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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 amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs  
- Outcome of the European Parliament's first reading and Corrigendum procedure  
(Strasbourg, 18 April 2019 and Brussels, 10 October 2019)

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## I. INTRODUCTION

In accordance with the provisions of Article 294 of the TFEU and the Joint Declaration on practical arrangements for the codecision procedure <sup>1</sup>, a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this legislative file at first reading.

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<sup>1</sup> OJ C 145, 30.6.2007, p.5

This file was expected <sup>2</sup> to undergo the Corrigendum procedure <sup>3</sup> in the new European Parliament after adoption by the previous Parliament of its position at first reading.

## II. VOTES

At its sitting of 18 April 2019, and following informal interinstitutional negotiations, the European Parliament adopted an amendment (amendment 2) (without legal linguistic revision) to the Commission proposal and a legislative resolution with a view to the adoption of the abovementioned proposal, constituting the European Parliament's position at first reading. It reflects what had been provisionally agreed between the Institutions.

After finalisation of the adopted text by the legal linguists, on 10 October 2019, the European Parliament approved a corrigendum to the position adopted at first reading.

With this corrigendum, the Council should be able to approve the position of the European Parliament as set out in the Annex <sup>4</sup> hereto, thus bringing to a close the first reading for both Institutions.

The act would then be adopted in the wording which corresponds to the Parliament's position.

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<sup>2</sup> 8507/19.

<sup>3</sup> Rule 241, EP Rules of Procedure.

<sup>4</sup> The text of the amendments adopted and the European Parliament's legislative resolution are set out in the Annex. The amendments are presented in the form of a consolidated text, where changes to the Commission's proposal are highlighted in bold and italics. The symbol "■" indicates deleted text.

## **Authorisation of CCPs and recognition of third-country CCPs \*\*\*I**

**European Parliament legislative resolution of 18 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (COM(2017)0331 – C8-0191/2017 – 2017/0136(COD))**

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

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2017)0331),
  - 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 (C8-0191/2017),
  - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
  - having regard to the opinion of the European Central Bank of 4 October 2017<sup>5</sup>,
  - having regard to the opinion of the European Economic and Social Committee of 20 September 2017<sup>6</sup>,
  - having regard to the provisional agreement approved by the committee responsible under Rule 69f(4) of its Rules of Procedure and the undertaking given by the Council representative by letter of 20 March 2019 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
  - having regard to Rule 59 of its Rules of Procedure,
  - having regard to the report of the Committee on Economic and Monetary Affairs (A8-0190/2018),
1. Adopts its position at first reading hereinafter set out;

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<sup>5</sup> OJ C 385 15.11.2017, p. 3.

<sup>6</sup> OJ C 434 15.12.2017, p. 63.

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.

**Position of the European Parliament adopted at first reading on 18 April 2019 with a view to the adoption of Regulation (EU) 2019/... of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Central Bank<sup>7</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>8</sup>,

Acting in accordance with the ordinary legislative procedure<sup>9</sup>,

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<sup>7</sup> OJ C 385 15.11.2017, p. 3

<sup>8</sup> OJ C 434 15.12.2017, p. 63.

<sup>9</sup> Position of the European Parliament of 18 April 2019.

Whereas:

- (1) Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>10</sup> requires standardised OTC derivatives contracts to be cleared through a central counterparty (CCP) in line with similar requirements in other G20 countries. That Regulation also introduced strict prudential, organisational and business conduct requirements for CCPs and established arrangements for their prudential supervision in order to minimise risks to users of CCPs and underpin financial stability.
- (2) Since the adoption of Regulation (EU) No 648/2012, the volume of CCP activity in the Union and globally has grown rapidly in scale and in scope. The expansion in CCP activity is set to continue in the coming years with the introduction of additional clearing obligations and the rise in voluntary clearing by counterparties not subject to a clearing obligation. Regulation (EU) 2019/834 of the European Parliament and of the Council<sup>11</sup> amends Regulation (EU) No 648/2012 in a targeted manner, improves its effectiveness and proportionality, creates further incentives for CCPs to offer central clearing of derivatives to counterparties, and facilitates access to clearing for small financial and non-financial counterparties. Deeper and more integrated capital markets resulting from the Capital Markets Union (CMU) will further increase the need for cross-border clearing in the Union, thus further increasing the importance and the interconnectedness of CCPs within the financial system.

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<sup>10</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).

<sup>11</sup> Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (OJ L 141, 28.5.2019, p. 42).

- (3) The number of CCPs currently established in the Union and authorised under Regulation (EU) No 648/2012 remains relatively limited, standing at **16** in **August 2019**. **33** third-country CCPs have been recognised by the European Securities and Markets Authority (ESMA) under that Regulation, allowing them to offer their services to clearing members and trading venues established in the Union. Clearing markets are well integrated across the Union but highly concentrated in certain asset classes and highly interconnected. The concentration of risk makes the failure of a CCP a low-probability but a potentially extremely high-impact event. In line with the G20 consensus, the Commission adopted a proposal for a Regulation on recovery and resolution of CCPs in November 2016 to ensure that authorities are appropriately prepared to address a failing CCP, safeguarding financial stability and limiting taxpayer costs.

- (4) Notwithstanding that legislative proposal and in light of the growing size, complexity and cross-border dimension of clearing in the Union and globally, the supervisory arrangements for Union and third-country CCPs should be revisited. By addressing identified problems at an early stage and establishing clear and coherent supervisory arrangements both for Union and third-country CCPs, the overall stability of the Union financial system would be reinforced and the potential risk of a CCP failure should be lowered even further.
- (5) In light of those considerations, the Commission adopted a Communication on 4 May 2017 on responding to challenges for critical financial market infrastructures and further developing the CMU, stating that further changes to Regulation (EU) No 648/2012 are necessary to improve the current framework that ensures financial stability and supports the further development and deepening of the CMU.



- (6) The supervisory arrangements under Regulation (EU) No 648/2012 rely mainly on the home-country authority. CCPs established in the Union are currently authorised and supervised by competent authorities of the Member States in cooperation with colleges comprising of national supervisors, ESMA, relevant members of the European System of Central Banks (ESCB), and other relevant authorities. The colleges rely on coordination and information sharing by the CCP's competent authority which bears the responsibility of enforcing the provisions laid out in Regulation (EU) No 648/2012. Diverging supervisory practices for CCPs across the Union can create risks of regulatory and supervisory arbitrage, jeopardising financial stability and resulting in unhealthy competition. The Commission has drawn attention to those emerging risks and the need for greater supervisory convergence in its Communication on CMU of 14 September 2016 and in the public consultation on the operations of the European Supervisory Authorities (ESAs). *Within the already existing general remit of ESMA to fulfil a coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes, ESMA should in particular focus on supervisory areas which have a cross-border dimension or a possible cross-border impact. ESMA should determine the supervisory areas which have a cross-border dimension or a possible cross-border impact based on its expertise and experience in the application of Regulation (EU) No 648/2012.*

- (7) In view of the global nature of financial markets and of the need to address inconsistencies in the supervision of Union and third-country CCPs, ESMA's ability to promote convergence in the supervision of CCPs should be enhanced. ***For that purpose, a permanent internal committee for CCPs ('CCP Supervisory Committee') should be created to handle tasks related to CCPs authorised within the Union and third-country CCPs. The establishment, the functions and composition of the CCP Supervisory Committee set up within ESMA should be a unique solution to bring together expertise in the field of CCP supervision and should not constitute a precedent for the ESAs.***

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(8) *The CCP Supervisory Committee should be responsible for specific tasks assigned to it pursuant to Regulation (EU) No 648/2012 to ensure the proper functioning of the internal market as well as the financial stability of the Union and its Member States.*

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(9) *In order to include the full range of practical experience and operational expertise regarding the supervision of CCPs, the CCP Supervisory Committee should be composed of a Chair, independent members, and the competent authorities of Member States with an authorised CCP. Where the CCP Supervisory Committee convenes in relation to authorised CCPs, central banks of issue of the Union currencies of the financial instruments cleared by those CCPs should be able to, on a voluntary basis, participate in the CCP Supervisory Committee in relation to the areas of Union-wide assessments of the resilience of CCPs to adverse market developments and relevant market developments, to facilitate access to information that could be relevant for carrying out their tasks. Where the CCP Supervisory Committee convenes in relation to third-country CCPs, central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the respective third-country CCP should be able to, on a voluntary basis, participate in the CCP Supervisory Committee for preparation of decisions in relation to third-country CCPs that are systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States (Tier 2 CCPs). Central banks of issue should be non-voting members of the CCP Supervisory Committee. The Chair of the CCP Supervisory Committee should be able to invite members of colleges as observers to ensure that the views of other relevant authorities are taken into account by the CCP Supervisory Committee.*

- (10) To provide for an appropriate level of expertise and accountability, the **Chair** and the **independent members** of the CCP **Supervisory Committee** should be appointed by **ESMA's Board of Supervisors** ('the Board of Supervisors') on the basis of merit, knowledge of clearing, post-trading, **prudential supervision**, and financial matters, as well as experience relevant to the supervision and regulation of CCPs, **following** an open selection procedure **organised and managed by the Board of Supervisors, assisted by the Commission, which should respect the principle of gender balance. Before the appointment of the Chair and the independent members of the CCP Supervisory Committee, and up to one month after their selection by the Board of Supervisors, the European Parliament should, after having heard the persons selected, approve or reject their designation. Only selected candidates approved by the European Parliament may be appointed by the Board of Supervisors.**
- (11) In order to ensure transparency and democratic control, as well as to safeguard the rights of the Union institutions, the **Chair** and the **independent members** of the CCP **Supervisory Committee** should be accountable to the European Parliament and to the Council for any decisions taken on the basis of Regulation (EU) No 648/2012.

- (12) The *Chair* and the *independent members* of the CCP *Supervisory Committee* should act independently and objectively in the interest of the Union. They should ensure that appropriate account is taken of the proper functioning of the internal market as well as financial stability in each Member State, *with or without authorised CCPs*, and in the Union.
- (13) *In order to ensure an appropriate, effective and swift decision-making process in the CCP Supervisory Committee, the Chair, the independent members, and the competent authorities of the Member States with an authorised CCP should have voting rights. The representatives of the central bank(s), as well as observers, should have no voting rights. The CCP Supervisory Committee should take its decisions by a simple majority of its members, each voting member should have one vote and the Chair should have a casting vote in the event of a tie. The final decision-making power should remain with the Board of Supervisors.*

**(14) *In order to ensure a coherent and consistent supervisory approach within the Union, the CCP Supervisory Committee should be responsible for preparing certain specific decisions and carrying out certain tasks which are entrusted to ESMA. Such responsibilities strengthen ESMA's coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, especially with regard to supervisory areas which have a cross-border dimension or a possible cross-border impact. In that respect, such relevant supervisory activities and decisions could include in particular supervisory areas where diverging supervisory practices can create risks of regulatory and supervisory arbitrage or jeopardise financial stability. ESMA should also be informed of all opinions adopted by colleges provided for in Regulation (EU) No 648/2012, including the basis of decision-making which the opinion of the college relates to and any recommendations adhered to in those opinions by the college.***

(15) *In addition, a mandatory ex ante exchange and discussion regarding draft decisions of competent authorities of CCPs on certain supervisory areas of particular importance should take place within the CCP Supervisory Committee. Moreover, on a voluntary basis and on the initiative of the competent authorities of CCPs, all draft decisions should be able to be subject to an exchange on an ex ante basis. ESMA should not provide an opinion where, as a result of the outcome of the discussion within the CCP Supervisory Committee, no diverging views have been identified. The power for ESMA to provide opinions should ensure that the CCP's competent authority receives an additional reaction regarding draft decisions by a group of supervisors specialised and experienced in the supervision of CCPs. Such opinions by ESMA should not have any implication for the responsibility of the CCP's competent authority to take the final decision, which means that the final content of the respective decision would remain at the full discretion of the CCP's competent authority. Where the competent authority does not agree with an opinion of ESMA, it should provide comments to ESMA on any significant deviation from that opinion. The competent authority should be able to provide comments before, at the same time as, or after adopting a decision. However, where the competent authority provides comments after adopting a decision, it should do so without undue delay. The opinion provided by ESMA should not interfere with the power of colleges to determine the content of their opinion at their own discretion, where applicable.*

**(16) *Where supervisory activities in relation to authorised CCPs show a lack of convergence and coherence in the application of Regulation (EU) No 648/2012, including on the basis of mandatory and voluntary consultation of ESMA by competent authorities and the discussions in the CCP Supervisory Committee, ESMA should promote the necessary degree of convergence and consistency, including by issuing guidelines, recommendations or opinions. To facilitate that process, the CCP Supervisory Committee should be able to request that the Board of Supervisors consider the adoption of guidelines, recommendations and opinions by ESMA. The CCP Supervisory Committee should also be able to submit opinions to the Board of Supervisors regarding decisions to be taken by ESMA concerning the tasks and activities of CCP competent authorities. The CCP Supervisory Committee should provide, for instance, opinions on draft technical standards or draft guidelines developed by ESMA in the area of authorisation and supervision of CCPs.***



- (17) *To provide effective supervision in relation to third-country CCPs, the CCP Supervisory Committee should prepare complete draft decisions for approval by the Board of Supervisors and carry out the tasks entrusted to ESMA with regard to the provisions concerning the recognition and supervision of third-country CCPs laid down in Regulation (EU) No 648/2012. As cooperation and information are essential, the CCP Supervisory Committee should, when it convenes in relation to third-country CCPs, share with the third-country CCP college relevant information, including the complete draft decisions it submits to the Board of Supervisors, final decisions adopted by the Board of Supervisors, agendas and minutes of the meetings of the CCP Supervisory Committee and applications for recognition by CCPs established in a third country.*
- (18) *In order to ensure the effective performance of its tasks, the CCP Supervisory Committee should be supported by dedicated staff from ESMA to prepare its meetings, prepare the analyses necessary to carry out its tasks and support it in its international cooperation.*

- (19) *Central banks of issue should be involved in the preparation of decisions by the CCP Supervisory Committee in relation to the classification of third-country CCPs according to their systemic importance and the supervision of Tier 2 CCPs in order to ensure the proper exercise of their tasks related to the monetary policy and the smooth operation of payment systems. As decisions by ESMA in relation to Tier 2 CCPs on margin requirements, liquidity risk control, collateral, settlement and approval of interoperability arrangements could be of particular relevance for central banks' tasks, the CCP Supervisory Committee should consult central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by third-country CCPs on the basis of a 'comply or explain' mechanism.*
- (20) *The Board of Supervisors should adopt the draft decisions submitted by the CCP Supervisory Committee, acting in accordance with the decision-making process set out in Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>12</sup>. In order to ensure an effective and swift decision-making process, certain decisions which do not relate to the recognition, classification of third-country CCPs, specific requirements imposed on Tier 2 CCPs, review or withdrawal of recognition or to the essential elements of the ongoing supervision of third-country CCPs, where consultation with the central banks of issue is required, should be adopted by the Board of Supervisors within three working days.*
- (21) *To further promote convergence on supervisory decisions, ESMA should receive new mandates to develop draft regulatory technical standards on the extension of activities and services and in order to specify the conditions under which changes to the models and parameters are considered to be significant. Furthermore, ESMA should issue necessary guidelines to specify further the common procedures for the supervisory review and evaluation process in relation to CCPs.*

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<sup>12</sup> *Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).*

