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#### COVER NOTE

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	14 July 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 14.7.2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third- country 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

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Delegations will find attached document C(2020) 4892 final.

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Encl.: C(2020) 4892 final



Brussels, 14.7.2020  
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**COMMISSION DELEGATED REGULATION (EU) .../...**

**of 14.7.2020**

**supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third-country 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**

(Text with EEA relevance)

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE DELEGATED ACT**

Article 25(2a) of Regulation (EU) No 648/2012 (EMIR) empowers the Commission to adopt a delegated act specifying further the criteria to be applied by the European Securities and Markets Authority (ESMA) when determining whether a third-country central counterparty (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.

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

### **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

#### ***Procedural aspects***

On 3 May 2019, the Commission sent ESMA a provisional request for its views ('technical advice') on a Commission delegated act specifying the criteria set out in the second subparagraph of paragraph 2a of Article 25 of EMIR. ESMA conducted a public consultation on its draft technical advice from 29 May 2019 to 29 July 2019. The non-confidential responses to the consultation are published on ESMA's website. ESMA sent its technical advice to the Commission on 11 November 2019. The technical advice received on the basis of this mandate does not prejudice the Commission's final decision, which is autonomous in this area.

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

In accordance with the Better Regulation Guidelines, the draft delegated act was published on the Better Regulation Portal for a four-week public feedback period, running between 11 June and 9 July 2020. 10 responses were received. The responses are available on the Better Regulation Portal.<sup>1</sup> In addition to the feedback received via the Better Regulation Portal, the Commission received several confidential replies. ESMA also provided further technical feedback.

#### ***Stakeholder views***

During the consultation of the Expert Group of the European Securities Committee (EGESC) on the provisional content of this delegated act Member States supported the Commission's approach and suggested a few amendments in order to better frame ESMA's assessment and enhance the predictability of the tiering process.

Responses to ESMA's consultation as well as other ad hoc contributions gave the Commission a wide range of views on the content of the delegated act. The views received mainly referred to the lack of predictability, the lack of proportionality and the need to demonstrate the nexus to the Union.

*Need to provide a degree of predictability*

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<sup>1</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12445-Systemic-importance-of-third-country-central-counterparties>

Stakeholders underlined the importance of a streamlined set of indicators that could provide an appropriate degree of predictability in the outcome.

First, stakeholders emphasised the need to focus on a limited set of indicators. Some stakeholders were concerned that a wide range of indicators would provide ESMA with too much flexibility and lead to a distortion of the number of third-country CCPs to be determined as Tier 2 CCPs. Several stakeholders also requested further details on how to determine whether “*a 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 by taking into account all of the following criteria*”. Some stakeholders believed that not all indicators were relevant to assess systemic importance and the information provided for some proposed indicators would be generic on the CCP and its business and thus less relevant.

Second, stakeholders commented that the list of indicators should facilitate the determination of the systemic importance of a third-country CCP for the Union. The stakeholders further noted the inability for third-country CCPs to pre-assess the likelihood of being tiered as a Tier 2 CCP and the lack of transparency of the process of determination. In this respect, some stakeholders raised concerns about ESMA’s potential flexibility in the assessment, e.g. references to ESMA “*may*” consider certain aspects of the indicators as well as the possibility for ESMA to consider further indicators not specified in the delegated act.

Consequently, the stakeholders requested more information on how the assessment of the indicators will be undertaken, if there will be thresholds, benchmarks or other indications as such aspects in order to ensure a fair and consistent application of the tiering criteria. Again, the concern is that it is difficult for a third-country CCP to obtain legal certainty. As such, stakeholders urged further clarity and thus certainty in this regard should be provided. During the EGESC, Member States gave their support for the use of quantitative indicators to provide more predictability for third-country CCPs as well as to focus ESMA’s resources on those third-country CCPs that were potentially of more systemic importance for the EU.

