific provisions

1. *Member States shall ensure that their laws, regulations and administrative provisions provide for penalties and other administrative measures at least in respect of the following situations:*
  - (a) *failure to draw up, maintain and update recovery plans infringing Article 9;*
  - (b) *failure to provide all the information necessary for the development of resolution plans, infringing Article 14;*
  - (c) *failure of the board of the CCP to notify the competent authority when the CCP is failing or likely to fail, infringing Article 68(1).*
  
2. *Member States shall ensure that, in the cases referred to in paragraph 1, the administrative penalties and other administrative measures that can be applied include at least the following:*
  - (a) *a public statement which indicates the natural person, institution, Union parent undertaking, CCP, or other legal person responsible and the nature of the infringement;*
  - (b) *an order requiring the natural or legal person responsible to cease the conduct and to desist from a repetition of that conduct;*
  - (c) *a temporary ban against the members of the senior management of the CCP or any other natural person, who is held responsible, to exercise functions in CCPs;*
  - (d) *in the case of a legal person, administrative fines of up to 10 % of the total annual net turnover of that legal person in the preceding business year. Where the legal person is a subsidiary of a parent undertaking, the relevant turnover shall be the turnover resulting from the consolidated accounts of the ultimate parent undertaking in the preceding business year;*



- (e) *in the case of a natural person, administrative fines of up to EUR 5 000 000, or in the Member States where the Euro is not the official currency, the corresponding value in the national currency on [date of entry into force of the Regulation];*
- (f) *administrative fines of up to twice the amount of the benefit derived from the infringement where that benefit can be determined.*

#### *Article 78c*

#### *Publication of administrative penalties*

1. *Member States shall ensure that resolution authorities and competent authorities publish on their official website at least any administrative penalties imposed by them for infringing the provisions laid down in this Regulation where such penalties have not been the subject of an appeal or where the right of appeal has been exhausted. Such publication shall be made without undue delay after the natural or legal person is informed of that penalty including information on the type and nature of the infringement and the identity of the natural or legal person on whom the penalty is imposed.*

*Where Member States permit publication of penalties against which there is an appeal, resolution authorities and competent authorities shall, without undue delay, publish on their official websites information on the status of that appeal and the outcome thereof.*

2. *Resolution authorities and competent authorities shall publish the penalties imposed by them on an anonymous basis, in a manner which is in accordance with national law, in any of the following circumstances:*
  - (a) *where the penalty is imposed on a natural person and publication of personal data is shown to be disproportionate by an obligatory prior assessment of the proportionality of such publication;*
  - (b) *where publication would jeopardise the stability of financial markets or an ongoing criminal investigation;*

- (c) *where publication would cause, insofar as it can be determined, disproportionate damage to the CCP or natural persons involved.*

*Alternatively, in such cases, the publication of the data in question may be postponed for a reasonable period of time, if it is foreseeable that the reasons for anonymous publication will cease to exist within that period.*

3. *Resolution authorities and competent authorities shall ensure that any publication in accordance with this Article shall remain on their official website for a period of at least five years. Personal data contained in the publication shall only be kept on the official website of the resolution authority or the competent authority for the period which is necessary in accordance with applicable data protection rules.*
4. *By ... [PO: insert date: 18 months after the entry into force of this Regulation], ESMA shall submit a report to the Commission on the publication by Member States, on an anonymous basis as provided for under paragraph 2, of penalties for non-compliance with the provisions laid down in this Regulation and in particular whether there have been significant divergences between Member States in that respect. That report shall also address any significant divergences in the duration of publication of penalties under national law for Member States for publication of penalties.*

#### *Article 78d*

##### *Maintenance of central database by ESMA*

1. *Subject to the professional secrecy requirements referred to in Article 71, resolution authorities and competent authorities shall inform ESMA of all administrative penalties imposed by them under Article 78a for infringements of the provisions laid down in this Article and of the status of that appeal and outcome thereof.*
2. *ESMA shall maintain a central database of penalties reported to it solely for the purpose of exchange of information between resolution authorities which shall be accessible to resolution authorities only and shall be updated on the basis of the information provided by resolution authorities.*

3. *ESMA shall maintain a central database of penalties reported to it solely for the purpose of exchange of information between competent authorities which shall be accessible to competent authorities only and shall be updated on the basis of the information provided by competent authorities.*
4. *ESMA shall maintain a webpage with links to each resolution authority's publication of penalties and each competent authority's publication of penalties under Article 78c and indicate the period for which each Member State publishes penalties.*