- (22) *The functioning of the colleges set up for Union CCPs is crucial for effective supervision of CCPs. In order to ensure Union-wide coherence of the processes within colleges, the written agreements determining the practical arrangements for the functioning of colleges should be refined and more standardised. To further promote the role of the members of colleges, they should be entitled to contribute to the agenda-setting of college meetings. To increase the transparency of colleges, their composition should be public. In order to avoid any conflicts of interest, Council Regulation (EU) No 1024/2013<sup>13</sup> stipulates that the supervisory tasks of the ECB and tasks relating to the monetary policy and any other of its tasks should be carried out in full separation. That specific separation of responsibilities of the ECB should be acknowledged. Accordingly, where the ECB is a member of a college set up for a Union CCP due to its function as a competent authority of a clearing member within the Single Supervisory Mechanism as well as due to its function as a central bank of issue representing the Eurosystem, the ECB should be vested with two votes in the college.*
- (23) *The number of central banks of issue and competent authorities responsible for the supervision of clearing members of the Member States represented in colleges set up for Union CCPs is currently limited. To facilitate access to information by a broader range of central banks of issue and competent authorities of other Member States, whose financial stability could be impacted by a CCP's financial distress, additional central banks of issue and competent authorities should be able to participate in colleges on request. To promote consistency in the supervision of CCPs across the Union, the Chair, or an independent member, of the CCP Supervisory Committee should also participate in colleges. In order to ensure an appropriate, effective and swift decision-making process, central banks of issue and competent authorities, which are participating on the*

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<sup>13</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63)

*basis of a request, as well as the Chair, or the independent member, of the CCP Supervisory Committee should be non-voting.*

**(24) *In order to strengthen their role, colleges should be able to provide opinions on additional supervisory areas of fundamental impact on a CCP's business operations, including on the assessment of shareholders and members with qualifying holdings of CCPs and the outsourcing of operational functions, services or activities. In addition, following a request by any member of the college, the college should be able to include in its opinions recommendations aimed at addressing shortcomings in a CCP's risk management and increasing its resilience, subject to a majority decision of the college. The vote of the college on the inclusion of such recommendations should be carried out separately from the vote of the college on the opinion. In order to reinforce the impact of college opinions and recommendations, the competent authorities should duly consider them and provide reasoning in cases of significant deviation from those opinions or recommendations.***

- (25) The supervisory arrangements in Regulation (EU) No 648/2012 for third-country CCPs offering clearing services within the Union also require revision. Access to information, the ability to conduct on-site inspections and *investigations*, the possibility to share information on third-country CCPs between relevant Union and Member States' authorities *as well as the possibility to enforce ESMA's decisions over third-country CCPs need* to be improved to avoid important financial stability implications for Union entities. There is also a risk that changes to ■ third-country CCP rules or to a third-country regulatory framework cannot be taken into account and could negatively affect the regulatory or supervisory outcomes ■ leading to an unlevel playing field between Union and third-country CCPs.
- (26) A significant amount of financial instruments denominated in Union currencies are cleared by *third-country CCPs*. This implies significant challenges for Union and Member States' authorities in safeguarding financial stability.

(27) As part of its commitment to integrated financial markets, the Commission should continue to determine, by way of equivalence decisions, that the legal and supervisory frameworks of third countries fulfil the requirements of Regulation (EU) No 648/2012. In order to enhance the implementation of the current equivalence regime in relation to CCPs, the Commission should be able to, if necessary, specify further the criteria for assessing the equivalence of third-country CCP regimes. It is also necessary to empower ESMA with the *monitoring* of regulatory and supervisory developments in those third-country CCP regimes that have been deemed equivalent by the Commission. This is in order to ensure that the equivalence criteria and any specific conditions set for their use continue to be satisfied by third countries. ESMA should report its findings to the *European Parliament, the Council, the Commission and the third-country CCP college* on a confidential basis.

(28) The Commission is currently able to amend, suspend, review or revoke an equivalence decision at any time, in particular where developments occur in a third country which materially affect the elements assessed in accordance with the equivalence requirements under Regulation (EU) No 648/2012. Where a third country's relevant authorities no longer cooperate with ESMA or other Union supervisors in good faith or fail to comply on a continuous basis with the applicable equivalence requirements, the Commission is also able to, inter alia, put those authorities on notice or publish a specific recommendation. Where the Commission decides at any time to revoke an equivalence decision, it is able to delay the date of application of that decision in order to address the risks to financial stability or of market disruptions. In addition to those powers currently available, the Commission should also be able to set specific conditions to ensure that the equivalence criteria continue to be fulfilled on an ongoing basis by the third country to which an equivalence decision relates. The Commission should also be able to set conditions ensuring that ESMA is able to effectively exercise its responsibilities in relation to third-country CCPs recognised under Regulation (EU) No 648/2012 or in relation to monitoring of regulatory and supervisory developments in third countries that are of relevance for adopted equivalence decisions.



- (29) In view of the growing cross-border dimension of CCPs and of the interlinkages in the Union financial system, it is necessary to improve the ability of the Union to identify, monitor and mitigate the potential risks related to third-country CCPs. The role of ESMA should therefore be enhanced to effectively supervise third-country CCPs that apply for recognition to provide clearing services in the Union. The involvement of the Union central banks of issue in the recognition **■**, supervision, *review of recognition and withdrawal of recognition* of third-country CCPs that are active in the currency they issue should also be improved. Therefore, Union central banks of issue should be consulted on certain aspects affecting their monetary policy responsibilities in relation to financial instruments denominated in Union currencies which are cleared *or to be cleared by* CCPs located outside the Union.
- (30) Once the Commission has determined the legal and supervisory framework of a third country as equivalent to the Union framework, the process to recognise CCPs from that third country should take into account the risks those CCPs present for the financial stability of the Union or *of one or more of its Member States*.

- (31) When considering the application of a third-country CCP for recognition, ESMA should assess the degree of systemic risk that the CCP presents to the financial stability of the Union *or of one or more of its Member States* on the basis of objective and transparent criteria set out in this Regulation. *Those criteria should contribute to the overall assessment. Individually, none of those criteria should be considered determinative on its own. Where assessing the risk profile of a third-country CCP, ESMA should consider all risks, including operational risks, such as fraud, criminal activity, IT- and cyber-risk.* A Commission delegated act should specify further those criteria. *In specifying those criteria, the nature of the transactions cleared by the CCP, including their complexity, price volatility and average maturity, as well as the transparency and liquidity of the markets concerned and the degree to which the CCP's clearing activities are denominated in euro or other Union currencies should be considered. In that regard, specific features concerning certain agricultural derivative contracts listed and executed on regulated markets in third countries, which relate to markets that largely serve domestic non-financial counterparties in that third country which manage their commercial risks through those contracts, may pose a negligible risk to clearing members and trading venues in the Union as they have a low degree of systemic interconnectedness with the rest of the financial system. Where a framework for the recovery and resolution of CCPs is in force in a third country, that should also be taken into account by ESMA in its analysis of the degree of systemic risk that the applicant CCP established in that third country presents to the financial stability of the Union or of one or more of its Member States.*

(32) CCPs that are not systemically important to the financial stability of the Union or *of one or more* of its Member States should be considered as 'Tier 1' CCPs. CCPs that are systemically important or likely to become systemically important for the financial stability of the Union or *of one or more* of its Member States should be considered as 'Tier 2' CCPs. Where ESMA determines that a third-country CCP is not systemically important for the financial stability of the Union *or of one or more of its Member States*, the existing recognition conditions under Regulation (EU) No 648/2012 should apply to that CCP. Where ESMA determines that a third-country CCP is systemically important, *specific* requirements ■ should be *imposed on that CCP*. ESMA should only recognise such a CCP where that CCP complies with those requirements. *Those* requirements should include certain prudential requirements set out in Regulation (EU) No 648/2012 that aim to increase the safety and efficiency of a CCP. ESMA should be directly responsible for ensuring that a systemically ■ important third-country CCP complies with those requirements. Related requirements should also enable ESMA to carry *out* full and effective supervision of that CCP *under Regulation (EU) No 648/2012*.

- (33) In order to ensure the proper involvement of central bank(s) of issue *of all Union currencies of the financial instruments cleared or to be cleared by third-country CCPs in the recognition of Tier 2 CCPs, ESMA, when recognising such CCPs, should take into account their compliance with specific requirements that those central banks of issue may have imposed in the carrying out of their monetary policy tasks. Those requirements should relate to the submission of information to the central bank(s) of issue upon its reasoned request, the cooperation of CCPs with the central bank(s) of issue in the context of the assessment of the CCP's resilience to adverse market developments carried out by ESMA, the opening of an overnight deposit account with the central bank(s) of issue and requirements in exceptional situations* that the central bank(s) of issue *considers necessary. The access criteria and requirements of central bank(s) of issue for opening an overnight deposit account should not amount to an obligation to relocate all or part of the clearing services of the CCP.*

(34) *As regards requirements that central bank(s) of issue might be able to impose in exceptional situations, the transmission of monetary policy or the smooth operation of payment systems might be affected by developments in centrally cleared markets in situations such as stresses in the markets (especially the money and repurchase markets) on which the CCP relies to obtain liquidity, situations where CCPs' operations contribute to the drying up of liquidity in the market, or serious malfunctions of payment or settlement arrangements that impede the CCP's ability to meet its payment obligations or increase its liquidity needs. The determination of the existence of such exceptional situations depends solely on monetary policy considerations and need not coincide with any emergency situation relating to the CCP. In such situations, the prudential framework might therefore not fully mitigate the ensuing risks, in which case direct action by the central bank(s) of issue to ensure the transmission of monetary policy or the smooth operation of payment systems might be necessary.*

(35) *In such exceptional situations, central banks of issue might need to impose, to the extent allowed under their respective institutional frameworks, temporary requirements relating to liquidity risks, settlement arrangements, margin requirements, collateral or interoperability arrangements. Non-compliance with such temporary requirements might trigger the withdrawal by ESMA of the recognition of the Tier 2 CCP. Those requirements could include, in particular, temporary enhancements to the liquidity risk management of a Tier 2 CCP, such as increase in liquidity buffer, increase in the frequency of the collection of intraday margins, and limits to cross-currency exposures, or specific arrangements for depositing cash and settling payments in the currency of the central bank. The requirements should not extend to other areas of prudential supervision or amount automatically to withdrawal of recognition. Furthermore, the application of those requirements should only be a condition for recognition for a limited period of time of up to six months with a potential extension once to an additional period not exceeding six months. After expiration of this additional period, the application of those requirements should cease to be a condition for the recognition of a Tier 2 CCP. Nevertheless, in the context of a new or different exceptional situation, central banks of issue should not be prevented from imposing temporary requirements, the application of which would be a condition for the recognition of a Tier 2 CCP under Regulation (EU) No 648/2012.*

- (36) *Before the application of the requirements or before a possible extension, a central bank of issue should provide ESMA, the other central banks of issue of all Union currencies of the financial instruments cleared or to be cleared, and the members of the third-country CCP college with an explanation of the effects of the requirements it intends to impose on the efficiency, soundness and resilience of CCPs and with a justification of why the requirements are necessary and proportionate to ensure the transmission of monetary policy or the smooth operation of payment systems while adequately respecting the need to protect confidential or sensitive information. In order to avoid duplication, the central bank of issue should cooperate and share information on a continuous basis with ESMA and with the other central banks of issue of all Union currencies of the financial instruments cleared or to be cleared in relation to the temporary requirements applicable in exceptional situations.*
- (37) *Central bank(s) of issue should provide ESMA with confirmation whether or not a Tier 2 CCP complies with any additional requirements as quickly as possible and in any case within 30 working days of the determination that a third-country CCP is not a Tier 1 CCP or, within 90 working days of the imposition of additional requirements where those requirements have been imposed after a Tier 2 CCP has been recognised.*

- (38) The degree of risk posed by a systemically-important CCP to the financial system and stability of the Union varies. The requirements for systemically-important CCPs should therefore be applied in a manner proportionate to the risks that the CCP might present to the Union. Where ESMA, *after consulting the European Systemic Risk Board (ESRB)*, and *in agreement with the* [ ] *central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by a third-country CCP, concludes, on the basis of a fully reasoned assessment, including a quantitative technical assessment of the costs and benefits*, that a third-country CCP *or some of its clearing services are* of such systemic importance that *compliance with the specific requirements set out in Regulation (EU) No 648/2012 would not sufficiently address the financial stability risk for the Union or for one or more of its Member States, and in the event that other measures are deemed insufficient to address financial stability risks*, ESMA should recommend to the Commission that that CCP *or some of its clearing services* not be recognised. *ESMA can, under that procedure, recommend to the Commission not to recognise a CCP, with or without prior classification of the CCP or some of its services as Tier 2.*
- (39) On the basis of that recommendation, the Commission should be empowered to adopt, as a measure of last resort, an implementing act specifying that the third [ ] -country CCP in question should not be able to provide some or all of its clearing services to clearing members and trading venues established in the Union unless that CCP is authorised in any Member State to do so in accordance with Regulation (EU) No 648/2012. That implementing act should also set up an appropriate adaptation period not exceeding two years, which might be extended once by an additional six months, and should indicate the conditions under which that CCP can continue to provide certain clearing services or activities during the adaptation period and any measures that should be taken during that period in order to limit the potential costs to clearing members and their clients, in particular those established in the Union.



- (40) *It is important for central banks of issue to be individually consulted by ESMA and express their agreement with any potential recommendation to deny recognition to a third-country CCP given the impact that such a decision could have on the currency that they issue and on the report by ESMA on the application of a Commission implementing act taken following such a recommendation. However, in the case of such a recommendation or report, the agreement or concerns that a central bank of issue may raise should only relate to the currency that it issues and not to the recommendation as a whole or to the report as a whole.*
- (41) ESMA should regularly review the recognition of third-country CCPs as well as their classification as Tier 1 or Tier 2 CCPs. In that regard, ESMA should consider amongst others, the changes in the nature, size and complexity of the third-country CCP's business. Such reviews should take place at least every *five years and whenever a recognised third-country CCP has extended or reduced the range of its activities and services in the Union. Where, following that review, ESMA determines that a Tier 1 CCP should be classified as a Tier 2 CCP, ESMA should set an appropriate adaptation period not exceeding 18 months within which the CCP should comply* with the requirements applicable *to Tier 2 CCPs.*

- (42) *At the request of a Tier 2 CCP, ESMA should also be able to take into account the extent to which the compliance of such a CCP with the requirements applicable in that third country can be compared to the compliance of that CCP with the requirements of Regulation (EU) No 648/2012. When conducting that assessment, ESMA should take into account the implementing act adopted by the Commission determining that the legal and supervisory arrangements of the third country where the CCP is established are equivalent to those of Regulation (EU) No 648/2012 and any conditions to which the application of that implementing act might be subject. In order to ensure proportionality, ESMA should also consider, when conducting that assessment, the extent to which the financial instruments cleared by the CCP are denominated in Union currencies. The Commission should adopt a delegated act specifying the modalities and conditions to assess such comparable compliance.*
- (43) ESMA should have all the powers necessary to supervise recognised third-country CCPs to ensure their ongoing compliance with the requirements of Regulation (EU) No 648/2012.

■

- (44) *In order to facilitate information sharing and cooperation between ESMA, the Member States' competent authorities responsible for CCP supervision, and the competent authorities responsible for supervision of entities on which the operations of the third-country CCPs might have an impact, ESMA should establish a third-country CCP college. The college members should be able to request any specific matter in relation to third-country CCPs to be discussed by the CCP Supervisory Committee.*
- (45) *In order to enable ESMA to conduct its tasks with regard to third-country CCPs effectively, third-country CCPs should pay supervisory fees for ESMA's supervisory and administrative tasks. Fees should cover costs associated with the applications for recognition of third-country CCPs and their supervision. The Commission should adopt a delegated act specifying further the types of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.*

- (46) *ESMA should be able to conduct investigations and on-site inspections of Tier 2 CCPs and related third parties to whom those CCPs have outsourced operational functions, services or activities. Where relevant, the competent authorities responsible for the supervision of the clearing members established in the Union should be informed of the findings of such investigations and on-site inspections. Where relevant for the carrying out of their monetary policy tasks, the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the CCP should be able to request participation in such on-site inspections.*
- (47) ESMA should be able to impose periodic penalty payments to compel third-country CCPs to end an infringement, to supply complete and correct information required by ESMA or to submit to an investigation or an on-site inspection.