#### *Need to ensure proportionality by limiting unnecessary administrative burden*

Concerns were expressed in some responses about the amount of information to be provided to assess the indicators. Stakeholders argued that it was unclear how the collection of such a large amount of information would allow the assessment of the systemic importance of a third-country CCP to the Union. These stakeholders also considered that the amount of information to be provided was unnecessary as well as unduly burdensome on smaller third-country CCPs. One stakeholder noted that it could result in third-country CCPs providing more information to ESMA than EU-CCPs.

The core concern raised by the stakeholders was that third-country CCPs may be discouraged from applying for recognition on the basis that it would be too onerous given the volume and granularity of information required to be provided. Stakeholders suggested various options to manage the information requirements for tiering, including:

- an assessment, focusing first on quantifiable indicators directly relevant to the impact of failure of the third-country CCP on the financial stability of the EU where, e.g. the exposure that EU members have to the third-country CCP and the amount of EU currencies are held by the third-country CCP, then, as a second step, where the potential for systemic risk is considered sufficiently large, the assessment concerning ownership structure and alternative clearing services could be viewed. This approach was tested with Member States during the EGESC, who supported it;

- a *de minimis* exemption for smaller third-country CCPs where the assessment shall not be made applicable on those third-country CCPs which are not clearing in any of the currencies of the union or its Member States;
- ranking the indicators by order of importance to assess systemic importance, to identify those which are more important to the assessment;
- for already recognised third-country CCPs, the use of information ESMA already holds in respect of the third-country CCP, as some of the information would overlaps with information a recognised third-country CCP would already have provided in their recognition application;
- use, whenever possible, information publicly available to assess the criteria. This approach was tested with Member States during the EGESC, who supported it;
- draw on existing risk assessments and disclosures that follow the CPMI-IOSCO Principles for Financial Market Infrastructures ('PFMIs'). This approach was tested with Member States during the EGESC, who supported it.

Some stakeholders also stressed that the information to be provided by third-country CCPs is extensive and likely to include commercial and other sensitive information. As such, some stakeholders noted the need for confidentiality of the information provided.

#### *Need to clarify the nexus to the Union*

Some stakeholders emphasised that EMIR requires a third-country CCP's nexus to the Union or one of its Member States to be established based on its clearing activities. One stakeholder stressed the need for all indicators to establish a clear nexus to the EU to determine the importance of that CCP for the EU clearly. Stakeholders underlined the risks associated with assessing indicators without a clear nexus to the Union in leading to a flawed result, where a third-country CCP with no systemic relevance to the Union could be designated as systemically important since captured by too general indicators.

In relation to the assessment of the nexus to the Union, several stakeholders underlined that this nexus, for certain indicators, should be captured by a reference to Union currencies i.e. assessments should be limited to Union currencies for example where considering the currency of the cleared instruments, underlying assets, payments obligations etc. One stakeholder suggested that systemic risk should be defined clearly as being tied to exposures in Union currencies and to EU domiciled financial institutions. Another stakeholder though noted that whilst Union currencies are relevant to the Union, third-country currencies may also be relevant to assess a third-country CCPs systemically importance to the Union.

### **3. IMPACT ASSESSMENT**

The Commission must further specify the five qualitative tiering criteria set out in Article 25(2a) of EMIR and which ESMA must take into account when determining the degree of systemic risk a third-country CCP presents to the EU or one or more of its Member States. These criteria include: (i) the nature, size and complexity of the CCP's business; (ii) the effect of the failure of or disruption to the CCP; (iii) the CCP's clearing membership structure; (iv) alternative clearing services provided by other CCPs; and (v) the CCP's relationship, interdependencies, or other interactions. In determining the systemic importance of a third-country CCP, ESMA is required to assess all these criteria, none of them being determinative..

#### *ESMA's technical advice*

In its technical advice, ESMA proposed a set of indicators further specifying the criteria to assess 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.

The Commission has fully considered all representations received, including ESMA’s technical advice and the responses to ESMA’s public consultation, the feedback received from the EGESC as well as other input provided to the Commission by stakeholders..