#### *Article 78e*

##### *Effective application of penalties and exercise of powers to impose penalties by competent authorities and resolution authorities*

*Member States shall ensure that, when determining the type of administrative penalties or other administrative measures and the level of administrative fines, the competent authorities and resolution authorities take into account all relevant circumstances, including where appropriate:*

- (a) the gravity and the duration of the infringement;*
- (b) the degree of responsibility of the natural or legal person responsible;*
- (c) the financial strength of the natural or legal person responsible, for example, as indicated by the total turnover of the responsible legal person or the annual income of the responsible natural person;*
- (d) the amount of profits gained or losses avoided by the natural or legal person responsible, insofar as they can be determined;*
- (e) the losses for third parties caused by the infringement, insofar as they can be determined;*
- (f) the level of cooperation of the natural or legal person responsible with the competent authority and the resolution authority; (g) previous infringements by the natural or legal person responsible;*

*(h) any potential systemic consequences of the infringement.*

**TITLE VII**  
**AMENDMENTS TO REGULATIONS (EU) NO 1095/2010, (EU) NO 648/2012, AND (EU)**  
**2015/2365**

*Article 79*

*Amendments to Regulation (EU) No 1095/2010*

Regulation (EU) No 1095/2010 is amended as follows:

(22) in Article 4, in paragraph 3, the following point (iv) is added:

'(iv) with regard to Regulation (EU) No [on CCP recovery and resolution], a resolution authority as defined in point 3 of Article 2(1) of Regulation (EU) No [on CCP recovery and resolution].';

(23) in Article 40, in paragraph 5, the following subparagraph is added:

‘For the purpose of acting within the scope of Regulation (EU) [on CCP recovery and resolution], the member of the Board of Supervisors referred to in point (b) of paragraph 1 may, where appropriate, be accompanied by a representative from the resolution authority in each Member State, who shall be non-voting.’.

*Article 80*

*Amendments to Regulation (EU) No 648/2012*

Regulation (EU) No 648/2012 is amended as follows:

(1) The following Article 6a is inserted:

*'Article 6a*

**Suspension of the clearing obligation in resolution**

1. Where a CCP meets the conditions under Article 22 of Regulation (EU) [on CCP recovery and resolution], the resolution authority of the CCP designated under Article 3(1) of that Regulation ■ may request the Commission to temporarily suspend the clearing obligation

laid down in Article 4(1) for specific classes of OTC derivatives where the following conditions are met:

- (a) the CCP in resolution is authorised under Article 14 to clear the specific classes of OTC derivatives subject to clearing pursuant to Article 4(1) for which the suspension is requested;
- (b) the suspension of the clearing obligation laid down in Article 4 for those specific classes of OTC derivatives is necessary to avoid a serious threat to financial stability in the Union in connection with the resolution of the CCP, in particular where ***all*** of the following criteria are met:
  - (i) there are adverse events or developments which constitute a serious threat to financial stability;
  - (ii) the measure is necessary to address the threat and will not have a detrimental effect on financial stability ***including possible procyclical effects*** which is disproportionate to its benefits.
  - (iii) no alternative CCPs are available to offer the clearing service to the clearing participants of the CCP in resolution, or clearing members and clients are not operationally and technically able to meet within a reasonable timeframe all legal or operational requirements of those alternative CCPs.***

The request referred to in the first subparagraph shall be accompanied by evidence that the conditions laid down in points (a) and (b) of the first subparagraph are fulfilled.

The ***resolution*** authority referred to in the first subparagraph shall notify its reasoned request to ESMA and the ESRB at the same time that the request is notified to the Commission.

2. ESMA shall, within 24 hours of notification of the request referred to in paragraph 1, and after consultation of the ESRB, issue an opinion on the intended suspension taking into account the necessity to avoid a serious threat to financial stability in the Union, the resolution objectives laid down in Article 21 of Regulation (EU) [*on CCP recovery and resolution*] and the criteria set out in paragraphs 4 and 5 of Article 5 of this Regulation.