- (48) ESMA should be able to impose fines on both Tier 1 and Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of Regulation (EU) No 648/2012 by providing incorrect or misleading information to ESMA. In addition, ESMA should be able to impose fines on Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of the additional requirements applicable to them in that Regulation. *Where ESMA has assessed that a Tier 2 CCP in its compliance with the applicable third-country legal framework is deemed to comply with the requirements set out in Article 16 and Titles IV and V of Regulation (EU) No 648/2012, the conduct of that CCP should not be considered an infringement of that Regulation to the extent that it complies with those comparable requirements.*

- (49) Fines should be imposed according to the level of seriousness of the infringement. Infringements should be divided into different groups for which specific fines should be allocated. In order to calculate the fine relating to a particular infringement, ESMA should apply a two-step methodology consisting of setting a basic amount and adjusting that basic amount, if necessary, by certain coefficients. The basic amount should be established by taking into account the annual turnover of the third-country CCPs concerned and the adjustments should be made by increasing or decreasing the basic amount through the application of the relevant coefficients in accordance with this Regulation.
- (50) This Regulation establishes coefficients linked to aggravating and mitigating circumstances in order to give the necessary tools to ESMA to impose a fine which is proportionate to the seriousness of the infringement committed by a third-country CCP, taking into account the circumstances under which that infringement has been committed.
- (51) The decision to impose fines or periodic penalty payments should be based on an independent investigation.

- (52) Before deciding whether to impose fines or periodic penalty payments, ESMA should give the persons subject to the proceedings the opportunity to be heard in order to respect their rights of defence.
- (53) ESMA should refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or from facts which are substantially the same, has acquired the force of res judicata as a result of criminal proceedings under national law.
- (54) ESMA's decisions imposing fines and periodic penalty payments should be enforceable and their enforcement should be subject to the rules of civil procedure which are in force in the State in the territory of which it is carried out. Rules of civil procedure should not include criminal procedural rules but could include administrative procedural rules.

- (55) In the case of an infringement committed by a Tier 2 CCP, ESMA should be empowered to apply a range of supervisory measures, including requiring a Tier 2 CCP to bring the infringement to an end ■ and, as a last resort, withdrawing the recognition where a Tier 2 CCP has seriously or repeatedly infringed Regulation (EU) No 648/2012. The supervisory measures should be applied by ESMA taking into account the nature and seriousness of the infringement and should respect the principle of proportionality. Before taking a decision on supervisory measures, ESMA should give the persons subject to the proceedings the opportunity to be heard in order to respect their rights of defence. *Where ESMA decides to withdraw recognition, ESMA should limit potential market disruption by defining an appropriate adaptation period not exceeding two years.*
- (56) *In relation to the validation by competent authorities and ESMA of significant changes to models and parameters adopted to calculate a CCP's margin requirements, default fund contributions, collateral requirements, and other risk-control mechanisms, procedural aspects and the interplay of that validation with the college decision should be clarified. The preliminary adoption of a significant change to the models or parameters should be possible where needed, especially where their swift change is necessary to ensure the soundness of the CCP's risk management.*



(57) *Effective supervision of CCPs relies on the building of competences, expertise and capabilities, as well as on the building of cooperative relationships and exchanges between institutions. Since those are all processes that develop over time and follow their own dynamics, the design of a functional, effective and efficient supervisory system for CCPs should take into account its potential evolution in the long term. Therefore, the division of competences established in this Regulation is likely to evolve as the role and capacities of ESMA, supported by the CCP Supervisory Committee, develop. With a view to developing an efficient and resilient supervisory approach regarding CCPs, the Commission should review the effectiveness of ESMA's tasks, in particular those of the CCP Supervisory Committee, in fostering a convergent and coherent application in the Union of Regulation (EU) No 648/2012 and of the division of responsibilities between Union's and Member States' institutions and bodies. The Commission should also report on the impact of this Regulation on the level playing field among CCPs and assess the framework for the recognition and supervision of third-country CCPs. The Commission should submit the report to the European Parliament and to the Council together with any appropriate proposals.*

(58) In order to ensure the effective application of the rules laid down in this Regulation in relation to third-country CCPs, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of the further specification of the type of fees, the matters for which fees are due, the amount of the fees to be paid and the manner in which they are to be paid; the further specification of the criteria *determining whether* a third-country CCP is systemically important or is likely to become systemically important for the financial stability of the Union or of one or more of its Member States; the further specification of the criteria to be used in its equivalence assessments of third countries; the specification of how and under what conditions certain requirements shall be complied with by third-country CCPs; the further specification of rules of procedure relating to the imposition of fines or periodic penalty payments, including provisions on the rights of defence, time limits, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalty payments or fines; and measures to amend Annex IV in order to take account of developments in the financial markets. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.<sup>14</sup> In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(59) In order to ensure uniform conditions for the implementation of this Regulation, and in particular with regard to the recognition of third-country CCPs and the equivalence of legal frameworks of third countries, implementing powers should be conferred on the

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<sup>14</sup> OJ L 123, 12.5.2016, p. 1.

Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>15</sup>.

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<sup>15</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

- (60) To ensure consistent harmonisation of rules and supervisory practice on extension of activities and services, colleges and review of models, stress testing and back testing, the Commission should be empowered to adopt regulatory technical standards developed by ESMA with regard to the following: the conditions under which additional services or activities to which a CCP wishes to extend its business are not covered by the initial authorisation; the conditions under which Union currencies are to be considered the most relevant for the purpose of central banks of issue membership in colleges and the details of the practical arrangements for the functioning of colleges; and the conditions under which changes to the models and parameters of CCPs are significant. The Commission should adopt those regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.
- (61) Since the objectives of this Regulation, namely, to increase the safety and efficiency of CCPs by laying down uniform requirements for their activities, cannot be sufficiently achieved by the Member States but can rather, by reason of their scale and effects, 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 those objectives.
- (62) The use by ESMA of its power to recognise a third-country CCP as a Tier 1 or a Tier 2 CCP should be deferred until the criteria to allow the assessment of: **(a)** whether or not a third-country CCP is systemically important or likely to become systemically important for the financial system of the Union or of one or more of its Member States; **and (b) comparable compliance** are further specified.
- (63) Regulation (EU) No 648/2012 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

## Article 1

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

(1) In Article 6, paragraph 2, point (b) is replaced by the following:

"(b) the CCPs that are authorised in accordance with Article 17 or recognised in accordance with Article 25 and the date of authorisation or recognition respectively, indicating the CCPs that are authorised or recognised for the purpose of the clearing obligation;"

(2) In Article 15, *the following* paragraph is *added*:

***"3. In order to ensure consistent application of this Article, ESMA shall, in cooperation with the ESCB, develop draft regulatory technical standards specifying the conditions under which additional services or activities to which a CCP wishes to extend its business are not covered by the initial authorisation and therefore require an extension of authorisation in accordance with paragraph 1 of this Article and also specifying the procedure for consulting the college established in accordance with Article 18 on whether or not those conditions are met.***

*ESMA shall submit those draft regulatory technical standards to the Commission by ... [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 the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010."*

(3) *In Article 17, paragraph 3 is replaced by the following:*

"3. Within 30 working days of receipt of the application, the competent authority ■ shall assess whether the application is complete. Where the application is not complete, the competent authority shall set a deadline by which the applicant CCP has to provide additional information. Upon receipt of such additional information, the competent authority shall immediately transmit it to ESMA and the college established in accordance with Article 18(1). After assessing ■ that an application is complete, the competent authority shall notify the applicant CCP and the members of the college *and ESMA* accordingly."

(4) Article 18 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. Within 30 calendar days of the submission of a complete application in accordance with Article 17, the CCP's competent authority shall establish, **manage and chair** a college to facilitate the exercise of the tasks referred to in Articles 15, 17, **30, 31, 32, 35**, 49, 51 and 54.";

■

(b) in paragraph 2, point (a) is **replaced** by the following:

"(a) the **Chair or any of the independent** members of the CCP **Supervisory Committee** referred to in **points (a) and (b) of Article 24a(2)**";

(c) in paragraph 2, point (c) is replaced by the following:

"(c) the competent authorities responsible for the supervision of the clearing members of the CCP which are established in the three Member States with the largest contributions to the default fund of the CCP referred to in Article 42 of this Regulation on an aggregate basis over a one-year period, including, where relevant, the ECB in **the framework of the tasks concerning the prudential supervision of credit institutions within the single supervisory mechanism conferred upon it in** accordance with Council Regulation (EU) No 1024/2013\*;

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\* Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).";

(d) *in paragraph 2, the following point is inserted:*

*"(ca) the competent authorities responsible for the supervision of clearing members of the CCP, other than those referred to in point (c), subject to the consent of the CCP's competent authority. Those competent authorities shall request the consent of the CCP's competent authority to participate in the college, justifying the request based on their assessment of the impact that the CCP's financial distress could have on the financial stability of their respective Member State. Where the CCP's competent authority does not grant the request, it shall provide full and detailed reasons in writing;"*

(e) *in paragraph 2, the following point is added:*

*"(i) the central banks of issue of the Union currencies of the financial instruments cleared or to be cleared by the CCP other than those referred to in point (h), subject to the consent of the CCP's competent authority. Those central banks of issue shall request the consent of the CCP's competent authority to participate in the college, justifying the request based on their assessment of the impact that the CCP's financial distress could have on their respective currency of issue. Where the CCP's competent authority does not grant the request, the CCP's competent authority shall provide full and detailed reasons in writing."*



(f) *in paragraph 2, the following subparagraph is added:*

*"The CCP's competent authority shall publish on its website a list of the members of the college . That list shall be updated by the CCP's competent authority without undue delay after any change to the composition of the college. The CCP's competent authority shall notify that list to ESMA within 30 calendar days of the college's establishment or change in its composition. Upon reception of the notification by the CCP's competent authority, ESMA shall publish on its website without undue delay the list of the members of that college";*

(g) *in paragraph 4, the following subparagraph is added:*

*"In order to facilitate the performance of the tasks assigned to colleges pursuant to the first subparagraph, members of the college referred to in paragraph 2 shall be entitled to contribute to the setting of the agenda of the college meetings, in particular by adding points to the agenda of a meeting.";*

*(h) in paragraph 5, the second subparagraph is replaced by the following:*

*"That agreement shall determine the practical arrangements for the functioning of the college, including detailed rules on:*

- (i) voting procedures as referred to in Article 19(3);*
- (ii) the procedures for setting the agenda of college meetings;*
- (iii) the frequency of the college meetings;*
- (iv) the format and scope of the information to be provided by the CCP's competent authority to the college members, especially with regard to the information to be provided in accordance with Article 21(4);*
- (v) the appropriate minimum timeframes for the assessment of the relevant documentation by the college members;*
- (vi) the modalities of communication between college members;*

*The agreement may also determine tasks to be entrusted to the CCP's competent authority or another member of the college."*

(i) *paragraph 6 is replaced by the following:*

*"6. In order to ensure the consistent and coherent functioning of colleges across the Union, ESMA shall, in cooperation with the ESCB, develop draft regulatory technical standards specifying the conditions under which the Union currencies referred to in point (h) of paragraph 2 are to be considered as the most relevant and the details of the practical arrangements referred to in paragraph 5.*

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

(5) *Article 19 is amended as follows:*

(a) *the following paragraph is inserted:*

*"1a. Where the college gives an opinion pursuant to this Regulation, at the request of any member of the college and upon adoption by a majority of the college in accordance with paragraph 3 of this Article, that opinion may include, in addition to the determination of whether the CCP complies with this Regulation, recommendations aimed at addressing shortcomings in the CCP's risk management and increasing its resilience.*

*Where the college may give an opinion, any central bank of issue, which is a member of the college pursuant to points (h) and (i) of Article 18(2), may adopt recommendations relating to the currency it issues."*

***(b) paragraph 3 is replaced by the following:***

"3. A majority opinion of the college shall be adopted on the basis of a simple majority of its members.

For colleges up to and including 12 members, a maximum of two college members belonging to the same Member State shall have a vote and each voting member, shall have one vote. For colleges with more than 12 members, a maximum of three members belonging to the same Member State shall have a vote and each voting member shall have one vote.

Where the ECB is a member of the college pursuant to points **■** (c) and (h) of Article 18(2), it shall have *two* votes.

**■**

***The members of the college referred to in points (a), (ca) and (i) of Article 18(2) shall have no voting rights on the opinions of the college."***

(c) *the following* paragraph is *added*:

*"4. Without prejudice to the procedure prescribed in Article 17, the competent authority shall duly consider the opinion of the college reached in accordance with paragraph 1 of this Article, including any possible recommendations aimed at addressing shortcomings in the CCP's risk management and increasing its resilience. Where the CCP's competent authority does not agree with an opinion of the college, including any recommendations contained therein aimed at addressing shortcomings in the CCP's risk management procedures and increasing its resilience, its decision shall contain full reasons and an explanation of any significant deviation from that opinion or recommendations."*

(6) Article 21 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. Without prejudice to the role of the college, the competent authorities referred to in Article 22 ■ shall review the arrangements, strategies, processes and mechanisms implemented by CCPs to comply with this Regulation and evaluate the risks, *including at least financial and operational risks*, to which CCPs are, or might be, exposed."

(b) paragraph 3 is replaced by the following:

"3. ***The competent authorities*** shall establish the frequency and depth of the review and evaluation referred to in paragraph 1, having ***particular*** regard to the size, systemic importance, nature, scale **■**, complexity of the activities ***and interconnectedness with other financial market infrastructures*** of the CCPs concerned. The review and evaluation shall be updated at least on an annual basis.

**■** CCPs shall be subject to on-site inspections. ***Upon ESMA's request, competent authorities may invite*** ESMA staff **■** to participate in on-site inspections.