This delegated nevertheless deviates from ESMA’s technical advice insofar as it streamlines and simplifies ESMA’s approach as described in more detail below. The objective of these deviations is to further improve the proportionality of the delegated act, provide greater predictability for third-country CCPs, and to clarify the nexus to the EU as required by EMIR, as well as reducing the administrative burden and costs for third-country CCPs.

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

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

In its technical advice, ESMA listed three policy options, namely:

<b>Policy option 1</b>	To further specify the criteria by <i>establishing a complete set of indicators each containing a granular list</i> of aspects to be covered by each indicator.
<b>Policy option 2</b>	To further specify the criteria by establishing <i>fewer indicators covering a more limited set of aspects</i> .
<b>Policy option 3</b>	To further specify the criteria by establishing <i>a complete set of “principle based” indicators</i> each aimed to establish a relevant data collection from the CCP at hand in order to achieve the objective of the indicator.

ESMA considered that option 1 would risk a disproportionately high application of indicators to all third-country CCPs and that option 2 would not enable ESMA to capture all relevant data and thus could result in a limited assessment of a CCP’s systemic importance for the EU or one of its Member States. ESMA therefore recommends Option 3.

The Commission believes that the approach proposed by ESMA must be refined, and the indicators specified, so as to provide more clarity on the information that third-country CCPs are expected to provide and that ESMA should assess.

When specifying the criteria to be assessed by ESMA in the tiering process, the Commission kept in mind the overarching principles of predictability and proportionality, while

minimising to the extent possible the administrative burden on CCPs that, by nature, do not pose a systemic risk to the Union.

### *Proportionality*

Taking into account the feedback received from all stakeholders, the Commission has sought to introduce a proportionate approach to the tiering of third-country CCPs.

The Commission believes that there is a need to prioritise some of the elements to be assessed without going against the explicit requirement that all criteria should be assessed and that none of the criteria should be determinative in itself.

As such, the Commission proposes to refine further the approach suggested by ESMA in its technical advice by streamlining the proposed indicators and clearly separating the basic information elements from those elements that are only relevant to CCPs that are more likely, in principle, to pose systemic risk to the EU or one of its Member States. As such, under this approach, all third-country CCPs will be required to provide certain basic information to enable the tiering. Those third-country CCPs that meet certain quantitative indicators, and which are therefore closer to a blurred boundary around Tier 1/Tier 2, would automatically have to provide additional information to enable a more rigorous assessment for tiering. ESMA would therefore need to assess these quantitative indicators first in order to determine the set of information required from a third-country CCP.

In addition, the Commission notes that a lot of the basic information, and indeed some of the more detailed information to be provided, is already publicly available. As such, ESMA is expected – as much as possible – rely on data that is publicly available, e.g. through the CPMI-IOSCO disclosure framework, or, for already recognised third-country CCPs, data that ESMA already has in its possession.

In this way, ESMA should have access to all relevant information for the tiering process, but the administrative burden on third-country CCPs will be substantially reduced.

### *Predictability*

In line with the feedback received from stakeholders calling for more predictability, the Commission introduces three objective indicators in order to allow for a simpler and more proportionate approach to the tiering process. Each criteria is split into a set of basic elements and a more advanced set of further information that ESMA should only assess where and only where one of the objective indicators are met. These objective indicators are:

- (i) whether a CCP clears or intends to clear financial instruments denominated in Union currencies;
- (ii) the aggregated resources collected by a CCP provided by clearing members established in the Union/a Member State or subsidiaries of entities established in the Union/a Member State;
- (iii) the largest payment obligation that would be caused by the default of any one or two largest clearing members in extreme but plausible market conditions<sup>2</sup>.

The first indicator would be split in order to differentiate between classes of financial instruments that are not easily comparable: securities transactions (including securities financing transactions) and transactions in derivatives the execution of which takes place on a regulated market or a third-country market considered to be equivalent to a regulated market on the one hand, and OTC derivatives on the other hand.

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<sup>2</sup> As commonly understood under the CPMI-IOSCO Principles for Financial Market Infrastructures.