3. The opinion referred to in paragraph 2 shall not be made public.
4. The Commission shall, within 48 hours of the request referred to in paragraph 1 and in accordance with paragraph 6 adopt a decision suspending temporarily the clearing obligation for specific classes of OTC derivatives or rejecting the requested suspension.
5. The Commission's decision shall be communicated to the authority that requested the suspension and to ESMA and shall be published on the Commission's website. Where the Commission decides to suspend a clearing obligation, this shall be published on the public register referred to in Article 6.
6. The Commission may decide to temporarily suspend the clearing obligation referred to in paragraph 1 for the specific class of OTC derivatives provided that the conditions in point (a) and (b) of paragraph 1 are fulfilled. In adopting such a decision, the Commission shall take into account the opinion issued by ESMA referred to in paragraph 2, the resolution objectives referred to in Article 21 of Regulation (EU) [*on CCP recovery and resolution*], the criteria set out in paragraphs 4 and 5 of Article 5 regarding those OTC derivative classes and the necessity of the suspension to avoid a serious threat to financial stability.
7. The suspension of a clearing obligation pursuant to paragraph 4 shall be valid for an initial period not exceeding **one month** from the date of its publication in the *Official Journal of the European Union*.
8. The Commission may, after consulting the **Resolution Authority, ESMA and the ESRB**, renew the suspension referred to in paragraph 7 for one or more periods not cumulatively exceeding six months from the end of the initial suspension period where the grounds for the suspension continue to apply.
9. Where the suspension is not renewed by the end of the initial period or by the end of any subsequent renewal period it shall automatically expire.
10. The Commission shall notify ESMA of its intention to renew the suspension of the clearing obligation.

ESMA shall, within 48 hours of notification by the Commission of its intention to renew the suspension of the clearing obligation, issue an opinion on the renewal of the suspension taking into account the necessity to avoid a serious threat to financial stability in the Union,

the resolution objectives laid down in Article 21 of Regulation (EU) [*on CCP recovery and resolution*] and the criteria set out in paragraphs 4 and 5 of Article 5 of this Regulation.';

(2) In Article 28, paragraph 3 is replaced by the following:

'3. The risk committee shall advise the board on any arrangements that may impact the risk management of the CCP, such as a significant change in its risk model, the default procedures, the criteria for accepting clearing members, the clearing of new classes of instruments, or the outsourcing of functions. The risk committee shall inform the board in a timely manner of any new risk affecting the resilience of the CCP. The advice of the risk committee is not required for the daily operations of the CCP. Reasonable efforts shall be made to consult the risk committee on developments impacting the risk management of the CCP in emergency situations, including on developments relevant to clearing members' exposures to the CCP and interdependencies with other CCPs' without prejudice to the limitations to the exchange of information laid out in competition law.

(3) In Article 28, paragraph 5 is replaced by the following:

'5. A CCP shall promptly inform the competent authority and the risk committee of any decision in which the board decides not to follow the advice of the risk committee and explain such decision. The risk committee or any member of the risk committee may inform the competent authority of any areas in which it considers that the advice of the risk committee has not been followed.';

(4) in Article 38, the following paragraph 6 is added:

'The clearing members of the CCP shall clearly inform their existing and potential clients of the specific potential losses or other costs that they may bear a result of the application of the default management process and loss allocation arrangements laid out in the CCPs operating rules, including the type of compensation they may receive, taking into account Article 48(7) of Regulation (EU) No 648/2012. Clients shall be provided with sufficient information to ensure that they understand the worst-case losses or other costs they could face should the CCP undertake recovery measures.';

(5) in Article 81, in paragraph 3, the following point (q) is added:



'(q) the resolution authorities designated under Article 3 of Regulation (EU) No [on CCP recovery and resolution]!'.

*Article 81*

*Amendment to Regulation (EU) 2015/2365*

In Article 12, in paragraph 2, the following point (n) is added:

'(n) the resolution authorities designated under Article 3 of Regulation (EU) [on CCP recovery and resolution]!'.