The competent authority ***may*** forward to ESMA any information received from the CCPs ***during or in relation to on-site inspections.***";

(c) *paragraph 6 is replaced by the following:*

*"6. By ... [12 months after the date of entry into force of this Regulation], in order to ensure consistency in the format, frequency and depth of the review carried out by the national competent authorities in accordance with this Article, ESMA shall issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to specify further, in a manner that is appropriate to the size, the structure and the internal organisation of CCPs and the nature, scope and complexity of their activities, the common procedures and methodologies for the supervisory review and evaluation process referred to in paragraphs 1 and 2 and in the first subparagraph of paragraph 3 of this Article."*



(7) The following *Article is* inserted:

"Article 23a

***Supervisory cooperation between competent authorities and ESMA with regards to authorised CCPs***

1. ***ESMA shall fulfil a coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes, especially with regard to supervisory areas which have a cross-border dimension or a possible cross-border impact.***
2. Competent authorities shall **█** submit ***their*** draft decisions to ESMA ***before adopting any act or measure*** pursuant to Articles 7, 8, 14, 15, ***29 to 33, 35, 36 and 54.***

**█**

**█** Competent authorities ***may also*** submit draft decisions to ***ESMA*** before adopting any ***other act or measure in accordance with their duties under Article 22(1).***

**█**

3. *Within 20 working days of receipt of a draft decision submitted in accordance with paragraph 2 in relation to a specific Article ESMA shall provide an opinion on that draft decision to the competent authority where necessary to promote a consistent and coherent application of that Article.*

*Where the draft decision submitted to ESMA in accordance with paragraph 2 shows a lack of convergence or coherence in the application of this Regulation, ESMA shall issue guidelines or recommendations to promote the necessary consistency or coherence in the application of this Regulation pursuant to Article 16 of Regulation (EU) No 1095/2010.*

4. *Where ESMA adopts an opinion in accordance with paragraph 3, the competent authority shall give it due consideration and shall inform ESMA of any subsequent action or inaction thereto. Where the competent authority does not agree with an opinion of ESMA, it shall provide comments to ESMA on any significant deviation from that opinion.";*

(8) Article 24 is replaced by the following:

"Article 24

Emergency situations

The CCP's competent authority or any other relevant authority shall inform ESMA, the college, the relevant members of the ESCB and other relevant authorities without undue delay of any emergency situation relating to a CCP, including developments in financial markets, which may have an adverse effect on market liquidity, the transmission of monetary policy, the smooth operation of payment systems or the stability of the financial system in any of the Member States where the CCP or one of its clearing members are established.";

(9) *The following Chapter is inserted:*

**"CHAPTER 3A**

**CCP Supervisory Committee**

**Article 24a**

**CCP Supervisory Committee**

1. *ESMA shall establish a permanent internal committee pursuant to Article 41 of Regulation (EU) No 1095/2010 for the purposes of preparing draft decisions for adoption by the Board of Supervisors and carrying out the tasks set out in paragraphs 7, 9 and 10 of this Article ('CCP Supervisory Committee').*
2. *The CCP Supervisory Committee shall be composed of:*
  - (a) *the Chair, who shall be voting;*
  - (b) *two independent members, who shall be voting;*

- (c) *the competent authorities of Member States referred to in Article 22 of this Regulation with an authorised CCP, who shall be voting; where a Member State has designated several competent authorities, each of the designated competent authorities of this Member State may decide to appoint one representative for the purposes of participation pursuant to this point, however, for the voting procedures set out in Article 24c, the representatives of the respective Member State shall together be considered as one voting member.*
- (d) *The following central banks of issue:*
- (i) *where the CCP Supervisory Committee convenes in relation to third-country CCPs, in respect of the preparation of all decisions pertaining to Articles referred to in paragraph 10 of this Article in relation to Tier 2 CCPs and to Article 25(2a), the central banks of issue referred to in point (f) of Article 25(3) that have requested membership of the CCP Supervisory Committee, who shall be non-voting;*

*(ii) where the CCP Supervisory Committee convenes in relation to CCPs authorised in accordance with Article 14, in the context of discussions pertaining to point (b) and subpoint (iv) of point (c) of paragraph 7 of this Article, the central banks of issue ~~referred to in point (h) of Article 18(2)~~ of the Union currencies of the financial instruments cleared by authorised CCPs that have requested membership of the CCP Supervisory Committee, who shall be non-voting.*

*Membership for the purpose of subpoints (i) and (ii) shall be granted automatically upon a one-off written request addressed to the Chair.*

*3. The Chair may invite as observers to the meetings of the CCP Supervisory Committee, where appropriate and necessary, members of the colleges referred to in Article 18.*

*4. Meetings of the CCP Supervisory Committee shall be convened by its Chair at his or her own initiative or at the request of any of its voting members. The CCP Supervisory Committee shall meet at least five times a year.*

5. *The Chair and the independent members of the CCP Supervisory Committee shall be full-time, independent professionals. They shall be appointed by the Board of Supervisors on the basis of merit, skills, knowledge of clearing, post-trading, prudential supervision and financial matters, as well as of experience relevant to CCP supervision and regulation, following an open selection procedure.*

*Before the appointment of the Chair and of the independent members of the CCP Supervisory Committee, and up to one month after the selection by the Board of Supervisors, which shall submit its shortlist of selected candidates respecting gender balance to the European Parliament, the European Parliament, after having heard the selected candidates, shall approve or reject them.*

*Where the Chair or any of the independent members of the CCP Supervisory Committee no longer fulfils the conditions required for the performance of his or her duties or has been found guilty of serious misconduct, the Council may, on a proposal from the Commission which has been approved by the European Parliament, adopt an implementing decision to remove him or her from office. The Council shall act by qualified majority.*

*The European Parliament or the Council may inform the Commission that they consider the conditions for the removal of the Chair or one of the independent members of the CCP Supervisory Committee to be fulfilled, to which the Commission shall respond.*

*The term of office of the Chair and the independent members of the CCP Supervisory Committee shall be five years and may be extended once.*

6. *The Chair and the independent members of the CCP Supervisory Committee shall not hold any office at national, Union, or international level. They shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body.*

*Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the Chair and the independent members of the CCP Supervisory Committee in the performance of their tasks.*



*In accordance with the Staff Regulations referred to in Article 68 of Regulation (EU) No 1095/2010, the Chair and the independent members of the CCP Supervisory Committee shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.*

*7. In relation to CCPs authorised or applying for authorisation in accordance with Article 14 of this Regulation, the CCP Supervisory Committee shall, for the purpose of Article 23a(1) of this Regulation, prepare decisions and carry out the tasks entrusted to ESMA in Article 23a(3) of this Regulation and in the following points:*

- (a) at least annually, conduct a peer review analysis of the supervisory activities of all competent authorities in relation to the authorisation and the supervision of CCPs in accordance with Article 30 of Regulation (EU) No 1095/2010;*
- (b) at least annually, initiate and coordinate Union-wide assessments of the resilience of CCPs to adverse market developments in accordance with Article 32(2) of Regulation (EU) No 1095/2010;*

- (c) *promote the regular exchange and discussion among competent authorities designated in accordance with Article 22(1) of this Regulation in relation to:*
- (i) *relevant supervisory activities and decisions that have been adopted by the competent authorities referred to in Article 22 when carrying out their duties in accordance with this Regulation regarding the authorisation and supervision of CCPs established in their territory;*
  - (ii) *draft decisions submitted to ESMA by a competent authority in accordance with the first subparagraph of Article 23a(2);*
  - (iii) *draft decisions submitted to ESMA by a competent authority on a voluntary basis in accordance with the second subparagraph of Article 23a(2);*
  - (iv) *relevant market developments, including situations or events which impact or are likely to impact the prudential or financial soundness or the resilience of CCPs authorised in accordance with Article 14 or their clearing members;*

*(d) be informed of and discuss all opinions and recommendations adopted by colleges pursuant to Article 19 of this Regulation, in order to contribute to the consistent and coherent functioning of the colleges and to foster coherence in the application of this Regulation among them.*

*For the purposes of points (a) to (d) of the first subparagraph, competent authorities shall provide ESMA with all relevant information and documentation without undue delay.*

*8. Where the activities or the exchange referred to in points (a) to (d) of paragraph 7 expose a lack of convergence and coherence in the application of this Regulation, ESMA shall issue the necessary guidelines or recommendations pursuant to Article 16 of Regulation (EU) No 1095/2010 or opinions pursuant to Article 29 of Regulation (EU) No 1095/2010. Where an assessment referred to in point (b) of paragraph 7 exposes shortcomings in the resilience of one or more CCPs, ESMA shall issue the necessary recommendations pursuant to Article 16 of Regulation (EU) No 1095/2010.*

9. *In addition, the CCP Supervisory Committee may:*
- (a) *based on its activities in accordance with points (a) to (d) of paragraph 7, request the Board of Supervisors to consider whether the adoption of guidelines, recommendations and opinions by ESMA is necessary in order to address a lack of convergence and coherence in the application of this Regulation among competent authorities and colleges. The Board of Supervisors shall duly consider such requests and provide an appropriate response;*
  - (b) *submit opinions to the Board of Supervisors on decisions to be taken in accordance with Article 44 of Regulation (EU) No 1095/2010, with the exception of decisions referred to in Articles 17 and 19 of that Regulation, relating to tasks conferred on the competent authorities referred to in Article 22 of this Regulation.*

10. *The CCP Supervisory Committee shall, in relation to third-country CCPs, prepare draft decisions to be taken by the Board of Supervisors and carry out the tasks entrusted to ESMA in Articles 25, 25a, 25b, 25f to 25q and 85(6).*
11. *The CCP Supervisory Committee shall, in relation to third-country CCPs, share with the third-country CCP college referred to in Article 25c the agendas of its meetings before those meetings take place, the minutes of its meetings, the complete draft decisions it submits to the Board of Supervisors and the final decisions adopted by the Board of Supervisors.*
12. *The CCP Supervisory Committee shall be supported by dedicated staff from ESMA, possessing sufficient knowledge, skills and experience, in order to:*
  - (a) *prepare the CCP Supervisory Committee meetings;*
  - (b) *prepare the analyses necessary for the CCP Supervisory Committee to carry out its tasks;*
  - (c) *support the CCP Supervisory Committee in its international cooperation at administrative level.*
13. *For the purposes of this Regulation, ESMA shall ensure structural separation between the CCP Supervisory Committee and other functions referred to in Regulation (EU) No 1095/2010.*

## *Article 24b*

### *Consultation of central banks of issue*

- 1. With regard to decisions to be taken pursuant to Articles 41, 44, 46, 50 and 54 in relation to Tier 2 CCPs, the CCP Supervisory Committee shall consult the central banks of issue referred to in point (f) of Article 25(3). Each central bank of issue may respond. Any response shall be received within 10 working days of the transmission of the draft decision. In emergency situations, the aforementioned period shall not exceed 24 hours. Where a central bank of issue proposes amendments or objects to draft decisions pursuant to Articles 41, 44, 46, 50 and 54, it shall provide full and detailed reasons, in writing. Upon conclusion of the period for consultation, the CCP Supervisory Committee shall duly consider the amendments proposed by the central banks of issue.*
  
- 2. Where the CCP Supervisory Committee does not reflect in its draft decision the amendments proposed by a central bank of issue, the CCP Supervisory Committee shall inform that central bank of issue in writing stating its full reasons for not taking into account the amendments proposed by that central bank of issue, providing an explanation for any deviations from those amendments. The CCP Supervisory Committee shall submit to the Board of Supervisors the amendments proposed by central banks of issue and its explanations for not taking them into account together with its draft decision.*

3. *With regard to decisions to be taken pursuant to Articles 25(2c) and 85(6), the CCP Supervisory Committee shall seek the agreement of the central banks of issue referred to in point (f) of Article 25(3) for matters relating to the currencies they issue. The agreement of each central bank of issue shall be deemed to be given, unless the central bank of issue proposes amendments or objects within 10 working days of the transmission of the draft decision. Where a central bank of issue proposes amendments or objects to a draft decision, it shall provide full and detailed reasons, in writing. Where a central bank of issue proposes amendments with respect to matters relating to the currency it issues, the CCP Supervisory Committee may only submit to the Board of Supervisors the draft decision as amended with respect to those matters. Where a central bank of issue objects with respect to matters relating to the currency it issues, the CCP Supervisory Committee shall not include those matters in the draft decision it submits to the Board of Supervisors for adoption.*

*Article 24c*

*Decision making within the CCP Supervisory Committee*

*The CCP Supervisory Committee shall take its decisions by a simple majority of its voting members. In the event of a tie, the Chair shall have the casting vote.*

*Article 24d*

*Decision making within the Board of Supervisors*

*Where the CCP Supervisory Committee submits draft decisions to the Board of Supervisors pursuant to Articles 25(2), 25(2a), 25(2b), 25(2c), 25(5), 25p, 85(6), 89(3b) of this Regulation and additionally only for Tier 2 CCPs in accordance with Articles 41, 44, 46, 50 and 54 of this Regulation, the Board of Supervisors shall decide on those draft decisions in accordance with Article 44 of Regulation (EU) No 1095/2010 within 10 working days.*

*Where the CCP Supervisory Committee submits draft decisions to the Board of Supervisors pursuant to Articles other than those referred to in the first subparagraph, the Board of Supervisors shall decide on those draft decisions in accordance with Article 44 of Regulation (EU) No 1095/2010 within three working days.*



*Article 24e*

*Accountability*

- 1. The European Parliament or the Council may invite the Chair and the independent members of the CCP Supervisory Committee to make a statement while fully respecting their independence. The Chair and the independent members of the CCP Supervisory Committee shall make that statement before the European Parliament and answer any questions put by its Members whenever so requested.*
- 2. The Chair and the independent members of the CCP Supervisory Committee shall report in writing on the main activities of the CCP Supervisory Committee to the European Parliament and to the Council where requested and at least 15 days before making the statement referred to in paragraph 1.*
- 3. The Chair and the independent members of the CCP Supervisory Committee shall report any relevant information requested by the European Parliament on an ad hoc and confidential basis. That report shall not cover confidential information relating to individual CCPs.";*

(10) Article 25 is amended as follows:

(a) *paragraph 1 is replaced by the following:*

*"1. A CCP established in a third country may only provide clearing services to clearing members or trading venues established in the Union where that CCP is recognised by ESMA.";*

(b) in paragraph 2, the following point is added:

"(e) the CCP has *not* been determined as  systemically important or  likely to become systemically important  in accordance with paragraph 2a *and is therefore a Tier 1 CCP.*";

(c) the following paragraphs are inserted:

"2a. *ESMA shall, after consulting the ESRB and the central banks of issue referred to in point (f) of paragraph 3, determine whether a third-country CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States* ■ (Tier 2 CCP) ■ *by taking into account all of the following criteria:*

(a) *the nature, size and complexity of the CCP's business in the Union, and outside the Union to the extent its business may have a systemic impact on the Union or on one or more of its Member States, including:*

*(i) the value in aggregate terms and in each Union currency of transactions cleared by the CCP, or the aggregate exposure of the CCP engaged in clearing activities to its clearing members and, to the extent the information is available, their clients and indirect clients established in the Union, including where they have been designated by Member States as other systemically important institutions (O-SIIs) pursuant to Article 131(3) of Directive 2013/36/EU; and*

*(ii) the risk profile of the CCP in terms of, amongst others, legal, operational and business risk;*

- (b) the effect that the failure of or a disruption to the CCP would have on:
- (i) financial markets, *including the liquidity of the markets served*;
  - (ii) financial institutions;
  - (iii) the broader financial system; or
  - (iv) the financial stability of the Union or *of* one or more of its Member States;
- (c) the CCP's clearing membership structure *including, to the extent the information is available, the structure of its clearing members' network of clients and indirect clients, established in the Union*;
- (d) *the extent to which alternative clearing services provided by other CCPs exist in financial instruments denominated in Union currencies for clearing members and, to the extent the information is available, their clients and indirect clients established in the Union*;
- (e) the CCP's relationships, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system *to the extent that that is likely to have an impact on the financial stability of the Union or one or more of its Member States*.

The Commission shall adopt a delegated act in accordance with Article 82 to specify further the criteria set out in the first subparagraph by ... [12 months from the date of entry into force of this Regulation].