Quantitative thresholds, determined on the basis of data available to the Commission, have been set for these indicators. These thresholds do not prevent ESMA from doing the tiering assessment and are in line with EMIR, as the thresholds would not be determinative in themselves. Rather the thresholds would provide an indication that third-country CCPs that meet those thresholds are unlikely to be, but could still be, determined Tier 1 CCPs after further analysis,

These changes improve the predictability of the tiering exercise, thus improving its efficiency.

#### *Nexus to the EU*

The Commission has sought to clarify the EU nexus of different indicators as well as their relevance for the assessment of a third-country CCP's systematic importance for the EU. In particular, the quantitative indicators used to enhance the predictability of the tiering process all refer to either the activity of EU clearing members and clients in the CCP or the activity the CCP conducts in instruments denominated in EU currencies. Furthermore, the elements specifying the criteria are generally meant to be assessed in a way that clearly illustrates the impact of the CCP on the financial stability of the Union.

### **3.1 Analysis of costs and benefits**

By introducing a two-step approach to the tiering process and ensuring that ESMA may rely as much as possible either on publicly available data or on data already in its possession, the policy option retained by the Commission limits the costs for ESMA and for the third-country CCPs being assessed for recognition or for which the recognition is being reviewed.

The costs for ESMA should be lower than under the approach proposed by ESMA as ESMA will only need to assess a limited set of data for those CCPs that are not captured by the quantitative indicators introduced in this Regulation.

On the one hand, costs may increase as ESMA needs to rely on publicly available data or information that they already have rather than relying solely on new information from a third-country CCP. This means that ESMA may need to check what information is available already which could require more resources.

On the other hand, the amount of information to be collected and analysed is substantially streamlined. This should reduce the resources required by ESMA to conduct the tiering assessment and focus its resources on those third-country CCPs that are, in principle, more likely to be Tier 2 CCPs. Resources could also be reduced by relying on publicly available or existing information since that information is assumed to be already provided in a relatively standardised and comparable format. Questions on the information or the quality of data provided may be less likely to arise.

The costs for third-country CCPs should also be lower. First, the amount of information provided is substantially streamlined. Certain additional information would only be needed in respect of potentially more systemically relevant CCPs. This means that the costs for those CCPs that are less systemically relevant will be substantially reduced. Second, ESMA is expected to use already available data, be it publicly or otherwise. This should theoretically reduce further the costs for all third-country CCPs. The modalities for collecting this information should however be further specified in ESMA's Regulatory Technical Standard



on information to be provided to ESMA for the recognition of a CCP<sup>3</sup>. Third, given that ESMA is expected to require less resources to assess tiering (e.g. due to more proportionate approach), there should also be a reduction in the level of fees required for the initial recognition of a third-country CCP, as this fee includes the tiering of third-country CCPs.

### **3.2 Proportionality**

This Regulation further specifies the criteria that ESMA needs to take into account when assessing a third-country CCP, whether in the process of an initial recognition or in reviewing an existing recognition decision as mandated under EMIR. This Regulation both limit the burden on non-systemic CCPs by limiting the information they are required to provide to that which is strictly necessary and allows ESMA to prioritise resources and reach a rapid decisions on tiering through a streamlined process.

In view of the above, this Regulation ensures the proportionate application of the rules set out in EMIR, thus taking into account the principle of proportionality.

### **3.3 Subsidiarity**

EMIR is a Regulation which is binding in its entirety and directly applicable in all Member States. The legal basis for EMIR is Article 114 of the Treaty on Functioning of the European Union and any changes to it would have the same legal basis.

EMIR sets out the supervisory framework applying to third-country CCPs that provide clearing services to clearing members or trading venues established in the EU. Member States and national supervisors cannot solve on their own the systemic risks posed by highly integrated and interconnected CCPs, which operate on a cross-border basis beyond the scope of national jurisdictions. In addition, Member States and national authorities cannot address on their own the systemic risks that third-country CCPs can pose to the financial stability of the EU as a whole,

As such, the objectives of EMIR to increase the safety and efficiency of CCPs by laying down uniform requirements for the performance their activities cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of actions, be better achieved at EU level in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on EU.