## TITLE VIII FINAL PROVISIONS

### *Article 82*

#### *Review*

*At the latest by ...[two years following the date of entry into force of this Regulation] and sooner if appropriate in the light of other legislation adopted, ESMA shall assess the staffing and resources needs arising from the assumption of its powers and duties in accordance with this Regulation and submit a report to the European Parliament, the Council and the Commission.*

*By ...[three years following the date of entry into force of this Regulation or upon adoption of other relevant legislation], the Commission shall review this Regulation and its implementation and shall assess the effectiveness of the governance arrangements for the recovery and resolution of CCPs in the Union and submit a report thereon to the European Parliament and to the Council.*

*This report shall in particular:*

- (a) assess whether establishing a single resolution authority for Union CCPs would be beneficial, timely and consistent with the developments regarding the supervisory architecture for CCPs in the Union and with the state of integration of such supervisory architecture; and*
- (b) review the Union institutions, bodies and agencies that could take up the duties of a single resolution authority for Union CCPs and assess their suitability.*

*If a single supervisor for Union CCPs has been established by the time of this report or if the report concludes that the supervisory architecture for Union CCPs is sufficiently integrated for a single resolution authority for CCPs to be consistent with it, the Commission shall present a proposal to amend this Regulation in order to create a single resolution authority for CCPs or, as the case may be, in order to entrust the resolution of Union CCPs to any suitable Union institution, body or agency.*

*Article 83*  
*Entry into force*

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

It shall apply from [PO: Please insert the date set out in the second subparagraph of Article 9(1) of the Directive amending Directive 2014/59/EU ].

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

Done at ...,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## ANNEX

### SECTION A

#### REQUIREMENTS FOR RECOVERY PLANS

1. The recovery plan shall:
  - (1) not assume any access to or receipt of extraordinary public financial support;
  - (2) consider the interests of all stakeholders that are likely to be affected by that plan;
  - (3) ensure that clearing members do not have unlimited exposures toward the CCP.

The CCP shall develop adequate mechanisms to involve linked FMIs and stakeholders which would bear losses, incur costs or contribute to cover liquidity shortfalls in the event that the recovery plan was implemented in the process of drawing-up of that plan.

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### SECTION B

#### INFORMATION THAT RESOLUTION AUTHORITIES MAY REQUEST CCPs TO PROVIDE FOR THE PURPOSES OF DRAWING UP AND MAINTAINING RESOLUTION PLANS

Resolution authorities may request institutions to provide for the purposes of drawing up and maintaining resolution plans at least the following information:

- (2) a detailed description of the CCP's organisational structure including a list of all legal persons;

- (3) identification of the direct holders and the percentage of voting and non-voting rights of each legal person;
- (4) the location, jurisdiction of incorporation, licensing and key management associated with each legal person;
- (5) a mapping of the CCP's critical operations and core business lines including balance sheet details of such operations and business lines, by reference to legal persons;
- (6) a detailed description of the components of the CCP's and all its legal entities' business activities, separating, at a minimum by types of services and respective amounts of cleared volumes, open interest, initial margin, variation margin flows, default funds and any associated assessment rights or other recovery actions pertaining to such business lines;
- (7) details of capital and debt instruments issued by the CCP and its legal entities;
- (8) an identification of from whom the CCP has received collateral and in what form (title transfer or security interest), and to whom it has pledged collateral and in what form and the person that holds the collateral, and in both cases the jurisdiction in which the collateral is located;
- (9) a description of the off balance sheet exposures of the CCP and its legal entities, including a mapping to its critical operations and core business lines;
- (10) the material hedges of the CCP including a mapping to legal persons;
- (11) identification of the relative exposures and importance of clearing members of the CCP as well as an analysis of the impact of the failure of major clearing members on the CCP;
- (12) each system on which the CCP conducts a material number or value amount of trades, including a mapping to the CCP's legal persons, critical operations and core business lines;
- (13) each payment, clearing or settlement system of which the CCP is directly or indirectly a member, including a mapping to the CCP's legal persons, critical operations and core business lines;
- (14) a detailed inventory and description of the key management information systems, including those for risk management, accounting and financial and regulatory reporting used by the

CCP including a mapping to the CCP's legal persons, critical operations and core business lines;