*Without prejudice to the outcome of the recognition process, ESMA shall, after conducting the assessment referred to in the first subparagraph, inform the applicant CCP whether or not it is considered to be a Tier 1 CCP within 30 working days of the determination that that CCP's application is complete in accordance with the second subparagraph of paragraph 4.*

- 2b. Where ESMA determines a CCP to be systemically important or likely to become systemically important (Tier 2 CCP) in accordance with paragraph 2a, it *shall* only recognise that CCP *to provide certain clearing services or activities* where, in addition to the conditions referred to in points (a) to (d) of paragraph 2, the following conditions are fulfilled:
- (a) the CCP complies, at the moment of recognition and thereafter on an ongoing basis, with the requirements set out in Article 16 and in Titles IV and V. *With regard to the CCP's compliance with Articles 41, 44, 46, 50 and 54, ESMA shall consult the central banks of issue referred to in point (f) of paragraph 3 in accordance with the procedure set out in Article 24b(1).* ESMA shall take into account, in accordance with Article 25a, the extent to which *a* CCP's compliance with those requirements is satisfied by *its* compliance with comparable requirements applicable in the third country;

- (b) *the central banks of issue referred to in point (f) of paragraph 3 have provided ESMA with written confirmation, within 30 working days of the determination that a third-country CCP is not a Tier 1 CCP in accordance with paragraph 2a or following the review in accordance with paragraph 5, that the CCP complies with the following requirements that those central banks of issue may have imposed in the carrying out of their monetary policy tasks:*
- (i) *to submit any information which the central bank of issue may require upon its reasoned request, where that information has not otherwise been obtained by ESMA;*
  - (ii) *to fully and duly cooperate with the central bank of issue in the context of the assessment of the CCP's resilience to adverse market developments carried out in accordance with Article 25b(3);*
  - (iii) *to open or notify the intent to open, in accordance with relevant access criteria and requirements, an overnight deposit account with the central bank of issue.*

*(iv) to comply with requirements, applied in exceptional situations by the central bank of issue, within its competences to address temporary systemic liquidity risks affecting the transmission of monetary policy or the smooth operation of payment systems, and relating to liquidity risk control, margin requirements, collateral, settlement arrangements or interoperability arrangements.*

*The requirements referred to in subpoint (iv) shall ensure the efficiency, soundness and resilience of CCPs and be aligned with those set out in Article 16 and in Titles IV and V of this Regulation.*

*The application of the requirements referred to in subpoint (iv) shall be a condition for recognition for a limited period of time of up to six months. Where at the end of that period the central bank of issue considers that the exceptional situation persists, the application of the requirements for recognition purposes may be extended once by an additional period not exceeding six months.*

*Before imposing, or extending the application of, the requirements referred to in point (iv), the central bank of issue shall inform ESMA, the other central banks of issue referred to in point (f) of paragraph 3 and the members of the third-country CCP college and provide them with an explanation of the effects of the requirements it intends to impose on the efficiency, soundness and resilience of CCPs and with a justification of why the requirements are necessary and proportionate to ensure the transmission of monetary policy or the smooth operation of payment systems in relation to the currency it issues. ESMA shall submit to the central bank of issue an opinion within 10 working days of the transmission of the draft requirement or draft extension. In emergency situations, the aforementioned period shall not exceed 24 hours. In its opinion, ESMA shall consider in particular the effects of the requirements imposed on the efficiency, soundness and resilience of the CCP. The other central banks of issue referred to in point (f) of paragraph 3 may submit an opinion within the same deadline. Upon conclusion of the period for consultation, the central bank of issue shall duly consider the amendments proposed in the opinions of ESMA or the central banks of issue referred to in point (f) of paragraph 3.*

*The central bank of issue shall also inform the European Parliament and the Council before extending the application of requirements referred to in point (iv).*



*The central bank of issue shall cooperate and share information on a continuous basis with ESMA and the other central banks of issue referred to in point (f) of paragraph 3 in relation to the requirements referred to in point (iv), in particular in relation to the assessment of systemic liquidity risks and the effects of the imposed requirements on the efficiency, soundness and resilience of CCPs.*

*Where a central bank of issue imposes any of the requirements referred to in this point after a Tier 2 CCP has been recognised, compliance with any such requirement shall be considered as a condition for recognition and the central banks of issue shall provide ESMA with written confirmation, within 90 working days, that the CCP complies with the requirement.*

*Where a central bank of issue has not provided a written confirmation to ESMA within the deadline, ESMA may consider that requirement to be fulfilled;*

- (c) the CCP has provided ESMA with:
- (i) a written *statement*, signed by *its* legal representative, *expressing the unconditional consent* of the CCP ■ to:
- provide within *three working days* after service of a request by ESMA any documents, records, information and data held by *that* CCP at *the time the request is served; and*
  - *allow ESMA to* access any of the CCP's business premises;
- (ii) a reasoned legal opinion by an independent legal expert confirming that the consent *expressed* is valid and enforceable under the relevant applicable laws;
- (d) the CCP has *implemented* all necessary measures and *established all necessary* procedures *to* ensure the effective compliance with the requirements laid down in points (a) and (c);
- (e) the Commission has not adopted an implementing act in accordance with paragraph 2c.

- 2c. ESMA, *after consulting the ESRB and* in agreement with the █ central banks of issue *referred to in point (f) of paragraph 3 in accordance with Article 24b(3)* and commensurate with the degree of systemic importance of the CCP in accordance with paragraph 2a of this Article, may, *on the basis of a fully reasoned assessment*, conclude that a CCP *or some of its clearing services* are of such substantial systemic importance that *that CCP should not be recognised to provide certain clearing services or activities. The agreement of a central bank of issue shall only relate to the currency it issues and not to the recommendation as a whole as referred to in the second subparagraph of this paragraph. In its assessment ESMA shall also:*
- (a) *explain how* compliance with the conditions set out in paragraph 2b *would* not sufficiently *address* the financial stability *risk for* the Union or *for* one or more of its Member States █ ;
  - (b) *describe the characteristics of the clearing services provided by the CCP, including the liquidity and physical settlement requirements associated with the provision of such services;*

- (c) *provide a quantitative technical assessment of the costs and benefits and consequences of a decision not to recognise the CCP to provide certain clearing services or activities, taking into account:*
- (i) *the existence of potential alternative substitutes for the provision of the clearing services concerned in the currencies concerned to clearing members, and to the extent the information is available, their clients and indirect clients established in the Union;*
  - (ii) *the potential consequences of including the outstanding contracts held at the CCP within the scope of the implementing act.*

*On the basis of its assessment*, ESMA shall recommend that the Commission adopt an implementing act confirming that that CCP should not be recognised *to provide certain clearing services or activities.*

*The Commission shall have a minimum of 30 working days to assess ESMA's recommendation.*

After submission of the recommendation referred to in the *second* subparagraph, the Commission may, *as a measure of last resort*, adopt an implementing act *specifying*:

- (a) *that following the adaptation period specified by the Commission in accordance with point (b) of this subparagraph, some or all of the clearing services of that third-country CCP can only be provided to clearing members and trading venues established in the Union by that CCP after it has been authorised to do so in accordance with Article 14;*
- (b) *an appropriate adaptation period for the CCP, its clearing members and their clients. The adaptation period shall not exceed two years, and may only be extended once by an additional period of six months where the reasons for granting an adaptation period still exist;*
- (c) *the conditions under which that CCP may continue to provide certain clearing services or activities during the adaptation period referred to in point (b);*
- (d) *any measures that shall be taken during the adaptation period, in order to limit the potential costs to clearing members and their clients, in particular those established in the Union.*

*In specifying the services and adaptation period referred to in points (a) and (b) of the fourth subparagraph, the Commission shall consider:*

- (a) the characteristics of the services offered by the CCP and their substitutability;*
- (b) whether and to what extent, outstanding cleared transactions shall be included within the scope of the implementing act, taking into account the legal and economic consequences of that inclusion;*
- (c) the potential cost implications to clearing members and, where that information is available, their clients, in particular those established in the Union.*

*The implementing act shall be adopted in accordance with the examination procedure referred to in Article 86(2).";*

*(d) paragraph 3 is amended as follows:*

*(i) the introductory part is replaced by the following:*

*"3. When assessing whether the conditions referred to in paragraph 2(a) to (d) are met, ESMA shall consult:";*

*(ii) point (f) is replaced by the following:*

*"(f) the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the CCP.";*

*(e) in paragraph 4, the second to fifth subparagraphs are replaced by the following:*

*"The applicant CCP shall provide ESMA with all information necessary for its recognition. Within 30 working days of receipt, ESMA shall assess whether the application is complete. If the application is not complete, ESMA shall set a deadline by which the applicant CCP is to provide additional information. ESMA shall immediately transmit all information received from the applicant CCP to the third-country CCP college."*

*The recognition decision shall be based on the conditions set out in paragraph 2 for Tier 1 CCPs and in points (a) to (d) of paragraph 2 and paragraph 2b for Tier 2 CCPs. It shall be independent of any assessment as the basis for the equivalence decision as referred to in Article 13(3). Within 180 working days of the determination that an application is complete in accordance with the second subparagraph, ESMA shall inform the applicant CCP in writing, with a fully reasoned explanation, whether the recognition has been granted or refused.";*

*(f) in paragraph 4, the sixth subparagraph is replaced by the following:*

*"ESMA shall publish on its website a list of the CCPs recognised in accordance with this Regulation, indicating their classification as Tier 1 CCPs or Tier 2 CCPs.";*



(g) paragraph 5 is replaced by the following:

"5. ESMA shall, after consulting the authorities and entities referred to in paragraph 3, review the recognition of *a* CCP established in a third country:

(a) if that CCP *intends to extend or reduce* the range of its activities and services in the Union, *in which case the CCP shall inform ESMA thereof submitting all necessary information;* and

(b) in any case at least every *five* years.

That review shall be conducted in accordance with paragraphs 2 to 4.

*Where, following the review referred to in the first subparagraph, ESMA determines that a third-country CCP that has been classified as Tier 1 CCP should be classified as a Tier 2 CCP, ESMA shall set an appropriate adaptation period which shall not exceed 18 months within which the CCP must comply with the requirements referred to in paragraph 2b. ESMA may extend that adaptation period by up to an additional six months upon the reasoned request of the CCP or competent authority responsible for the supervision of the clearing members, where such extension is justified by exceptional circumstances and implications for the clearing members established in the Union."*

(h) paragraph 6 is replaced by the following:

"6. The Commission *may* adopt an implementing act under Article 5 of Regulation (EU) No 182/2011, determining that:

- (a) the legal and supervisory arrangements of a third country ensure that CCPs authorised in that third country comply on an ongoing basis with legally binding requirements which are equivalent to the requirements laid down in Title IV of this Regulation;
- (b) those CCPs are subject to effective supervision and enforcement in that third country on an ongoing basis;
- (c) the legal framework of that third country provides for an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes.

The Commission may subject the application of the implementing act referred to in the first subparagraph to the effective fulfilment of any requirement set out therein by a third country on an ongoing basis and to the ability by ESMA to effectively exercise its responsibilities in relation to third-country CCPs recognised under paragraphs 2 and 2b or in relation to monitoring referred to in paragraph 6b, including by way of agreeing and applying the cooperation arrangements referred to in paragraph 7.";

(i) the following paragraphs are inserted:

- "6a. The Commission may adopt a delegated act in accordance with Article 82 to specify further the criteria referred to in points (a), (b) and (c) of paragraph 6.
- 6b. ESMA shall monitor the regulatory and supervisory developments in third countries for which implementing acts have been adopted pursuant to paragraph 6.

Where ESMA identifies any regulatory or supervisory development in those third countries that may impact the financial stability of the Union or *of* one or more █ of its Member States, it shall inform the *European Parliament, the Council, the Commission █ and the members of the third-country CCP college referred to in Article 25c* without delay. *All such information shall be treated confidentially.*

ESMA shall submit a confidential report to the Commission *and to the members of the third-country CCP college referred to in Article 25c* on the regulatory and supervisory developments in the third countries referred to in the first subparagraph on an annual basis.";

(j) **█** paragraph 7 is *amended as follows*:

(i) *the introductory part is* replaced by the following:

"7. ESMA shall establish effective cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent to this Regulation in accordance with paragraph 6. ***Such arrangements shall specify at least:***";

(ii) *point (a) is replaced by* the following **█** :

***"(a) the mechanism for the exchange of information between ESMA, the central banks of issue referred to in point (f) of paragraph 3 and the competent authorities of the third countries concerned, including access to all information requested by ESMA regarding CCPs authorised in third countries, such as significant changes to risk models and parameters, extension of CCP activities and services, changes in the client account structure and in the use of payment systems that substantially affect the Union;"***;

**(iii) point (d) is replaced by the following:**

"(d) the procedures concerning the coordination of supervisory activities, including the agreement of third-country authorities to allow investigations and on-site inspections in accordance with Articles 25g and 25h respectively.";

**(iv) the following points are added:**

"(e) the procedures necessary for the effective monitoring of regulatory and supervisory developments in a third country;

**(f) the procedures for third-country authorities to assure the effective enforcement of decisions adopted by ESMA in accordance with Articles 25b, 25f to 25m, 25p and 25q.**

- (g) *the procedures for third-country authorities to inform ESMA, the third-country CCP college referred to in Article 25c, and the central banks of issue referred to in point (f) of paragraph 3 without undue delay of any emergency situations relating to the recognised CCP, including developments in financial markets, which may have an adverse effect on market liquidity and the stability of the financial system in the Union or one of its Member States and the procedures and contingency plans to address such situations.*
- (h) *the consent of third-country authorities to the onward sharing of any information they have provided to ESMA under the cooperation arrangements with the authorities referred to in paragraph 3 and the members of the third-country CCP college, subject to the professional secrecy requirements set out in Article 83;"*
- (v) *the following final subparagraph is added:*

*"Where ESMA considers that a third-country competent authority fails to apply any of the provisions laid down in a cooperation arrangement established in accordance with this paragraph, it shall inform the Commission thereof confidentially and without delay. In such a case, the Commission may decide to review the implementing act adopted in accordance with paragraph 6.";*

(11) The following Articles are inserted:

“Article 25a

Comparable compliance

1. *A CCP referred to in Article 25(2b) may submit a reasoned request that ESMA assesses whether in its compliance with the applicable third-country framework, taking into account the provisions of the implementing act adopted in accordance with Article 25(6), that CCP may be deemed to satisfy compliance with the requirements set out in Article 16 and Titles IV and V. ESMA shall immediately transmit the request to the third-country CCP college.*
2. The request referred to in paragraph 1 shall provide the factual basis for a finding of comparability and the reasons why compliance with the requirements applicable in the third country satisfies the requirements set out in Article 16 and Titles IV and V .

3. The Commission, in order to ensure that the assessment referred to in paragraph 1 effectively reflects the regulatory objectives of the requirements set out in Article 16 and Titles IV and V and the Union's interests as a whole, shall adopt a delegated act specifying the following:
  - (a) the minimum elements to be assessed for the purposes of paragraph 1 of this Article;
  - (b) the modalities and conditions to carry out the assessment.

The Commission shall adopt the delegated act referred to in the first subparagraph in accordance with Article 82 by ... ***[12 months from the date of entry into force of this Regulation].***

#### Article 25b

##### Ongoing compliance with the conditions for recognition

1. ESMA shall be responsible for carrying out the duties resulting from this Regulation for the supervision on an ongoing basis of the compliance of recognised Tier 2 CCPs with the requirements referred to in point (a) of Article 25(2b). ***With regard to decisions pursuant to Articles 41, 44, 46, 50 and 54, ESMA shall consult the central banks of issue referred to in point (f) of Article 25(3) in accordance with Article 24b(1).***



ESMA shall require confirmation from each Tier 2 CCP at least on a yearly basis that the requirements referred to in points (a), (c) and (d) of Article 25(2b) continue to be fulfilled.

Where a central bank of issue referred to in *point (f) of Article 25(3)* considers that a Tier 2 CCP no longer fulfils the condition referred to in point (b) of Article 25(2b), it shall immediately notify ESMA.