## **4. LEGAL ELEMENTS OF THE DELEGATED ACT**

This delegated regulation lays down rules to further specify the criteria that ESMA should take into account to 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.

- Article 1 defines a core set of elements to be assessed by ESMA when taking into the nature, size and complexity of the CCP's business in accordance with Article 25(2a)(a). It also defines a set of additional elements to be assessed for CCPs crossing one or more of the quantitative indicators listed under Article 6.
- Article 2 defines a core set of elements to be assessed by ESMA when taking into the effect of failure of or a disruption to a CCP in accordance with Article 25(2a)(b). It

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<sup>3</sup> Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties.

also defines a set of additional elements to be assessed for CCPs crossing one or more of the quantitative indicators listed under Article 6.

- Article 3 defines a core set of elements to be assessed by ESMA when taking into the CCP's clearing membership structure in accordance with Article 25(2a)(c). It also defines a set of additional elements to be assessed for CCPs crossing one or more of the quantitative indicators listed under Article 6.
- Article 4 defines a core set of elements to be assessed by ESMA when taking into alternative clearing services provided by other CCPs in accordance with Article 25(2a)(d). It also defines a set of additional elements to be assessed for CCPs crossing one or more of the quantitative indicators listed under Article 6.
- Article 5 defines a core set of elements to be assessed by ESMA when taking into the CCP's relationship, interdependencies, or other interactions in accordance with Article 25(2a)(e). It also defines a set of additional elements to be assessed for CCPs crossing one or more of the quantitative indicators listed under Article 6.
- Article 6 defines quantitative indicators allowing ESMA to estimate the exposure of clearing members and clients established in the Union to third-country CCPs.
- Article 7 provides the date of the entry into force of the Act.

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

of 14.7.2020

**supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third-country 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**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, and in particular the second subparagraph of Article 25(2a) thereof,

Whereas:

- (1) When assessing the degree of systemic risk that a third-country CCP presents to the financial stability of the Union or of one or more of its Member States, ESMA should consider a range of objective quantitative and qualitative considerations that justify its decision to recognise a third-country CCP as a Tier 1 or a Tier 2 CCP. It should also take into account any conditions under which the Commission may have adopted its equivalence decision. In particular, when assessing the risk profile of a third-country CCP, ESMA must consider objective and transparent quantitative activity indicators with regard to the business conducted with respect to clearing participants established in the Union or denominated in Union currencies, at the time of the assessment. While ESMA must consider the business conducted by the CCP in a holistic manner, its assessment should reflect the risk that a particular CCP could bring to the financial stability of the Union.
- (2) In specifying the criteria that ESMA is to take into account when determining the tier of a third-country CCP, the nature of the transactions cleared by the CCP, including their complexity, risk profile 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 this regard, specific features concerning certain products, such as agricultural products, listed and executed on regulated markets in third countries, which relate to markets that largely serve domestic non-financial counterparties in that third country who 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.
- (3) The countries where the CCP operates, the extent of the services it provides, the characteristics of the financial instruments it clears as well as the volumes cleared are objective indicators of the complexity of the CCP's business. When taking into account the criterion set out in point (a) of Article 25(2a) of Regulation (EU) No

648/2012, ESMA should therefore consider the ownership, business and corporate structure of the CCP, as well as the range, nature and complexity of clearing services offered by the CCP and the extent to which those services are of importance to clearing members and clients ('clearing participants') established in the Union. While the systemic importance of a CCP should be assessed in a holistic way, ESMA should take specific account of the proportion of the business of the CCP conducted in Union currencies, as well as the proportion of the business of the CCP originated from clearing participants established in the Union. For a CCP more likely to be of systemic importance to the Union it is important that ESMA assesses the structure and ownership of the group of which the CCP might be part in order to determine whether the interests of the Union are at risk. Additionally, the depth, liquidity and transparency of the markets served by such a CCP should also be assessed so that ESMA can better grasp the risk to clearing members established in the Union in the conduct of a default management auction.