- (15) an identification of the owners of the systems identified in point (13), service level agreements related thereto, and any software and systems or licenses, including a mapping to their legal entities, critical operations and core business lines;
- (16) an identification and mapping of the legal persons and the interconnections and interdependencies among the different legal persons such as:
  - common or shared personnel, facilities and systems;
  - capital, funding or liquidity arrangements;
  - existing or contingent credit exposures;
  - cross guarantee agreements, cross-collateral arrangements, cross-default provisions and cross-affiliate netting arrangements;
  - risks transfers and back-to-back trading arrangements; service level agreements;
- (17) the competent and resolution authority for each legal person, if different to those designated under Article 22 of Regulation (EU) No 648/2012 and under Article 3 of this Regulation;
- (18) the member of the board responsible for providing the information necessary to prepare the resolution plan of the CCP as well as those responsible, if different, for the different legal persons, critical operations and core business lines;
- (19) a description of the arrangements that the CCP has in place to ensure that, in the event of resolution, the resolution authority will have all the necessary information, as determined by the resolution authority, for applying the resolution tools and powers;
- (20) all the agreements entered into by the CCP and their legal entities with third parties the termination of which may be triggered by a decision of the authorities to apply a resolution tool and whether the consequences of termination may affect the application of the resolution tool;
- (21) a description of possible liquidity sources for supporting resolution;

- (22) information on asset encumbrance, liquid assets, off-balance sheet activities, hedging strategies and booking practices.

**SECTION C**  
**MATTERS THAT THE RESOLUTION AUTHORITY IS TO CONSIDER**  
**WHEN ASSESSING THE RESOLVABILITY OF A CCP**

When assessing the resolvability of a CCP, the resolution authority shall consider the following:

- (23) the extent to which the CCP is able to map core business lines and critical operations to legal persons;
- (24) the extent to which legal and corporate structures are aligned with core business lines and critical operations;
- (25) the extent to which there are arrangements in place to provide for essential staff, infrastructure, funding, liquidity and capital to support and maintain the core business lines and the critical operations;
- (26) the extent to which the service agreements that the CCP maintains are fully enforceable in the event of resolution of the CCP;
- (27) the extent to which the governance structure of the CCP is adequate for managing and ensuring compliance with the CCP's internal policies with respect to its service level agreements;
- (28) the extent to which the CCP has a process for transitioning the services provided under service level agreements to third parties in the event of the separation of critical functions or of core business lines;
- (29) the extent to which there are contingency plans and measures in place to ensure continuity in access to payment and settlement systems;
- (30) the adequacy of the management information systems in ensuring that the resolution authorities are able to gather accurate and complete information regarding the core business lines and critical operations so as to facilitate rapid decision making;



- (31) the capacity of the management information systems to provide the information essential for the effective resolution of the CCP at all times even under rapidly changing conditions;
- (32) the extent to which the CCP has tested its management information systems under stress scenarios as defined by the resolution authority;
- (33) the extent to which the CCP can ensure the continuity of its management information systems both for the affected CCP and the new CCP in the case that the critical operations and core business lines are separated from the rest of the operations and business lines;
- (34) where the CCP benefits or is exposed to any intra-group guarantees, the extent to which those guarantees are provided at market conditions and the risk management systems concerning those guarantees are robust;
- (35) where the CCP engages in back-to-back transactions, the extent to which those transactions are performed at market conditions and the risk management systems concerning those transactions practices are robust;
- (36) the extent to which the use of any intra-group guarantees or back-to-back booking transactions increases contagion across the group;
- (37) the extent to which the legal structure of the CCP inhibits the application of the resolution tools as a result of the number of legal persons, the complexity of the group structure or the difficulty in aligning business lines to group entities;
- (38) the extent to which the resolution of the CCP could have a negative impact on another part of its group, where applicable;
- (39) the existence and robustness of service level agreements;
- (40) whether third-country authorities have the resolution tools necessary to support resolution actions by Union resolution authorities, and the scope for coordinated action between Union and third-country authorities;
- (41) the feasibility of using resolution tools in such a way which meets the resolution objectives, given the tools available and the CCP's structure;

- (42) any specific requirements needed to issue new instruments of ownership as referred to in Article 33(1);
  - (43) the arrangements and means through which resolution could be hampered in the cases of CCP that have clearing members or collateral arrangements established in different jurisdictions;
  - (44) the credibility of using resolution tools in such a way which meets the resolution objectives, given possible impacts on clearing participants, other counterparties and employees and possible actions that third-country authorities may take;
  - (45) the extent to which the impact of the CCP's resolution on the financial system and on financial market's confidence can be adequately evaluated;
  - (46) the extent to which the resolution of the CCP could have a significant direct or indirect adverse effect on the financial system, market confidence or the economy;
  - (47) the extent to which contagion to other CCPs or to the financial markets could be contained through the application of the resolution tools and powers;
  - (48) the extent to which the resolution of the CCP could have a significant effect on the operation of payment and settlement systems.
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