2. *Where a Tier 2 CCP fails to provide ESMA with the confirmation referred to in the second subparagraph of paragraph 1 or where ESMA receives a notification pursuant to the third subparagraph of paragraph 1, the CCP shall be considered as no longer meeting the conditions for recognition pursuant to Article 25(2b) and the procedure set out in Article 25p(2), (3) and (4) shall apply.*

3. ESMA shall, *in cooperation with the ESRB*, carry out assessments of the resilience of recognised *Tier 2* CCPs to adverse market developments in accordance with Article 32(2) of Regulation (EU) No 1095/2010, *in coordination with the assessments referred to in point (b) of Article 24a(7). Central banks of issue referred to in point (f) of Article 25(3) may contribute to such assessments in the carrying out of their monetary policy tasks. In carrying out those assessments, ESMA shall include at least financial and operational risks, and ensure consistency with the assessments of the resilience of Union CCPs carried out pursuant to point (b) of Article 24a(7) of this Regulation.*

#### *Article 25c*

##### *Third-country CCP college*

1. *ESMA shall establish a college for third-country CCPs to facilitate the sharing of information.*
2. *The college shall consist of:*
  - (a) *the Chair of the CCP Supervisory Committee, who shall chair the college;*
  - (b) *the two independent members of the CCP Supervisory Committee;*

- (c) *the competent authorities referred to in Article 22 ; in Member States where more than one authority has been designated as competent in accordance with Article 22, those authorities shall agree on a common representative;*
  - (d) *the competent authorities responsible for the supervision of the clearing members established in the Union;*
  - (e) *the competent authorities responsible for the supervision of trading venues established in the Union, served or to be served by the CCPs;*
  - (f) *the competent authorities supervising central securities depositories established in the Union to which the CCPs are linked or intend to be linked;*
  - (g) *the members of the ESCB.*
3. *The college members may request that the CCP Supervisory Committee discusses specific matters in relation to a CCP established in a third country. Such request shall be made in writing and shall include detailed reasoning for the request. The CCP Supervisory Committee shall duly consider such requests and provide an appropriate response.*

4. *The establishment and functioning of the college shall be based on a written agreement between all its members. The obligation of professional secrecy in accordance with Article 83 shall apply to all college members.*

#### *Article 25d*

##### *Fees*

1. *ESMA shall charge the following fees to CCPs established in a third country in accordance with this Regulation and in accordance with the delegated act adopted pursuant to paragraph 3:*
  - (a) *fees associated with applications for recognition pursuant to Article 25;*
  - (b) *annual fees associated with ESMA's tasks in accordance with this Regulation in relation to the CCPs recognised in accordance with Article 25.*
2. *The fees referred to in paragraph 1 shall be proportionate to the turnover of the CCP concerned and shall cover all costs incurred by ESMA for the recognition and the performance of its tasks in accordance with this Regulation.*

3. *The Commission shall adopt a delegated act in accordance with Article 82 in order to specify further the following:*
- (a) the types of fees;*
  - (b) the matters for which fees are due;*
  - (c) the amount of the fees;*
  - (d) the manner in which fees are to be paid by the following:*
    - (i) a CCP which applies for recognition;*
    - (ii) a recognised CCP classified as a Tier 1 CCP in accordance with Article 25(2);*
    - (iii) a recognised CCP classified as a Tier 2 CCP in accordance with Article 25(2b).*

*Article 25e*

*Exercise of the powers referred to in Articles 25f to 25h*

*The powers conferred on ESMA or any official of or other person authorised by them by Articles 25f to 25h shall not be used to require the disclosure of information or documents which are subject to legal privilege.*

## Article 25f

### Request for information

1. ESMA may by simple request or by decision require recognised CCPs and related third parties to whom those CCPs have outsourced operational functions or activities to provide all necessary information to enable ESMA to carry out its duties under this Regulation.
2. When sending a simple request for information under paragraph 1, ESMA shall indicate all of the following:
  - (a) the reference to this Article as the legal basis of the request;
  - (b) the purpose of the request;
  - (c) the information required;
  - (d) the time limit to provide the information;
  - (e) inform the person from whom the information is requested that there is no obligation to provide the information but that in the case of a voluntary reply to the request the information provided must not be incorrect or misleading;
  - (f) the fine provided for in Article 25j in conjunction with point (a) of Section V of Annex III, where the answers to questions asked are incorrect or misleading.

3. When requiring that information is provided under paragraph 1 by decision, ESMA shall indicate all of the following:
- (a) the reference to this Article as the legal basis of the request;
  - (b) the purpose of the request;
  - (c) the information required;
  - (d) the time limit to provide the information;
  - (e) the periodic penalty payments provided for in Article 25k where the production of the required information is incomplete;
  - (f) the fine provided for in Article 25j in conjunction with point (a) of Section V of Annex III, for failing to provide the required information or where the answers to questions asked are incorrect or misleading; and
  - (g) the right to appeal the decision before ESMA's Board of Appeal and to have the decision reviewed by the Court of Justice of the European Union ('Court of Justice') in accordance with Articles 60 and 61 of Regulation (EU) No 1095/2010.

4. The persons referred to in paragraph 1 or their representatives and, in the case of legal persons or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
5. ESMA shall, without delay, send a copy of the simple request or of its decision to the relevant third-country competent authority where the persons referred to in paragraph 1 concerned by the request for information are domiciled or established.

#### Article 25g

##### General investigations

1. In order to carry out its duties under this Regulation, ESMA may conduct necessary investigations of Tier 2 CCPs ***and related third parties to whom those CCPs have outsourced operational functions, services or activities***. To that end, the officials and other persons authorised by ESMA shall be empowered to:
  - (a) examine any records, data, procedures and any other material relevant to the execution of its tasks irrespective of the medium on which they are stored;



- (b) take or obtain certified copies of or extracts from such records, data, procedures and other material;
- (c) summon and ask Tier 2 CCPs or their representatives or staff for oral or written explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers;
- (d) interview any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation;
- (e) request records of telephone and data traffic.

*The central banks of issue referred to in point (f) of Article 25(3) may, upon a reasoned request to ESMA, participate in such investigations where those investigations are relevant for the carrying out of their monetary policy tasks.*

*The third-country CCP college referred to in Article 25c shall be informed without undue delay of any findings that may be relevant for the execution of its tasks.*

2. The officials and other persons authorised by ESMA for the purposes of the investigations referred to in paragraph 1 shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the investigation. That authorisation shall also indicate the periodic penalty payments provided for in Article 25k where the production of the required records, data, procedures or any other material, or the answers to questions asked to Tier 2 CCPs are not provided or are incomplete, and the fines provided for in Article 25j in conjunction with point (b) of Section V of Annex III, where the answers to questions asked to Tier 2 CCPs are incorrect or misleading.
3. Tier 2 CCPs are required to submit to investigations launched on the basis of a decision of ESMA. The decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 25k of this Regulation, the legal remedies available under Regulation (EU) No 1095/2010 and the right to have the decision reviewed by the Court of Justice.

4. Prior to notifying a Tier 2 CCP of an investigation, ESMA shall inform the relevant third-country competent authority where the investigation is to be carried out of the investigation and of the identity of the authorised persons. Officials of the third-country competent authority concerned may, upon the request of ESMA, assist those authorised persons in carrying out their duties. Officials of the third-country competent authority concerned may also attend the investigations. Investigations *carried out in a third country* in accordance with this Article shall be conducted *pursuant to the cooperation arrangements established with* the relevant third-country competent authority **■**.

#### Article 25h

##### On-site inspections

1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections at any business premises, *land or property* of Tier 2 CCPs *and related third parties to whom those CCPs have outsourced operational functions, services or activities*.

The *central banks of issue referred to in point (f) of Article 25(3)* may submit a *reasoned request to ESMA* to participate in such on-site inspections *where relevant for the carrying out of their monetary policy tasks*.

*The third-country CCP college referred to in Article 25c shall be informed without undue delay of any findings that may be relevant for the execution of its tasks.*

2. The officials and other persons authorised by ESMA to conduct an on-site inspection may enter any business premises, land or property of the legal persons subject to an inspection decision adopted by ESMA and shall have all the powers stipulated in Article 25g(1). They shall also have the power to seal any business premises and books or records for the period of, and to the extent necessary for, the inspection.
3. In sufficient time before the inspection, ESMA shall give notice of the inspection to the relevant third-country competent authority where the inspection is to be conducted. Where the proper conduct and efficiency of the inspection so require, ESMA, after informing the relevant third-country competent authority, may carry out the on-site inspection without prior notice to the CCP. Inspections *conducted in a third country* in accordance with this Article shall be conducted *pursuant to the cooperation arrangements established with* the relevant third-country competent authority ■ .

The officials and other persons authorised by ESMA to conduct an on-site inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the periodic penalty payments provided for in Article 25k where the persons concerned do not submit to the inspection.

4. Tier 2 CCPs shall submit to on-site inspections ordered by decision of ESMA. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the periodic penalty payments provided for in Article 25k, the legal remedies available under Regulation (EU) No 1095/2010 as well as the right to have the decision reviewed by the Court of Justice.
5. Officials of, as well as those authorised or appointed by, the competent authority of the third country where the inspection is to be conducted may, at the request of ESMA, actively assist the officials and other persons authorised by ESMA. Officials of the *relevant* third-country competent authority may also attend the on-site inspections.

6. ESMA may also request third-country competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in this Article and in Article 25g(1) on its behalf.
7. Where the officials and other accompanying persons authorised by ESMA find that a person opposes an inspection ordered pursuant to this Article, ESMA may request the third-country competent authority concerned to afford them the necessary assistance, including, where appropriate, the assistance of the police or of an equivalent enforcement authority, to enable them to conduct their on-site inspection.



#### Article 25i

##### Procedural rules for taking supervisory measures and imposing fines

1. Where, in carrying out its duties under this Regulation, ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III, ESMA shall appoint an independent investigation officer within ESMA to investigate the matter. The appointed officer shall not be involved or have been directly or indirectly involved in the recognition or supervision process of the CCP concerned and shall perform his or her functions independently from ESMA.

2. The investigation officer shall investigate the alleged infringements, taking into account any comments submitted by the persons who are subject to the investigations, and shall submit a complete file with his or her findings to ESMA.

In order to carry out his or her tasks, the investigation officer may exercise the power to request information in accordance with Article 25f and to conduct investigations and on-site inspections in accordance with Articles 25g and 25h. When using those powers, the investigation officer shall comply with Article 25e .

Where carrying out his or her tasks, the investigation officer shall have access to all documents and information gathered by ESMA in its activities.

3. Upon completion of his or her investigation and before submitting the file with his or her findings to ESMA, the investigation officer shall give the persons subject to the investigations the opportunity to be heard on the matters being investigated. The investigation officer shall base his or her findings only on facts on which the persons concerned have had the opportunity to comment.

The rights of the defence of the persons concerned shall be fully respected during investigations under this Article.

4. When submitting the file with his or her findings to ESMA, the investigation officer shall notify that fact to the persons who are subject to the investigations. The persons subject to the investigations shall be entitled to have access to the file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information *or ESMA's internal preparatory documents*.
5. On the basis of the file containing the investigation officer's findings and, when requested by the persons concerned, after having heard the persons subject to the investigations in accordance with Article 25l, ESMA shall decide if one or more of the infringements listed in Annex III *have* been committed by the persons who have been subject to the investigations and, in such a case, shall take a supervisory measure in accordance with Article 25q and impose a fine in accordance with Article 25j.
6. The investigation officer shall not participate in ESMA's deliberations or in any other way intervene in ESMA's decision-making process.



7. The Commission shall adopt delegated acts in accordance with Article 82 to specify further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of penalties.
8. ESMA shall refer matters **■** to the appropriate authorities for investigation and possible criminal prosecution where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts *that it knows to be* liable to constitute *a criminal offence under the applicable third-country legal framework*. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where *it is aware that* a prior acquittal or conviction arising from identical fact or facts which are substantially the same has already acquired the force of res judicata as the result of criminal proceedings under national law.

## Article 25j

### Fines

1. Where, in accordance with Article 25i(5), ESMA finds that a CCP has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2 of this Article.

An infringement by a CCP shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the CCP or its senior management acted deliberately to commit the infringement.

2. The basic amounts of the fines referred to in paragraph 1 shall be up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10 % of the total annual turnover, as defined in relevant Union law, of a legal person in the preceding business year.
3. The basic amounts set out in paragraph 2 shall be adjusted, if need be, by taking into account aggravating or mitigating factors in accordance with the relevant coefficients set out in Annex IV.

The relevant aggravating coefficients shall be applied one by one to the basic amount. If more than one aggravating coefficient is applicable, the difference between the basic amount and the amount resulting from the application of each individual aggravating coefficient shall be added to the basic amount.

The relevant mitigating coefficients shall be applied one by one to the basic amount. If more than one mitigating coefficient is applicable, the difference between the basic amount and the amount resulting from the application of each individual mitigating coefficient shall be subtracted from the basic amount.

4. Notwithstanding paragraphs 2 and 3, the amount of the fine shall not exceed 20 % of the annual turnover of the CCP concerned in the preceding business year but, where the CCP has directly or indirectly benefited financially from the infringement, the amount of the fine shall be at least equal to that benefit.

Where an act or omission of a CCP constitutes more than one infringement listed in Annex III, only the higher fine calculated in accordance with paragraphs 2 and 3 and relating to one of those infringements shall apply.

## Article 25k

### Periodic penalty payments

1. ESMA shall, by decision, impose periodic penalty payments in order to compel:
  - (a) a Tier 2 CCP to put an end to an infringement in accordance with a decision taken pursuant to point (a) of Article 25q(1);
  - (b) a person referred to in Article 25f(1) to supply complete information which has been requested by a decision pursuant to Article 25f;
  - (c) a Tier 2 CCP:
    - (i) to submit to an investigation and in particular to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by a decision pursuant to Article 25g; or
    - (ii) to submit to an on-site inspection ordered by a decision taken pursuant to Article 25h.

2. A periodic penalty payment shall be effective and proportionate. The periodic penalty payment shall be imposed for each day of delay.
3. Notwithstanding paragraph 2, the amount of the periodic penalty payments shall be 3 % of the average daily turnover in the preceding business year, or, in the case of natural persons, 2 % of the average daily income in the preceding calendar year. It shall be calculated from the date stipulated in the decision imposing the periodic penalty payment.
4. A periodic penalty payment shall be imposed for a maximum period of six months following the notification of ESMA's decision. Following the end of that period, ESMA shall review the measure.

## Article 25l

### Hearing of the persons concerned

1. Before taking any decision on a fine or periodic penalty payment under Articles 25j and 25k, ESMA shall give the persons subject to the proceedings the opportunity to be heard on its findings. ESMA shall base its decisions only on findings on which the persons subject to the proceedings have had an opportunity to comment.  
  
*The first subparagraph of this paragraph shall not apply where urgent action is needed in order to prevent significant and imminent damage to the financial system. In such a case ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision.*
2. The rights of the defence of the persons subject to the proceedings shall be fully respected in the proceedings. They shall be entitled to have access to ESMA's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or ESMA's internal preparatory documents.

## Article 25m

### Disclosure, nature, enforcement and allocation of fines and periodic penalty payments

1. ESMA shall disclose to the public every fine and periodic penalty payment that has been imposed pursuant to Articles 25j and 25k of this Regulation unless such disclosure to the public would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. Such disclosure shall not contain personal data within the meaning of Regulation (EC) No 45/2001.
2. Fines and periodic penalty payments imposed pursuant to Articles 25j and 25k shall be of an administrative nature.
3. Where ESMA decides to impose no fines or penalty payments, it shall inform the European Parliament, the Council, the Commission, and the relevant third-country competent authorities accordingly and shall set out the reasons for its decision.
4. Fines and periodic penalty payments imposed pursuant to Articles 25j and 25k shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the Member State or third-country in which it is carried out.

5. The amounts of the fines and periodic penalty payments shall be allocated to the general budget of the European Union.

#### Article 25n

##### Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby ESMA has imposed a fine or a periodic penalty payment. It may annul, reduce or increase the fine or periodic penalty payment imposed.

#### Article 25o

##### Amendments to Annex IV

In order to take account of developments on financial markets the Commission is empowered to adopt delegated acts in accordance with Article 82 concerning measures to amend Annex IV.



## Article 25p

### Withdrawal of recognition

1. Without prejudice to Article 25q **■** and subject to the following paragraphs, ESMA, ***after consulting the authorities and entities referred to in Article 25(3)***, shall withdraw a recognition decision adopted in accordance with Article 25 where **■** :
  - (a) ***the CCP concerned has not made*** use of the recognition within six months, expressly renounces the **■** ***recognition*** or has ceased to engage in business for more than six ***months***;
  - (b) ***the CCP concerned*** has obtained the recognition through false statements or by any other irregular means;
  - (c) ***the CCP concerned has seriously and systematically infringed any of the conditions for recognition laid down in Article 25 or no longer complies with any of those conditions and in any of those situations has not taken the remedial action requested by ESMA within an appropriately set timeframe of up to a maximum of six months***;

- (d) *ESMA is unable to exercise effectively its responsibilities under this Regulation over the CCP concerned, due to the failure of the third-country authority of the CCP to provide ESMA with all relevant information or cooperate with ESMA in accordance with Article 25(7);*
- (e) the implementing act referred to in Article 25(6) has been withdrawn or suspended, or any of the conditions attached to it is no longer satisfied.

ESMA may limit the withdrawal of the recognition to a particular service, activity or class of financial instruments.