- (4) The capital of the CCP and the financial resources committed by clearing participants as well as the type and nature of the collateral that they provide, are essential elements to be considered when assessing the capacity of a CCP to withstand any adverse development. When taking into account the criterion set out in point (b) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA should therefore have an overview of the financial resources available to the CCP in case of a default or a non-default event. ESMA should also consider the secured, unsecured, committed, uncommitted, funded or unfunded nature of these resources as well as the means used by the CCP to provide legal certainty and confidence as to the settlement of the payments it effects and the collateral it has to deal with. Finally, ESMA should consider the existence, nature and effect of a recovery and resolution framework for CCPs in the jurisdiction the CCP applying for recognition operates. Such recovery and resolution frameworks should be assessed against internationally agreed guidance and key attributes. When looking at settlement and liquidity risk, ESMA should pay particular attention for those CCPs that are likely to be systemic on how securely those CCP access liquidity as well as the liquidity strains on Union currencies. While the safety of payments and settlements might be reinforced through the use of distributed ledger technology or other recent technologies, ESMA should pay attention to the additional risk it may bring to the CCP, in particular cyber risk.
- (5) The nature of the conditions imposed by a CCP in order for clearing participants to access its services and the interlinkages between those clearing participants have repercussions on the way a CCP may be affected by an adverse event in relation to those participants. Therefore, when taking into account the criterion set out in point (c) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA should determine to the extent possible the identity of clearing participants to the CCP, in particular where that CCP provides services to clearing participants established in the Union. ESMA should also determine the relevant market share or relative importance of clearing participants or groups of clearing participants in that CCP. Insofar as necessary to assess the impact it might have on the clearing membership structure, ESMA should assess the conditions and options under which the CCP provides access to its clearing services. With respect to a CCP that is likely to be systemic to the Union, ESMA should assess whether the legal and prudential requirements that a CCP imposes on its clearing members are sufficiently stringent.
- (6) In the event of a disruption to a CCP, clearing participants may have to rely, whether directly or indirectly, on the provision by other CCPs of similar or identical services.

In order to assess the relative importance of the CCP applying for recognition, ESMA should therefore, when taking into account the criterion set out in point (d) of Article 25(2a) of Regulation (EU) No 648/2012, determine whether clearing participants may substitute some or all of the clearing services provided by that CCP with services provided by other CCPs, in particular where those alternative CCPs are authorised or recognised in the Union. Where clearing members and clients established in the Union can only clear certain products subject to a clearing obligation in one third-country CCP, the systemic importance of that CCP should be considered with acute attention by ESMA.

- (7) CCPs may be connected in many ways to other financial infrastructures such as other CCPs or central securities depositories. A disruption those connections may adversely affect the good functioning of the CCP. Therefore, when taking into account the criterion set out in point (e) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA should assess the extent to which the CCP is connected with other financial market infrastructures or financial institutions in a way that could impact the financial stability of the Union or of one or more of its Member States. In doing this ESMA should give particular attention to those connections and interdependencies with entities located in the Union. Finally, ESMA should identify and assess the nature of the services outsourced by the CCP and the risk such arrangements might pose to the CCP in case they were to be interrupted or impaired in any way.
- (8) Where, as determined using objective quantitative indicators, the exposure of clearing members and clients established in the Union to a CCP is significant, ESMA should assess additional elements for each criterion. The more of those indicators are met by a CCP, the greater the likelihood that ESMA concludes that that CCP is of systemic importance for the financial stability of the Union or of one or more of its Member States.
- (9) This Delegated Regulation should enter into force as a matter of urgency to ensure the fastest operationalisation of Regulation (EU) No 2019/2099.

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### ***The nature, size and complexity of the CCP's business***

1. When taking into account the criterion set out in point (a) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA shall assess the following elements:
  - (a) the countries where the CCP provides or intends to provide services;
  - (b) the extent to which the CCP provides other services in addition to clearing services;
  - (c) the type of financial instruments cleared or to be cleared by the CCP;
  - (d) whether the financial instruments cleared or to be cleared by the CCP are subject to the clearing obligation under Article 4 of Regulation (EU) No 648/2012;
  - (e) the average values cleared by the CCP over one year, at the following levels:
    - (i) the level of the CCP;

- (ii) the level of each clearing member that is an entity established in the Union or an entity part of a group subject to consolidated supervision in the Union;
  - (iii) the level of clearing members established outside of the Union or that are not part of a group subject to consolidated supervision in the Union where they clear on behalf of clients and indirect clients established in the Union, in aggregate.
- (f) whether the CCP has completed an assessment of its risk profile based on internationally agreed standards or otherwise, the methodology used and the result of the assessment.
2. For the purposes of point (e) of paragraph 1, ESMA shall assess the following values separately:
- (a) for securities transactions (including securities financing transactions according to Regulation (EU) 2015/2365), the value of open positions or open interest;
  - (b) for derivative transactions traded on a regulated market within the meaning of Directive 2014/65/EU, the value of open interest or turnover;
  - (c) for over-the-counter (OTC) derivatives transactions, the gross and net notional outstanding amount.

Those values shall be assessed per currency and per asset class.

3. Where any of the indicators referred to in Article 6 applies, ESMA, in addition to the elements listed in paragraph 1 of this Article, shall also assess the following elements:
- (a) the ownership structure of the CCP;
  - (b) where the CCP belongs to the same group as another financial market infrastructure, such as another CCP or central securities depository, the corporate structure of the group to which the CCP belongs;
  - (c) whether the CCP provides clearing services to clients or indirect clients established in the Union through clearing members established outside of the Union;
  - (d) the nature, depth and liquidity of the markets served and the level of available information on the adequate pricing data to market participants and any generally accepted and reliable pricing sources;
  - (e) whether quotes, pre-trade bid and offer prices and depths of trading interests are made public;
  - (f) whether post-trade price, volume and time of the transactions executed or concluded, on and off the markets served by the CCP are made public.

## *Article 2*

### ***The effect of failure of or a disruption to a CCP***

1. When taking into account the criterion set out in point (b) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA shall assess the following elements:
- (a) the capital, including retained earnings and reserves, of the CCP;

- (b) the type and amount of collateral accepted and held by the CCP, the haircuts applied, the corresponding haircut methodology, the currencies in which the collateral is denominated and the extent to which the collateral is provided by entities established in the Union or that are part of a group subject to consolidated supervision in the Union;
- (c) the maximum amount of margins collected by the CCP on a single day during a period of 365 days preceding ESMA's assessment;
- (d) the maximum amount of margins collected by the CCP on a single day during a period of 365 days preceding ESMA's assessment from each clearing member that is an entity established in the Union or an entity part of a group subject to consolidated supervision in the Union, per asset class or segregated default fund where applicable;
- (e) where applicable for each default fund of the CCP, the maximum default fund contributions required and held by the CCP on a single day during a period of 365 days preceding ESMA's assessment;
- (f) where applicable for each default fund of the CCP, the maximum default fund contributions required and held by the CCP on a single day during a period of 365 days preceding ESMA's assessment from each clearing member that is an entity established in the Union or an entity part of a group subject to consolidated supervision in the Union;
- (g) the estimated largest payment obligation on a single day in total and in each Union currency that would be caused by the default of any one or two largest single clearing members (and their affiliates) in extreme but plausible market conditions;
- (h) the total amount and for each Union currency of liquid financial resources to the CCP's benefit separated by type of resources, including cash deposits, committed or uncommitted resources;
- (i) the amount of total liquid financial resources committed to the CCP by entities established in the Union or that are part of a group subject to consolidated supervision in the Union.

2. Where any of the indicators referred to in Article 6 applies, ESMA, in addition to the elements listed in paragraph 1 of this Article, shall also assess the following elements:

- (a) the identity of the liquidity providers established in the Union or which are part of a group subject to consolidated supervision in the Union;
- (b) the average and peak aggregate daily values of incoming and outgoing Union currency payments;
- (c) the extent to which central bank money is used for settlement and payment or whether other entities are used for settlement or payment;
- (d) the extent to which the CCP applies technologies such as distributed ledger technology in its settlement/payment process;
- (e) the recovery plan of the CCP;
- (f) the resolution regime applicable to the CCP;
- (g) whether a crisis management group has been established for that CCP.