When determining the date of entry into effect of the decision to withdraw the recognition, ESMA shall *endeavour* to minimise *potential* market disruption *and provide for an appropriate adaptation period which shall not exceed two years.*

2. *Before withdrawing the recognition in accordance with* point (c) of paragraph 1 of this Article, *ESMA shall take into account the possibility of applying measures under points (a), (b) and (c) of Article 25q(1).*

■ If ESMA determines that remedial action within the set timeframe *of up to a maximum of six months under point (c) of the first subparagraph of paragraph 1 of this Article has not been taken* or that the action taken is not appropriate, *and after consulting the authorities referred to in Article 25(3), ESMA* shall withdraw the recognition decision.

3. ESMA shall, without undue delay, notify the relevant third-country competent authority of a decision to withdraw the recognition of a recognised CCP.
4. Any of the authorities referred to in Article 25(3), which consider that one of the conditions referred to in paragraph 1 has been met, may request ESMA to examine whether the conditions for the withdrawal of *the* recognition of a recognised CCP *or of its recognition for a particular service, activity or class of financial instruments* are met. Where ESMA decides not to withdraw the *recognition* of the █ CCP concerned, it shall provide full reasons to the requesting authority.

#### Article 25q

##### Supervisory measures by ESMA

1. Where, in accordance with Article 25i(5), ESMA finds that a Tier 2 CCP has committed one of the infringements listed in Annex III, it shall take one or more of the following decisions:
  - (a) require the CCP to bring the infringement to an end;
  - (b) impose fines under Article 25j;

- (c) issue public notices;
  - (d) withdraw the recognition of the CCP, *or its recognition for a particular service, activity or class of financial instruments*, under Article 25p.
2. When taking the decisions referred to in paragraph 1, ESMA shall take into account the nature and seriousness of the infringement, having regard to the following criteria:
- (a) the duration and frequency of the infringement;
  - (b) whether the infringement has revealed serious or systemic weaknesses in the CCP's procedures or in its management systems or internal controls;
  - (c) whether financial crime has been occasioned, facilitated or otherwise attributable to the infringement;
  - (d) whether the infringement has been committed intentionally or negligently.

3. Without undue delay, ESMA shall notify any decision adopted pursuant to paragraph 1 to the CCP concerned, and shall communicate it to the relevant third-country competent authorities and to the Commission. It shall publicly disclose any such decision on its website within 10 working days of the date when it was adopted.

When making public its decision as referred to in the first subparagraph, ESMA shall also make public the right of the CCP concerned to appeal the decision, the fact, where relevant, that such an appeal has been lodged, specifying that such an appeal does not have suspensive effect, and the fact that it is possible for ESMA's Board of Appeal to suspend the application of the contested decision in accordance with Article 60(3) of Regulation (EU) No 1095/2010.";

**(12) In Article 32(1), the following subparagraph is added:**

***"The assessment of the competent authority concerning the notification provided for in Article 31(2) and the information referred to in Article 31(3), shall be subject to an opinion of the college pursuant to Article 19."***

(13) *In Article 35(1), the last subparagraph is replaced by the following:*

*"A CCP shall not outsource major activities linked to risk management unless such outsourcing is approved by the competent authority. The decision of the competent authority shall be subject to an opinion of the college pursuant to Article 19.";*

(14) Article 49 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. A CCP shall regularly review the models and parameters adopted to calculate its margin requirements, default fund contributions, collateral requirements and other risk control mechanisms. It shall subject the models to rigorous and frequent stress tests to assess their resilience in extreme but plausible market conditions and shall perform back tests to assess the reliability of the methodology adopted. The CCP shall obtain independent validation, shall inform its competent authority and ESMA of the results of the tests performed and shall obtain *their* validation ■ in accordance with paragraphs *1a, 1b, 1c, 1d and 1e* before adopting any significant change to the models and parameters.

The adopted models and parameters, including any significant change thereto, shall be subject to an opinion of the college in accordance with the following paragraphs.

ESMA shall ensure that information on the results of the stress tests is passed on to the ESAs, the ESCB and the Single Resolution Board to enable them to assess the exposure of financial undertakings to the default of CCPs.";

(b) the following paragraphs are inserted:

- "1a. Where a CCP intends to adopt any significant change to the models and parameters referred to in paragraph 1, it shall apply to the competent authority **and ESMA** for validation of that change. The CCP shall enclose an independent validation of the intended change to its **applications**. **The competent authority and ESMA shall each confirm the receipt of the complete application to the CCP.**
- 1b. Within **50** working days of the receipt of the **complete applications**, the competent authority **and** ESMA shall each conduct a risk assessment of the significant change and submit **their reports** to the college established in accordance with Article 18.

- 1c. Within **30** working days of the receipt of the **reports** referred to in paragraph 1b, the college shall adopt a majority opinion in accordance with Article 19(3). ***Notwithstanding a provisional adoption in accordance with paragraph 1e, the competent authority shall not adopt a decision granting or refusing the validation of significant changes to models and parameters until such an opinion has been adopted by the college, unless the college has not adopted that opinion within the deadline.***
- 1d. Within **90** working days of the receipt of the **applications** referred to in paragraph 1a, the competent authority **and ESMA** shall each inform the CCP **and each other** in writing, including a fully reasoned explanation, whether the validation has been granted or refused.
- 1e. The CCP may not adopt any significant change to the models and parameters referred to in paragraph 1 before obtaining the **validations by its competent authority and ESMA**. The **█** competent authority, in agreement with ESMA, may allow for a provisional adoption of a significant change **of** those models or parameters prior to **their validations** where duly justified.";



(c) *the following paragraph is added:*

*"5. To ensure uniform conditions of application of this Article, ESMA shall, after consulting EBA, other relevant competent authorities and the members of the ESCB, develop draft regulatory technical standards specifying the conditions under which changes to the models and parameters referred to in paragraph 1 are significant.*

*ESMA shall submit those draft regulatory technical standards to the Commission by ... [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 the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010."*

(15) *Article 82 is amended as follows:*

(a) *paragraphs 2, 3 and 4 are replaced by the following:*

- "2. *The power to adopt **delegated** acts referred to in Articles 1(6), Article 4(3a), Article 25(2a), Article 25(6a), Article 25a(3), Article 25d(3), Article 25i(7), Article 25o, Article 64(7), Article 70, Article 72(3), and Article 85(2) shall be conferred to the Commission for an indeterminate period of time.*
3. *The delegation of power referred to in Article 1(6), Article 4(3a), Article 25(2a), Article 25(6a), Article 25a(3), Article 25d(3), Article 25i(7), Article 25o, Article 64(7), Article 70, Article 72(3) and Article 85(2) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.*

4. *Before adopting a delegated act, the Commission shall endeavour to consult ESMA and shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.*";

(b) *paragraph 6 is replaced by the following:*

*"6. A delegated act adopted pursuant to Article 1(6), Article 4(3a), Article 25(2a), Article 25(6a), Article 25a(3), Article 25d(3), Article 25i(7), Article 25o, Article 64(7), Article 70, Article 72(3) and Article 85(2) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council."*

(16) *in Article 85 the following paragraphs are added:*

*"6. ESMA shall, in cooperation with the ESRB and in agreement with, in accordance with Article 24b(3), the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the third-country CCP to which the implementing act referred to in the second subparagraph of Article 25(2c) is addressed, submit a report to the Commission on the application of the provisions of that implementing act, in particular assessing whether the financial stability risk for the Union or for one or more of its Member States is sufficiently mitigated. ESMA shall submit its report to the Commission within 12 months of the end of the adaptation period determined in accordance with point (b) of the fourth subparagraph of Article 25(2c). The agreement of a central bank of issue shall only relate to the currency it issues and not to the report as a whole.*

*Within 12 months of transmission of the report referred to in the first subparagraph, the Commission shall prepare a report on the application of the provisions of that implementing act. The Commission shall submit its report to the European Parliament and to the Council, together with any appropriate proposals.*

7. *By ... [36 months after the date of entry into force of this Regulation], the Commission shall prepare a report assessing the effectiveness of:*
- (a) ESMA's tasks, in particular the CCP Supervisory Committee's, in fostering the convergence and coherence of the application of this Regulation among the competent authorities referred to in Article 22 and the colleges referred to in Article 18;*
  - (b) the framework for the recognition and supervision of third-country CCPs;*
  - (c) the framework for guaranteeing a level playing field among CCPs authorised in accordance with Article 14 as well as among authorised CCPs and third-country CCPs recognised in accordance with Article 25;*
  - (d) the division of responsibilities between ESMA, the competent authorities and the central banks of issue.*

*The Commission shall submit the report to the European Parliament and the Council together with any appropriate proposals.";*

(17) in Article 89, the following paragraphs are inserted:

- "3a. ESMA shall not exercise its powers pursuant to Article 25(2a), (2b) and (2c) until *the* date of entry into force of the delegated acts referred to in the second subparagraph of *Article 25(2a) and in Article 25a(3) and, in relation to CCPs for which ESMA has not adopted a recognition decision pursuant to Article 25 before ... [the date of entry into force of this Regulation], until the date of entry into force of the relevant implementing act referred to in Article 25(6).*
- 3b. ESMA shall *establish and manage a college* pursuant to Article 25c *for all CCPs recognised in accordance with Article 25* before ... [*the date of* entry into force of this Regulation] within *four* months from the date of entry into force of the delegated act referred to in the second subparagraph of Article 25(2a) **■**.
- 3c. *ESMA shall review the recognition decisions adopted pursuant to Article 25(1) before the date of entry into force of the delegated acts referred to in the second subparagraph of Article 25(2a) and in Article 25a(3) within 18 months from the date of entry into force of the delegated act referred to in the second subparagraph of Article 25(2a), in accordance with Article 25(5).*

*Where, following the review referred to in the first subparagraph of this paragraph, ESMA determines that a CCP recognised before ... [the date of entry into force of this Regulation] should be classified as a Tier 2 CCP in accordance with Article 25(2a), ESMA shall set an appropriate adaptation period which shall not exceed 18 months within which the CCP must comply with the requirements referred to in Article 25(2b). ESMA may extend the adaptation period up to an additional six months upon the reasoned request of the CCP or any of the competent authorities responsible for the supervision of clearing members established in the Union, where such extension is justified by exceptional circumstances and by the impact on the clearing members established in the Union.";*

(18) *Article 90 is replaced by the following:*

*"Article 90*

*Staff and resources of ESMA*

*By ... [two years after the date of entry into force of this amending Regulation], 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."*

(19) The texts set out in the Annex to this Regulation are added as Annexes III and IV.

## Article 2

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

This Regulation shall 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

The following texts are added as Annexes III and IV to Regulation (EU) No 648/2012.

### “ANNEX III

List of infringements referred to in Article 25j(1)

#### I. Infringements relating to capital requirements:

- (a) a Tier 2 CCP infringes Article 16(1) by not having a permanent and available initial capital of at least EUR 7,5 million;
- (b) a Tier 2 CCP infringes Article 16(2) by not having capital, including retained earnings and reserves, which is proportionate to the risk stemming from its activities and at all times sufficient to ensure an orderly winding-down or restructuring of that activities over an appropriate time span and an adequate protection of the CCP against credit, counterparty, market, operational, legal and business risks which are not already covered by specific financial resources as referred to in Articles 41 to 44.

#### II. Infringements relating to organisational requirements or conflicts of interest:

- (a) a Tier 2 CCP infringes Article 26(1) by not having robust governance arrangements which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks to which it is or might be exposed and adequate internal control mechanisms, including sound administrative and accounting procedures;

- (b) a Tier 2 CCP infringes Article 26(2) by not adopting policies and procedures which are sufficiently effective to ensure compliance including that of its managers and employees, with this Regulation;
- (c) a Tier 2 CCP infringes Article 26(3) by not maintaining or operating an organisational structure that ensures continuity and orderly functioning in the performance of its services and activities or by not employing appropriate and proportionate systems, resources or procedures;
- (d) a Tier 2 CCP infringes Article 26(4) by not maintaining a clear separation between the reporting lines for risk management and those for other operations of the CCP;
- (e) a Tier 2 CCP infringes Article 26(5) by not adopting, implementing or maintaining a remuneration policy which promotes sound and effective risk management and which does not create incentives to relax risk standards;
- (f) a Tier 2 CCP infringes Article 26(6) by not maintaining information technology systems adequate to deal with the complexity, variety and type of services and activities performed to ensure high standards of security and the integrity and confidentiality of the information maintained;

- (g) a Tier 2 CCP infringes Article 26(7) by not making its governance arrangements, the rules governing the CCP, or its admission criteria for clearing membership available publicly free of charge;
- (h) a Tier 2 CCP infringes Article 26(8) by not being subject to frequent and independent audits or by not communicating the results of those audits to the board or by not making those results available to ESMA;
- (i) a Tier 2 CCP infringes Article 27(1) or the second subparagraph of Article 27(2) by not ensuring that its senior management and the members of the board are of sufficiently good repute and experience to ensure the sound and prudent management of the CCP;
- (j) a Tier 2 CCP infringes Article 27(2) by not ensuring that at least one third, but no less than two, of the members of that board are independent or by not inviting the representatives of the clients of clearing members to board meetings for matters relevant to Articles 38 and 39 or by linking the compensation of the independent and other non-executive members of the board to the business performance of the CCP;

- (k) a Tier 2 CCP infringes Article 27(3) by not clearly determining the roles and responsibilities of the board or by not making the minutes of the board meeting available to ESMA or the auditors;
- (l) a Tier 2 CCP infringes Article 28(1) by not establishing a risk committee or by not composing that risk committee of representatives of its clearing members, independent members of the board and representatives of its clients, by composing the risk committee in a way that one of those groups of representatives has a majority in the risk committee, or by not duly informing ESMA of the activities and decisions of the risk committee where ESMA has requested to be duly informed;
- (m) a Tier 2 CCP infringes Article 28(2) by not clearly determining the mandate, the governance arrangements to ensure its independence, the operational procedures, the admission criteria or the election mechanism of risk committee members or by not making those governance arrangements publicly available or by not determining that the risk committee is chaired by an independent member of the board and reports directly to the board and holds regular meetings;

- (n) a Tier 2 CCP infringes Article 28(3) by not allowing the risk committee to advise the board on any arrangements that may impact the risk management of the CCP or by not making reasonable efforts to consult the risk committee on developments impacting the risk management of the CCP in emergency situations;
- (o) a Tier 2 CCP infringes Article 28(5) by not promptly informing ESMA of any decision in which the board decides not to follow the advice of the risk committee;
- (p) a Tier 2 CCP infringes Article 29(1) by not maintaining all the records on the services and activity provided by that CCP for a period of at least ten years, which are required to enable ESMA to monitor the CCP's compliance with this Regulation;
- (q) a Tier 2 CCP infringes Article 29(2) by not maintaining, for a period of at least ten years following the termination of a contract, all information on all contracts it has processed in a way that enables the identification of the original terms of a transaction before clearing by that CCP;
- (r) a Tier 2 CCP infringes Article 29(3) by not making the records and information referred to in paragraphs 1 and 2 of Article 29, or all information on the positions of cleared contracts, irrespective of the venue where the transactions were executed, available upon request to ESMA and the relevant members of the ESCB;

- (s) a Tier 2 CCP infringes Article 30(1) by not, or by falsely or by incompletely, informing ESMA of the identities of its shareholders or members, whether direct or indirect, *natural* or legal, persons that have qualifying holdings or of the amounts of those holdings;
- (t) a Tier 2 CCP infringes Article 30(4) by allowing the persons referred to in Article 30(1) exercise an influence which is likely to be prejudicial to the sound and prudent management of the CCP;
- (u) a Tier 2 CCP infringes Article 31(1) by not, or by falsely or by incompletely, notifying ESMA of any change to its management or not providing ESMA with all information necessary to assess compliance with Article 27(1) or the second subparagraph of Article 27(2);
- (v) a Tier 2 CCP infringes Article 33(1) by not maintaining or operating effective written organisational and administrative arrangements to identify or manage any potential conflict of interest between itself, including its managers, employees or any person with direct or indirect control or close links, and its clearing members or their clients known to the CCP or by not maintaining or implementing adequate procedures aiming at resolving possible conflicts of interest;