### Article 3

#### ***The CCP's clearing membership structure***

1. When taking into account the criterion set out in point (c) of Article 25(2a) of Regulation (EU) No 648/2012 ESMA shall assess the following:
  - (a) the clearing membership and, where the information is available, whether and which clients or indirect clients, established in the Union or that are part of a group subject to consolidated supervision in the Union are using the clearing services of the CCP; and
  - (b) the different options available to access the clearing services of the CCP (including different membership and direct access models for clients), any conditions for granting, denying or terminating access.
2. Where any of the indicators referred to in Article 6 applies, ESMA, in addition to the elements listed in paragraph 1 of this Article, shall specifically assess any legal or prudential requirements imposed by the CCP on clearing members to access its clearing services.

### Article 4

#### ***Alternative clearing services provided by other CCPs***

1. When taking into account the criterion set out in point (d) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA shall assess whether clearing members and clients established in the Union may access some or all of the clearing services provided by a CCP through other CCPs and whether those CCPs are authorised or recognised under Articles 14 and 25 of that Regulation.
2. Where any of the indicators referred to in Article 6 applies, ESMA, in addition to the elements listed in paragraph 1 of this Article, shall also assess whether the services provided by the CCP relate to a class of derivatives subject to the clearing obligation under Article 4 of Regulation (EU) No 648/2012.

### Article 5

#### ***The CCP's relationship, interdependencies, or other interactions***

1. When taking into account the criterion set out in point (e) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA shall assess the scope of functions, services or activities that have been outsourced by the CCP.
2. Where any of the indicators referred to in Article 6 applies, ESMA, in addition to the elements listed in paragraph 1 of this Article, shall also assess the following elements:
  - (a) the possible effects that the inability of the provider of outsourced functions, services or activities to comply with its obligations under the outsourcing arrangements would have on the Union or one or more of its Members States;
  - (b) whether the CCP serves trading venues established in the Union;



- (c) whether the CCP has interoperability arrangements or cross-margining agreements with CCPs established in the Union, or links with or participation in other financial market infrastructures located in the Union, such as Central Securities Depositories or payment systems.

#### *Article 6*

#### ***Indicators of minimum exposure of clearing members and clients established in the Union to the CCP***

1. The indicators for the purpose of Articles 1 to 5 are the following:
  - (a) the maximum open interest of securities transactions, including securities financing transactions, or exchange traded derivatives denominated in Union currencies cleared by the CCP over a period of one year prior to the assessment or intended to be cleared by the CCP over a period of one year following the assessment is more than EUR 1000 billion;
  - (b) the maximum notional outstanding of OTC derivatives transactions denominated in Union currencies cleared by the CCP over a period of one year prior to the assessment or intended to be cleared by the CCP over a period of one year following the assessment is more than EUR 1000 billion;
  - (c) the average aggregated margin requirement and default fund contributions for accounts held at the CCP by clearing members that are entities established in the Union or part of a group subject to consolidated supervision in the Union, calculated by the CCP on a net basis at clearing member account level over a period of two years prior to the assessment is more than EUR 25 billion;
  - (d) the estimated largest payment obligation committed by entities established in the Union or part of a group subject to consolidated supervision in the Union and computed over a period of one year prior to the assessment, that would result from the default of at least the two largest single clearing members and their affiliates, in extreme but plausible market conditions is more than EUR 3 billion.

For the purposes of point (d), the payment obligation shall aggregate the commitments in all currencies of the Union converted into EUR as necessary.

2. ESMA may only determine, based on the criteria specified in Articles 1 to 5, that a third-country CCP is a Tier 2 CCP where at least one of the indicators in paragraph 1 is met.

#### *Article 7*

#### ***Entry into force***

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

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

Done at Brussels, 14.7.2020

*For the Commission*  
*The President*  
*Ursula VON DER LEYEN*