- (w) a Tier 2 CCP infringes Article 33(2) by not clearly disclosing the general nature or sources of conflicts of interest, before accepting new transactions from the clearing member concerned, to the clearing member or to a concerned client of that clearing member who is known to the CCP where the organisational or administrative arrangements of that CCP to manage a conflict of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interest of a clearing member or client are prevented;
- (x) a Tier 2 CCP infringes Article 33(3) by not taking into account in its written arrangements any circumstances, of which it is or should be aware, which may give rise to a conflict of interest arising as a result of the structure and business activities of other undertakings with which it has a parent undertaking or a subsidiary relationship;
- (y) a Tier 2 CCP infringes Article 33(5) by not taking all reasonable steps to prevent any misuse of the information held in its systems or preventing the use of that information for other business activities, or by a natural person who has a close link to a CCP or a legal person that has a parent undertaking or a subsidiary relationship with the CCP using confidential information recorded in that CCP for any commercial purposes without the prior consent of the client to whom such confidential information belongs;

- (z) a Tier 2 CCP infringes Article 36(1) by not acting fairly and professionally in accordance with the best interests of its clearing members and their clients;
- (aa) a Tier 2 CCP infringes Article 36(2) by not having accessible, transparent and fair rules for the prompt handling of complaints;
- (ab) a Tier 2 CCP infringes Article 37(1) or (2) by using, on an ongoing basis, discriminatory, opaque or subjective admission criteria, or by otherwise failing to ensure fair and open access to that CCP on an ongoing basis or by failing to ensure on an ongoing basis that its clearing members have sufficient financial resources and operational capacity to meet the obligations arising from the participation in that CCP, or by failing to conduct a comprehensive review of compliance by its clearing members on an annual basis;
- (ac) a Tier 2 CCP infringes Article 37(4) by failing to have objective and transparent procedures for the suspension and the orderly exit of clearing members that no longer meet the criteria referred to in Article 37(1);
- (ad) a Tier 2 CCP infringes Article 37(5) by denying access to a clearing member meeting the criteria referred to in Article 37(1) where such denial of access is not duly justified in writing and based on a comprehensive risk analysis;



- (ae) a Tier 2 CCP infringes Article 38(1) by not allowing the clients of its clearing members separate access to the specific services provided;
- (af) a Tier 2 CCP infringes Article 39(7) by not offering the different levels of segregation referred to in that paragraph on reasonable commercial terms;

III. Infringements relating to operational requirements:

- (a) a Tier 2 CCP infringes Article 34(1) by not establishing, implementing or maintaining an adequate business continuity policy and disaster recovery plan aimed at ensuring the preservation of its functions, the timely recovery of operations and the fulfilment of the CCP's obligations, which at least allows for the recovery of all transactions at the time of disruption to allow the CCP to continue to operate with certainty and to complete settlement on the scheduled date;
- (b) a Tier 2 CCP infringes Article 34(2) by not establishing, implementing or maintaining an adequate procedure aimed at ensuring the timely and orderly settlement or transfer of the assets and positions of clients and clearing members in the event of withdrawal of recognition pursuant to a decision under Article 25;

- (c) a Tier 2 CCP infringes the second subparagraph of Article 35(1) by outsourcing major activities linked to the risk management of that CCP without ESMA's approval;
- (d) a Tier 2 CCP infringes Article 39(1) by not keeping separate records and accounts that enable it, at any time and without delay, to distinguish in accounts with the CCP the assets and positions held for the account of one clearing member from the assets and positions held for the account of any other clearing member and from its own assets;
- (e) a Tier 2 CCP infringes Article 39(2) by not offering to keep and not keeping where so requested separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions of that clearing member from those held for the account of its clients;
- (f) a Tier 2 CCP infringes Article 39(3) by not offering to keep and not keeping where so requested separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from those held for the account of other clients, or by not offering its clearing members the possibility to open more accounts in their own name for the account of their clients where so requested;

- (g) a Tier 2 CCP infringes Article 40 by not measuring and assessing its liquidity and credit exposures to each clearing member and, where relevant, to another CCP with which it has concluded an interoperability arrangement on a near to real-time basis or by not having access to the relevant pricing sources to effectively measure its exposures on a reasonable cost basis;
- (h) a Tier 2 CCP infringes Article 41(1) by not imposing, calling or collecting margins to limit its credit exposures from its clearing members or, where relevant, from CCPs with which it has concluded an interoperability arrangement, or by imposing, calling or collecting margins which are not sufficient to cover potential exposures that the CCP estimates to occur until the liquidation of the relevant positions or to cover losses that result at least 99 % of the exposures movements over an appropriate time horizon or sufficient to ensure that the CCP fully collateralises its exposures with all its clearing members and, where relevant, with all CCPs with which it has concluded an interoperability arrangement, at least on a daily basis, or, if necessary, to take into account any potentially procyclical effects;

- (i) a Tier 2 CCP infringes Article 41(2) by failing to adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared taking into account the interval between margin collections, market liquidity and the possibility of changes over the duration of the transaction;
- (j) a Tier 2 CCP infringes Article 41(3) by not calling and collecting margins on an intraday basis, at least when predefined thresholds are exceeded;
- (k) a Tier 2 CCP infringes Article 42(3) by not maintaining a default fund which at least enables it to withstand, under extreme but plausible market conditions, the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members if the sum of their exposures are larger, or by developing scenarios that do not include the most volatile periods that have been experienced by the markets for which the CCP provides its services and a range of potential future scenarios, which take into account sudden sales of financial resources and rapid reductions in market liquidity;

- (l) a Tier 2 CCP infringes Article 43(2) where its default fund referred to in Article 42 and its other financial resources referred to in Article 43(1) do not enable it to withstand the default of the two clearing members to which it has the largest exposures under extreme but plausible market conditions;
- (m) a Tier 2 CCP infringes Article 44(1) by not having access at all times to adequate liquidity to perform its services and activities or by not measuring on a daily basis its potential liquidity needs;
- (n) a Tier 2 CCP infringes Article 45(1), (2) and (3) by not using the margins posted by a defaulting clearing member prior to other financial resources in covering losses;
- (o) a Tier 2 CCP infringes Article 45(4) by not using dedicated own resources before using the default fund contributions of non-defaulting clearing members;
- (p) a Tier 2 CCP infringes Article 46(1) by accepting anything other than highly liquid collateral with minimal credit and market risk to cover its initial and ongoing exposure to its clearing members where other collateral is not allowed under the delegated act adopted by the Commission under Article 46(3);
- (q) a Tier 2 CCP infringes Article 47(1) by investing its financial resources other than in cash or highly liquid financial instruments with minimum market and credit risk and capable of being liquidated rapidly with minimal adverse price effect;

- (r) a Tier 2 CCP infringes Article 47(3) by not depositing financial instruments posted as margins or as default fund contributions with operators of securities settlement systems that ensure the full protection of those financial instruments where those are available or by not using other highly secure arrangements with authorised financial institutions;
- (s) a Tier 2 CCP infringes Article 47(4) by performing cash deposits other than through highly secure arrangements with authorised financial institutions or through the use of standing deposit facilities of central banks or other comparable means provided by central banks;
- (t) a Tier 2 CCP infringes Article 47(5) by depositing assets with a third party without ensuring that the assets belonging to the clearing members are *identifiable* separately from the assets belonging to the CCP and from assets belonging to that third party by means of differently titled accounts on the books of the third party or any other equivalent measures that achieve the same level of protection or by not having prompt access to the financial instruments when required;

- (u) a Tier 2 CCP infringes Article 47(6) by investing its capital or the sums arising from the requirements laid down in Articles 41 to 44 in its own securities or those of its parent undertaking or its subsidiary;
- (v) a Tier 2 CCP infringes Article 48(1) by not having detailed procedures in place to be followed where a clearing member does not comply with the participation requirements laid down in Article 37 within the time limit and in accordance with the procedures established by the CCP, or by not setting out in detail the procedures to be followed in the event the default of a clearing member is not declared by the CCP, or by not reviewing those procedures annually;
- (w) a Tier 2 CCP infringes Article 48(2) by failing to take prompt action to contain losses and liquidity pressures resulting from clearing member defaults and to ensure that the closing out of any clearing member's positions does not disrupt its operations or expose the non-defaulting clearing members to losses they cannot anticipate or control;
- (x) a Tier 2 CCP infringes Article 48(3) by failing to promptly inform ESMA before the default procedure is declared or triggered;

- (y) a Tier 2 CCP infringes Article 48(4) by not verifying that its default procedures are enforceable and not taking all reasonable steps to ensure that it has the legal powers to liquidate the proprietary positions of the defaulting clearing member and to transfer or liquidate the clients' positions of the defaulting clearing member;
- (z) a Tier 2 CCP infringes Article 49(1) by not regularly reviewing its models and parameters adopted to calculate its margin requirements, default fund contributions, collateral requirements or other risk control mechanisms; by not subjecting those models to rigorous and frequent stress tests to assess their resilience in extreme but plausible market conditions; by not performing back tests to assess the reliability of the methodology adopted; by failing to obtain independent validation; by failing to inform ESMA of the results of the tests performed; or by failing to obtain ESMA's validation before adopting any significant change to the models and parameters where ESMA did not allow for a provisional adoption of that change prior to its validation;
- (aa) a Tier 2 CCP infringes Article 49(2) by not regularly testing the key aspects of its default procedures or by failing to take all reasonable steps to ensure that all clearing members understand them and have appropriate arrangements in place to respond to a default event;

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- (ab) a Tier 2 CCP infringes Article 50(1) by not using, where practical and available, central bank money to settle its transactions or by not taking steps to strictly limit cash settlement risks where central bank money is not used;
- (ac) a Tier 2 CCP infringes Article 50(3) by not eliminating principal risks through the use of delivery-versus-payment mechanisms to the extent possible, where that CCP has an obligation to make or receive deliveries of financial instruments;
- (ad) a Tier 2 CCP infringes Article 50a or Article 50b by not calculating  $K_{CCP}$  as specified in those Articles or by not following the rules for the calculation of  $K_{CCP}$  set out in Articles 50a(2), 50b and 50d;
- (ae) a Tier 2 CCP infringes Article 50a(3) by calculating  $K_{CCP}$  less than quarterly or less frequently than required by ESMA in accordance with Article 50a(3);
- (af) a Tier 2 CCP infringes Article 51(2) by not having non-discriminatory access both to the data that it needs for the performance of its functions from a trading venue to the extent that the CCP complies with the operational and technical requirements established by that trading venue and to the relevant settlement system;

- (ag) a Tier 2 CCP infringes Article 52(1) by entering into an interoperability arrangement without fulfilling any of the requirements set out in points (a) to (d) of that paragraph;
- (ah) a Tier 2 CCP infringes Article 53(1) by not distinguishing in accounts the assets and positions held for the account of another CCP with whom it has entered into an interoperability arrangement;
- (ai) a Tier 2 CCP infringes Article 54(1) by entering an interoperability arrangement without the prior approval of ESMA.

IV. Infringements relating to transparency and the availability of information:

- (a) a Tier 2 CCP infringes Article 38(1) by not publicly disclosing the prices and fees of each service provided separately including discounts and rebates and the conditions to benefit from those reductions;
- (b) a Tier 2 CCP infringes Article 38(1) by not disclosing the information on costs and revenues of its services to ESMA;

- (c) a Tier 2 CCP infringes Article 38(2) by not disclosing to its clearing members and their clients the risks associated with the services provided;
- (d) a Tier 2 CCP infringes Article 38(3) by not disclosing to its clearing members or ESMA the price information used to calculate its end-of-day exposures to its clearing members or by not publicly disclosing the volume of cleared transactions for each instrument cleared by the CCP on an aggregated basis;
- (e) a Tier 2 CCP infringes Article 38(4) by not publicly disclosing the operational and technical requirements relating to the communication protocols covering content and message formats it uses to interact with third parties including the operational and technical requirements referred to in Article 7;
- (f) a Tier 2 CCP infringes Article 38(5) by not publicly disclosing any breaches by clearing members of the criteria referred to in Article 37(1) or the requirements laid down in Article 38(1) except where ESMA considered that such a disclosure would constitute a threat to financial stability or to market confidence or would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved;
- (g) a Tier 2 CCP infringes Article 38(6) by not providing its clearing members with a simulation tool allowing them to determine the amount of additional initial margin, on a gross basis, that the CCP may require upon the clearing of a new transaction or by making that tool accessible on an unsecured basis.
- (h) a Tier 2 CCP infringes Article 38(7) by not providing its clearing members with information on the initial margin models it uses as detailed in points (a), (b) and (c) of the second sentence of that paragraph.

- (i) a Tier 2 CCP infringes Article 39(7) by not publicly disclosing the levels of protection and the costs associated with the different levels of segregation that it provides;
- (j) a Tier 2 CCP infringes Article 49(3) by not publicly disclosing key aspects on its risk management model or assumptions adopted to perform the stress test referred to in Article 49(1);
- (k) a Tier 2 CCP infringes Article 50(2) by not clearly stating its obligations with respect to deliveries of financial instruments, including whether it has an obligation to make or receive delivery of a financial instrument or whether it indemnifies participants for losses incurred in the delivery process.
- (l) a Tier 2 CCP infringes Article 50c(1) by not reporting the information referred in points (a) to (e) of Article 50c(1) to those of its clearing members which are institutions or to their competent authorities;
- (m) a Tier 2 CCP infringes Article 50c(2) by notifying those of its clearing members which are institutions less than quarterly or less frequently than required by ESMA in accordance with Article 50c(2).

V. Infringements relating to obstacles to the supervisory activities:

- (a) a CCP infringes Article 25f by ***failing to provide information in response to a decision requiring information pursuant to Article 25f(3), or by*** providing incorrect or misleading information in response to a simple request for information by ESMA in accordance with Article 25f(2) or in response to a decision by ESMA requiring information in accordance with Article 25f(3);
- (b) a CCP ***or its representatives provide*** incorrect or misleading answers to questions asked pursuant to Article 25g(1)(c);
- (c) ***a CCP infringes Article 25g(1)(e) by not complying with ESMA's request for records of telephone or data traffic;***
- (d) a Tier 2 CCP does not comply in due time with a supervisory measure required by a decision adopted by ESMA pursuant to Article 25q;
- (e) a Tier 2 CCP does not submit to an on-site inspection required by an inspection decision adopted by ESMA **■** pursuant to Article 25h.

## ANNEX IV

List of the coefficients linked to aggravating and mitigating factors for the application of Article 25j(3)

The following coefficients shall be applicable, cumulatively, to the basic amounts referred to in Article 25j(2):

- I. Adjustment coefficients linked to aggravating factors:
  - (a) if the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1,1 shall apply;
  - (b) if the infringement has been committed for more than six months, a coefficient of 1,5 shall apply;
  - (c) if the infringement has revealed systemic weaknesses in the organisation of the CCP, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply;

- (d) if the infringement has a negative impact on the quality of the activities and services of the CCP, a coefficient of 1,5 shall apply;
- (e) if the infringement has been committed intentionally, a coefficient of 2 shall apply;
- (f) *if* no remedial action has been taken since the breach has been identified, a coefficient of 1,7 shall apply;
- (g) if the CCP's senior management has not cooperated with ESMA in carrying out its investigations, a coefficient of 1,5 shall apply.

II. Adjustment coefficients linked to mitigating factors:

- (a) if the infringement has been committed for less than 10 working days, a coefficient of 0,9 shall apply;
- (b) if the CCP's senior management can demonstrate to have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply;
- (c) if the CCP has brought quickly, effectively and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply;
- (d) if the CCP has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply."