This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

►B 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

(Text with EEA relevance)

(OJ L 201, 27.7.2012, p. 1)

Amended by:

		Official Journal		
		No	page	date
►M1	Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013	L 176	1	27.6.2013
►M2	Commission Delegated Regulation (EU) No 1002/2013 of 12 July 2013	L 279	2	19.10.2013

Corrected by:

►C1	Corrigendum, OJ L 321, 30.11.2013, p. 6 (575/2013)

▼B

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Central Bank ([1]),

Having regard to the opinion of the European Economic and Social Committee ([2]),

Acting in accordance with the ordinary legislative procedure ([3]),

Whereas:

(1) At the request of the Commission, a report was published on 25 February 2009 by a High-Level Group chaired by Jacques de Larosière and concluded that the supervisory framework of the financial sector of the Union needed to be strengthened to reduce the risk and severity of future financial crises and recommended far-reaching reforms to the structure of supervision of that sector, including the creation of a European System of Financial Supervisors, comprising three European supervisory authorities, one each for the banking, the insurance and occupational pensions and the securities and markets sectors, and the creation of a European Systemic Risk Council.

(2) The Commission Communication of 4 March 2009, entitled 'Driving European Recovery', proposed to strengthen the Union's regulatory framework for financial services. In its Communication of 3 July 2009 entitled 'Ensuring efficient, safe and sound derivatives markets', the Commission assessed the role of derivatives in the financial crisis, and in its Communication of 20 October 2009 entitled 'Ensuring efficient, safe and sound derivative markets: Future policy actions', the Commission outlined the actions it intends to take to reduce the risks associated with derivatives.

([1]) OJ C 57, 23.2.2011, p. 1.
([2]) OJ C 54, 19.2.2011, p. 44.
([3]) Position of the European Parliament of 29 March 2012 (not yet published in the Official Journal) and decision of the Council of 4 July 2012.

▼B

(3) On 23 September 2009, the Commission adopted proposals for three regulations establishing the European System of Financial Supervision, including the creation of three European Supervisory Authorities (ESAs) to contribute to a consistent application of Union legislation and to the establishment of high-quality common regulatory and supervisory standards and practices. The ESAs comprise the European Supervisory Authority (European Banking Authority) (EBA) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council ([1]), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) (EIOPA) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council ([2]), and the European Supervisory Authority (European Securities and Markets Authority) (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council ([3]). The ESAs have a crucial role to play in safeguarding the stability of the financial sector. It is therefore essential to ensure continuously that the development of their work is a matter of high political priority and that they are adequately resourced.

(4) Over-the-counter derivatives ('OTC derivative contracts') lack transparency as they are privately negotiated contracts and any information concerning them is usually only available to the contracting parties. They create a complex web of interdependence which can make it difficult to identify the nature and level of risks involved. The financial crisis has demonstrated that such characteristics increase uncertainty in times of market stress and, accordingly, pose risks to financial stability. This Regulation lays down conditions for mitigating those risks and improving the transparency of derivative contracts.

(5) At the 26 September 2009 summit in Pittsburgh, G20 leaders agreed that all standardised OTC derivative contracts should be cleared through a central counterparty (CCP) by the end of 2012 and that OTC derivative contracts should be reported to trade repositories. In June 2010, G20 leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of OTC derivative contracts in an internationally consistent and non-discriminatory way.

(6) The Commission will monitor and endeavour to ensure that those commitments are implemented in a similar way by the Union's international partners. The Commission should cooperate with third-country authorities in order to explore mutually supportive solutions to ensure consistency between this Regulation and the requirements established by third countries and thus avoid any

([1]) OJ L 331, 15.12.2010, p. 12.
([2]) OJ L 331, 15.12.2010, p. 48.
([3]) OJ L 331, 15.12.2010, p. 84.

▼B

possible overlapping in this respect. With the assistance of ESMA, the Commission should monitor and prepare reports to the European Parliament and the Council on the international application of principles laid down in this Regulation. In order to avoid potential duplicate or conflicting requirements, the Commission might adopt decisions on equivalence of the legal, supervisory and enforcement framework in third countries, if a number of conditions are met. The assessment which forms the basis of such decisions should not prejudice the right of a CCP established in a third country and recognised by ESMA to provide clearing services to clearing members or trading venues established in the Union, as the recognition decision should be independent of this assessment. Similarly, neither an equivalence decision nor the assessment should prejudice the right of a trade repository established in a third country and recognised by ESMA to provide services to entities established in the Union.

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

(8) It is appropriate and necessary in this context, taking account of the characteristics of derivative markets and the functioning of CCPs, to verify the effective equivalence of foreign regulatory systems in meeting G20 goals and standards in order to improve transparency in derivatives markets, mitigate systemic risk and protect against market abuse. The very special situation of CCPs requires that the provisions relating to third countries are organised and function in accordance with arrangements that are specific to these market structure entities. Therefore this approach does not constitute a precedent for other legislation.

(9) The European Council, in its Conclusions of 2 December 2009, agreed that there was a need to substantially improve the mitigation of counterparty credit risk and that it was important to improve transparency, efficiency and integrity for derivative transactions. The European Parliament resolution of 15 June 2010 on 'Derivatives markets: future policy actions' called for mandatory clearing and reporting of OTC derivative contracts.

▼B

(10) ESMA should act within the scope of this Regulation by safeguarding the stability of financial markets in emergency situations, ensuring the consistent application of Union rules by national supervisory authorities and settling disagreements between them. It is also entrusted with developing draft regulatory and implementing technical standards and has a central role in the authorisation and monitoring of CCPs and trade repositories.

(11) One of the basic tasks to be carried out through the European System of Central Banks (ESCB) is to promote the smooth operation of payment systems. In this respect, the members of the ESCB execute oversight by ensuring efficient and sound clearing and payment systems, including CCPs. The members of the ESCB are thus closely involved in the authorisation and monitoring of CCPs, recognition of third-country CCPs and the approval of interoperability arrangements. In addition, they are closely involved in respect of the setting of regulatory technical standards as well as guidelines and recommendations. This Regulation is without prejudice to the responsibilities of the European Central Bank (ECB) and the national central banks (NCBs) to ensure efficient and sound clearing and payment systems within the Union and with other countries. Consequently, and in order to prevent the possible creation of parallel sets of rules, ESMA and the ESCB should cooperate closely when preparing the relevant draft technical standards. Further, the access to information by the ECB and the NCBs is crucial when fulfilling their tasks relating to the oversight of clearing and payment systems as well as to the functions of a central bank of issue.

(12) Uniform rules are required for derivative contracts set out in Annex I, Section C, points (4) to (10) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments ([1]).

(13) Incentives to promote the use of CCPs have not proven to be sufficient to ensure that standardised OTC derivative contracts are in fact cleared centrally. Mandatory CCP clearing requirements for those OTC derivative contracts that can be cleared centrally are therefore necessary.

(14) It is likely that Member States will adopt divergent national measures which could create obstacles to the smooth functioning of the internal market and be to the detriment of market participants and financial stability. A uniform application of the clearing obligation in the Union is also necessary to ensure a high level of investor protection and to create a level playing field between market participants.

([1]) OJ L 145, 30.4.2004, p. 1.

▼B

(15) Ensuring that the clearing obligation reduces systemic risk requires a process of identification of classes of derivatives that should be subject to that obligation. That process should take into account the fact that not all CCP-cleared OTC derivative contracts can be considered suitable for mandatory CCP clearing.

(16) This Regulation sets out the criteria for determining whether or not different classes of OTC derivative contracts should be subject to a clearing obligation. On the basis of draft regulatory technical standards developed by ESMA, the Commission should decide whether a class of OTC derivative contract is to be subject to a clearing obligation, and from when the clearing obligation takes effect including, where appropriate, phased-in implementation and the minimum remaining maturity of contracts entered into or novated before the date on which the clearing obligation takes effect, in accordance with this Regulation. A phased-in implementation of the clearing obligation could be in terms of the types of market participants that must comply with the clearing obligation. In determining which classes of OTC derivative contracts are to be subject to the clearing obligation, ESMA should take into account the specific nature of OTC derivative contracts which are concluded with covered bond issuers or with cover pools for covered bonds.

(17) When determining which classes of OTC derivative contracts are to be subject to the clearing obligation, ESMA should also pay due regard to other relevant considerations, most importantly the interconnectedness between counterparties using the relevant classes of OTC derivative contracts and the impact on the levels of counterparty credit risk as well as promote equal conditions of competition within the internal market as referred to in Article 1(5)(d) of Regulation (EU) No 1095/2010.

(18) Where ESMA has identified that an OTC derivative product is standardised and suitable for clearing but no CCP is willing to clear that product, ESMA should investigate the reason for this.

(19) In determining which classes of OTC derivative contracts are to be subject to the clearing obligation, due account should be taken of the specific nature of the relevant classes of OTC derivative contracts. The predominant risk for transactions in some classes of OTC derivative contracts may relate to settlement risk, which is addressed through separate infrastructure arrangements, and may distinguish certain classes of OTC derivative contracts (such as foreign exchange) from other classes. CCP clearing specifically addresses counterparty credit risk, and may not be the optimal solution for dealing with settlement risk. The regime for such contracts should rely, in particular, on preliminary international convergence and mutual recognition of the relevant infrastructure.

▼B

(20) In order to ensure a uniform and coherent application of this Regulation and a level playing field for market participants when a class of OTC derivative contract is declared subject to the clearing obligation, this obligation should also apply to all contracts pertaining to that class of OTC derivative contract entered into on or after the date of notification of a CCP authorisation for the purpose of the clearing obligation received by ESMA but before the date from which the clearing obligation takes effect, provided that those contracts have a remaining maturity above the minimum determined by the Commission.

(21) In determining whether a class of OTC derivative contract is to be subject to clearing requirements, ESMA should aim for a reduction in systemic risk. This includes taking into account in the assessment factors such as the level of contractual and operational standardisation of contracts, the volume and the liquidity of the relevant class of OTC derivative contract as well as the availability of fair, reliable and generally accepted pricing information in the relevant class of OTC derivative contract.

(22) For an OTC derivative contract to be cleared, both parties to that contract must be subject to a clearing obligation or must consent. Exemptions to the clearing obligation should be narrowly tailored as they would reduce the effectiveness of the obligation and the benefits of CCP clearing and may lead to regulatory arbitrage between groups of market participants.

(23) In order to foster financial stability within the Union, it might be necessary also to subject the transactions entered into by entities established in third countries to the clearing and risk-mitigation techniques obligations, provided that the transactions concerned have a direct, substantial and foreseeable effect within the Union or where such obligations are necessary or appropriate to prevent the evasion of any provisions of this Regulation.

(24) OTC derivative contracts that are not considered suitable for CCP clearing entail counterparty credit and operational risk and therefore, rules should be established to manage that risk. To mitigate counterparty credit risk, market participants that are subject to the clearing obligation should have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral. When preparing draft regulatory technical standards specifying those risk-management procedures, ESMA should take into account the proposals of the international standard setting bodies on margining

▼B

requirements for non-centrally cleared derivatives. When developing draft regulatory technical standards to specify the arrangements required for the accurate and appropriate exchange of collateral to manage risks associated with uncleared trades, ESMA should take due account of impediments faced by covered bond issuers or cover pools in providing collateral in a number of Union jurisdictions. ESMA should also take into account the fact that preferential claims given to covered bond issuers counterparties on the covered bond issuer's assets provides equivalent protection against counterparty credit risk.

(25) Rules on clearing OTC derivative contracts, reporting on derivative transactions and risk-mitigation techniques for OTC derivative contracts not cleared by a CCP should apply to financial counterparties, namely investment firms as authorised in accordance with Directive 2004/39/EC, credit institutions as authorised in accordance with Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions ([1]), insurance undertakings as authorised in accordance with First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, Regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance ([2]), assurance undertakings as authorised in accordance with Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance ([3]), reinsurance undertakings as authorised in accordance with Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance ([4]), undertakings for collective investments in transferable securities (UCITS) and, where relevant, their management companies, as authorised in accordance with Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ([5]), institutions for occupational retirement provision as defined in Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision ([6]) and alternative investment funds managed by alternative investment fund managers (AIFM) as authorised or registered in accordance with Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers ([7]).

([1]) OJ L 177, 30.6.2006, p. 1.
([2]) OJ L 228, 16.8.1973, p. 3.
([3]) OJ L 345, 19.12.2002, p. 1.
([4]) OJ L 323, 9.12.2005, p. 1.
([5]) OJ L 302, 17.11.2009, p. 32.
([6]) OJ L 235, 23.9.2003, p. 10.
([7]) OJ L 174, 1.7.2011, p. 1.

▼B

(26) Entities operating pension scheme arrangements, the primary purpose of which is to provide benefits upon retirement, usually in the form of payments for life, but also as payments made for a temporary period or as a lump sum, typically minimise their allocation to cash in order to maximise the efficiency and the return for their policy holders. Hence, requiring such entities to clear OTC derivative contracts centrally would lead to divesting a significant proportion of their assets for cash in order for them to meet the ongoing margin requirements of CCPs. To avoid a likely negative impact of such a requirement on the retirement income of future pensioners, the clearing obligation should not apply to pension schemes until a suitable technical solution for the transfer of non-cash collateral as variation margins is developed by CCPs to address this problem. Such a technical solution should take into account the special role of pension scheme arrangements and avoid materially adverse effects on pensioners. During a transitional period, OTC derivative contracts entered into with a view to decreasing investment risks directly relating to the financial solvency of pension scheme arrangements should be subject not only to the reporting obligation, but also to bilateral collateralisation requirements. The ultimate aim, however, is central clearing as soon as this is tenable.

(27) It is important to ensure that only appropriate entities and arrangements receive special treatment as well as to take into account the diversity of pension systems across the Union, while also to provide for a level playing field for all pension scheme arrangements. Therefore, the temporary derogation should apply to institutions for occupational retirement provision registered in accordance with Directive 2003/41/EC, including any authorised entity responsible for managing such an institution and acting on its behalf as referred to in Article 2(1) of that Directive as well as any legal entity set up for the purpose of investment by such institutions, acting solely and exclusively in their interest, and to occupational retirement provision businesses of institutions referred to in Article 3 of Directive 2003/41/EC.

(28) The temporary derogation should also apply to occupational retirement provision businesses of life insurance undertakings provided that all corresponding assets and liabilities are ring-fenced, managed and organised separately, without any possibility of transfer. It should also apply to any other authorised and supervised entities operating on a national basis only or arrangements that are provided mainly in the territory of one Member State, only if both of them are recognised by national law and their primary purpose is to provide benefits upon retirement. The entities and arrangements referred to in this recital should be subject to the decision of the relevant

▼B

competent authority and in order to ensure consistency, remove possible misalignments and avoid any abuse, the opinion of ESMA, after consulting EIOPA. This could include entities and arrangements that are not necessarily linked to an employer pension programme but still have the primary purpose of providing income at retirement, either on a compulsory or on a voluntary basis. Examples could include legal entities operating pension schemes on a funded basis under national law, provided that they invest in accordance with the 'prudent person' principle, and pension arrangements taken up by individuals directly, which may also be provided by life insurers. The exemption in the case of pension arrangements taken up by individuals directly should not cover OTC derivative contracts relating to other life insurance products of the insurer which do not have the primary purpose of providing an income at retirement.

Further examples might be retirement provision businesses of insurance undertakings covered by Directive 2002/83/EC, provided that all assets corresponding to the businesses are included in a special register in accordance with the Annex to Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings ([1]) as well as occupational retirement provision arrangements of insurance undertakings based on collective bargaining agreements. Institutions established for the purpose of providing compensation to members of pension scheme arrangements in the case of a default should also be treated as a pension scheme for the purpose of this Regulation.

(29) Where appropriate, rules applicable to financial counterparties, should also apply to non-financial counterparties. It is recognised that non-financial counterparties use OTC derivative contracts in order to cover themselves against commercial risks directly linked to their commercial or treasury financing activities. Consequently, in determining whether a non-financial counterparty should be subject to the clearing obligation, consideration should be given to the purpose for which that non-financial counterparty uses OTC derivative contracts and to the size of the exposures that it has in those instruments. In order to ensure that non-financial institutions have the opportunity to state their views on the clearing thresholds, ESMA should, when preparing the relevant regulatory technical standards, conduct an open public consultation ensuring the participation of non-financial institutions. ESMA should also consult all relevant authorities, for example the Agency for the Cooperation of Energy Regulators, in order to

([1]) OJ L 110, 20.4.2001, p. 28.

▼B

ensure that the particularities of those sectors are fully taken into account. Moreover, by 17 August 2015, the Commission should assess the systemic importance of the transactions of non-financial firms in OTC derivative contracts in different sectors, including in the energy sector.

(30) In determining whether an OTC derivative contract reduces risks directly relating to the commercial activities and treasury activities of a non-financial counterparty, due account should be taken of that non-financial counterparty's overall hedging and risk-mitigation strategies. In particular, consideration should be given to whether an OTC derivative contract is economically appropriate for the reduction of risks in the conduct and management of a non-financial counterparty, where the risks relate to fluctuations in interest rates, foreign exchange rates, inflation rates or commodity prices.

(31) The clearing threshold is a very important figure for all non-financial counterparties. When the clearing threshold is set, the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivative contract should be taken into account. In that connection, appropriate efforts should be made to recognise the methods of risk mitigation used by non-financial counterparties in the context of their normal business activity.

(32) Members of the ESCB and other Member States' bodies performing similar functions, other Union public bodies charged with or intervening in the management of the public debt, and the Bank for International Settlements should be excluded from the scope of this Regulation in order to avoid limiting their power to perform their tasks of common interest.

(33) As not all market participants that are subject to the clearing obligation are able to become clearing members of the CCP, they should have the possibility to access CCPs as clients or indirect clients subject to certain conditions.

(34) The introduction of a clearing obligation along with a process to establish which CCPs can be used for the purpose of this obligation may lead to unintended competitive distortions of the OTC derivatives market. For example, a CCP could refuse to clear transactions executed on certain trading venues because the CCP is owned by a competing trading venue. In order to avoid such discriminatory practices, CCPs should agree to clear transactions executed in different trading venues, to the extent that those trading venues comply with the operational and

▼B

technical requirements established by the CCP, without reference to the contractual documents on the basis of which the parties concluded the relevant OTC derivative transaction, provided that those documents are consistent with market standards. Trading venues should provide the CCPs with trade feeds on a transparent and non-discriminatory basis. The right of access of a CCP to a trading venue should allow for arrangements whereby multiple CCPs use trade feeds of the same trading venue. However, this should not lead to interoperability for derivatives clearing or create liquidity fragmentation.

(35) This Regulation should not block fair and open access between trading venues and CCPs in the internal market, subject to the conditions laid down in this Regulation and in the regulatory technical standards developed by ESMA and adopted by the Commission. The Commission should continue to monitor closely the evolution of the OTC derivatives market and should, where necessary, intervene in order to prevent competitive distortions from occurring in the internal market with the aim of ensuring a level playing field in the financial markets.

(36) In certain areas within financial services and trading of derivative contracts, commercial and intellectual property rights may also exist. In instances where such property rights relate to products or services which have become, or impact upon, industry standards, licences should be available on proportionate, fair, reasonable and non-discriminatory terms.

(37) In order to identify the relevant classes of OTC derivative contracts that should be subject to the clearing obligation, the thresholds and systemically relevant non-financial counterparties, reliable data is needed. Therefore, for regulatory purposes, it is important that a uniform derivatives data reporting requirement is established at Union level. Moreover, a retrospective reporting obligation is needed, to the largest possible extent, for both financial counterparties and non-financial counterparties, in order to provide comparative data, including to ESMA and the relevant competent authorities.

(38) An intragroup transaction is a transaction between two undertakings which are included in the same consolidation on a full basis and are subject to appropriate centralised risk evaluation, measurement and control procedures. They are part of the same institutional protection scheme as referred to in Article 80(8) of Directive 2006/48/EC or, in the case of credit institutions affiliated to the same central body, as referred to in Article 3(1) of that Directive, both are credit institutions or one is a credit

▼B

institution and the other is a central body. OTC derivative contracts may be recognised within non-financial or financial groups, as well as within groups composed of both financial and non-financial undertakings, and if such a contract is considered an intragroup transaction in respect of one counterparty, then it should also be considered an intragroup transaction in respect of the other counterparty to that contract. It is recognised that intragroup transactions may be necessary for aggregating risks within a group structure and that intragroup risks are therefore specific. Since the submission of those transactions to the clearing obligation may limit the efficiency of those intragroup risk-management processes, an exemption of intragroup transactions from the clearing obligation may be beneficial, provided that this exemption does not increase systemic risk. As a result, adequate exchange of collateral should be substituted to the CCP clearing those transactions, where that is appropriate to mitigate intragroup counterparty risks.

(39) However, some intragroup transactions could be exempted, in some cases on the basis of the decision of the competent authorities, from the collateralisation requirement provided that their risk-management procedures are adequately sound, robust and consistent with the level of complexity of the transaction and there is no impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties. Those criteria as well as the procedures for the counterparties and the relevant competent authorities to be followed while applying exemptions should be specified in regulatory technical standards adopted in accordance with the relevant regulations establishing the ESAs. Before developing such draft regulatory technical standards, the ESAs should prepare an impact assessment of their potential impact on the internal market as well as on financial market participants and in particular on the operations and the structure of groups concerned. All the technical standards applicable to the collateral exchanged in intragroup transactions, including criteria for the exemption, should take into account the prevailing specificities of those transactions and existing differences between non-financial and financial counterparties as well as their purpose and methods of using derivatives.

(40) Counterparties should be considered to be included in the same consolidation at least where they are both included in a consolidation in accordance with Council Directive 83/349/EEC [1] or International Financial Reporting Standards (IFRS) adopted pursuant to Regulation (EC) No 1606/2002 of the European Parliament and of the Council [2] or, in relation to a group the parent undertaking of which has its head office in a third country, in accordance with generally accepted accounting principles of a third country determined to be equivalent to IFRS in accordance

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

[2] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).

▼B

with Commission Regulation (EC) No 1569/2007 [1] (or accounting standards of a third country the use of which is permitted in accordance with Article 4 of Regulation (EC) No 1569/2007), or where they are both covered by the same consolidated supervision in accordance with Directive 2006/48/EC or with Directive 2006/49/EC of the European Parliament and of the Council [2] or, in relation to a group the parent undertaking of which has its head office in a third country, the same consolidated supervision by a third country competent authority verified as equivalent to that governed by the principles laid down in Article 143 of Directive 2006/48/EC or in Article 2 of Directive 2006/49/EC.

(41) It is important that market participants report all details regarding derivative contracts they have entered into to trade repositories. As a result, information on the risks inherent in derivatives markets will be centrally stored and easily accessible, inter alia, to ESMA, the relevant competent authorities, the European Systemic Risk Board (ESRB) and the relevant central banks of the ESCB.

(42) The provision of trade repository services is characterised by economies of scale, which may hamper competition in this particular field. At the same time, the imposition of a comprehensive reporting requirement on market participants may increase the value of the information maintained by trade repositories also for third parties providing ancillary services such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression. It is appropriate to ensure that a level playing field in the post-trade sector more generally is not compromised by a possible natural monopoly in the provision of trade repository services. Therefore, trade repositories should be required to provide access to the information held in the repository on fair, reasonable and non-discriminatory terms, subject to necessary precautions on data protection.

(43) In order to allow for a comprehensive overview of the market and for assessing systemic risk, both CCP-cleared and non-CCP-cleared derivative contracts should be reported to trade repositories.

---

[1] Commission Regulation (EC) No 1569/2007 of 21 December 2007 establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council (OJ L 340, 22.12.2007, p. 66).

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

▼B

(44) The ESAs should be provided with adequate resources in order to perform the tasks they are given in this Regulation effectively.

(45) Counterparties and CCPs that conclude, modify, or terminate a derivative contract should ensure that the details of that contract are reported to a trade repository. They should be able to delegate the reporting of the contract to another entity. An entity or its employees that report the details of a derivative contract to a trade repository on behalf of a counterparty, in accordance with this Regulation, should not be in breach of any restriction on disclosure. When preparing the draft regulatory technical standards regarding reporting, ESMA should take into account the progress made in the development of a unique contract identifier and the list of required reporting data in Annex I, Table 1 of Commission Regulation (EC) No 1287/2006 ([1]) implementing Directive 2004/39/EC and consult other relevant authorities such as the Agency for the Cooperation of Energy Regulators.

(46) Taking into consideration the principles set out in the Commission's Communication on reinforcing sanctioning regimes in the financial services sector and legal acts of the Union adopted as a follow-up to that Communication, Member States should lay down rules on penalties applicable to infringements of this Regulation. Member States should enforce those penalties in a manner that does not reduce the effectiveness of those rules. Those penalties should be effective, proportionate and dissuasive. They should be based on guidelines adopted by ESMA to promote convergence and cross-sector consistency of penalty regimes in the financial sector. Member States should ensure that the penalties imposed are publicly disclosed, where appropriate, and that assessment reports on the effectiveness of existing rules are published at regular intervals.

(47) A CCP might be established in accordance with this Regulation in any Member State. No Member State or group of Member States should be discriminated against, directly or indirectly, as a venue for clearing services. Nothing in this Regulation should attempt to restrict or impede a CCP in one jurisdiction from clearing a product denominated in the currency of another Member State or in the currency of a third country.

([1]) OJ L 241, 2.9.2006, p. 1.

▼B

(48) Authorisation of a CCP should be conditional on a minimum amount of initial capital. Capital, including retained earnings and reserves of a CCP, should be proportionate to the risk stemming from the activities of the CCP at all times in order to ensure that it is adequately capitalised against credit, counterparty, market, operational, legal and business risks which are not already covered by specific financial resources and that it is able to conduct an orderly winding-up or restructuring of its operations if necessary.

(49) As this Regulation introduces a legal obligation to clear through specific CCPs for regulatory purposes, it is essential to ensure that those CCPs are safe and sound and comply at all times with the stringent organisational, business conduct, and prudential requirements established by this Regulation. In order to ensure uniform application of this Regulation, those requirements should apply to the clearing of all financial instruments in which the CCPs deal.

(50) It is therefore necessary, for regulatory and harmonisation purposes, to ensure that counterparties only use CCPs which comply with the requirements laid down in this Regulation. Those requirements should not prevent Member States from adopting or continuing to apply additional requirements in respect of CCPs established in their territory including certain authorisation requirements under Directive 2006/48/EC. However, imposing such additional requirements should not influence the right of CCPs authorised in other Member States or recognised, in accordance with this Regulation, to provide clearing services to clearing members and their clients established in the Member State introducing additional requirements, since those CCPs are not subject to those additional requirements and do not need to comply with them. By 30 September 2014, ESMA should draft a report on the impact of the application of additional requirements by Member States.

(51) Direct rules regarding the authorisation and supervision of CCPs are an essential corollary to the obligation to clear OTC derivative contracts. It is appropriate that competent authorities retain responsibility for all aspects of the authorisation and the supervision of CCPs, including the responsibility for verifying that the applicant CCP complies with this Regulation and with Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems [1], in view of the fact that those national competent authorities remain best placed to examine how the CCPs operate on a daily basis, to carry out regular reviews and to take appropriate action, where necessary.

[1] OJ L 166, 11.6.1998, p. 45.

▼B

(52) Where a CCP risks insolvency, fiscal responsibility may lie predominantly with the Member State in which that CCP is established. It follows that authorisation and supervision of that CCP should be exercised by the relevant competent authority of that Member State. However, since a CCP's clearing members may be established in different Member States and they will be the first to be impacted by the CCP's default, it is imperative that all relevant competent authorities and ESMA be involved in the authorisation and supervisory process. This will avoid divergent national measures or practices and obstacles to the proper functioning of the internal market. Furthermore, no proposal or policy of any member of a college of supervisors should, directly or indirectly, discriminate against any Member State or group of Member States as a venue for clearing services in any currency. ESMA should be a participant in every college in order to ensure the consistent and correct application of this Regulation. ESMA should involve other competent authorities in the Member States concerned in the work of preparing recommendations and decisions.

(53) In light of the role assigned to colleges, it is important that all the relevant competent authorities as well as members of the ESCB are involved in performing their tasks. The college should consist not only of the competent authorities supervising the CCP but also of the supervisors of the entities on which the operations of that CCP might have an impact, namely selected clearing members, trading venues, interoperable CCPs and central securities depositories. Members of the ESCB that are responsible for the oversight of the CCP and interoperable CCPs as well as those responsible for the issue of the currencies of the financial instruments cleared by the CCP, should be able to participate in the college. As the supervised or overseen entities would be established in a limited range of Member States in which the CCP operates, a single competent authority or member of the ESCB could be responsible for supervision or oversight of a number of those entities. In order to ensure smooth cooperation between all the members of the college, appropriate procedures and mechanisms should be put in place.

(54) Since the establishment and functioning of the college is assumed to be based on a written agreement between all of its members, it is appropriate to confer upon them the power to determine the college's decision-making procedures, given the sensitivity of the issue. Therefore, detailed rules on voting procedures should be laid down in a written agreement between the members of the college. However, in order to balance the interests of all the relevant market participants and Member States appropriately, the college should vote in accordance with the general principle whereby each member has one vote, irrespective of the number of functions it performs in accordance with this Regulation. For colleges with up to and including 12 members, a maximum of two college members belonging to the same Member State should have a vote and each voting member should have one vote. For colleges with more than 12 members, a maximum of three college members belonging to the same Member State should have a vote and each voting member should have one vote.

▼B

(55) The very particular situation of CCPs requires that colleges are organised and function in accordance with arrangements that are specific to the supervision of CCPs.

(56) The arrangements provided for in this Regulation do not constitute a precedent for other legislation on the supervision and oversight of financial market infrastructures, in particular with regard to the voting modalities for referrals to ESMA.

(57) A CCP should not be authorised where all the members of the college, excluding the competent authorities of the Member State where the CCP is established, reach a joint opinion by mutual agreement that the CCP should not be authorised. If, however, a sufficient majority of the college has expressed a negative opinion and any of the competent authorities concerned, based on that majority of two-thirds of the college, has referred the matter to ESMA, the competent authority of the Member State where the CCP is established should defer its decision on the authorisation and await any decision that ESMA may take regarding conformity with Union law. The competent authority of the Member State where the CCP is established should take its decision in accordance with such a decision by ESMA. Where all the members of the college, excluding the authorities of the Member State where the CCP is established, reach a joint opinion to the effect that they consider that the requirements are not met and that the CCP should not receive authorisation, the competent authority of the Member State where the CCP is established should be able to refer the matter to ESMA to decide on conformity with Union law.

(58) It is necessary to reinforce provisions on exchange of information between competent authorities, ESMA and other relevant authorities and to strengthen the duties of assistance and cooperation between them. Due to increasing cross-border activity, those authorities should provide each other with the relevant information for the exercise of their functions so as to ensure the effective enforcement of this Regulation, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. For the exchange of information, strict professional secrecy is needed. It is essential, due to the wide impact of OTC derivative contracts, that other relevant authorities, such as tax authorities and energy regulators, have access to information necessary to the exercise of their functions.

▼B

(59) In view of the global nature of financial markets, ESMA should be directly responsible for recognising CCPs established in third countries and thus allowing them to provide clearing services within the Union, provided that the Commission has recognised the legal and supervisory framework of that third country as equivalent to the Union framework and that certain other conditions are met. Therefore, a CCP established in a third country, providing clearing services to clearing members or trading venues established in the Union should be recognised by ESMA. However, in order not to hamper the further development of cross-border investment management business in the Union, a third-country CCP providing services to clients established in the Union through a clearing member established in a third country should not have to be recognised by ESMA. In this context, agreements with the Union's major international partners will be of particular importance in order to ensure a global level playing field and financial stability.

(60) On 16 September 2010, the European Council agreed on the need for the Union to promote its interest and values more assertively and, in a spirit of reciprocity and mutual benefit, in the context of the Union's external relations and to take steps, inter alia, to secure greater market access for European business and deepen regulatory cooperation with major trade partners.

(61) A CCP should have robust governance arrangements, senior management of good repute and independent members on its board, irrespective of its ownership structure. At least one-third, and no less than two, members of its board should be independent. However, different governance arrangements and ownership structures may influence a CCP's willingness or ability to clear certain products. It is thus appropriate that the independent members of the board and the risk committee to be established by the CCP address any potential conflict of interests within a CCP. Clearing members and clients need to be adequately represented as decisions taken by the CCP may have an impact on them.

(62) A CCP may outsource functions. The CCP's risk committee should advise on such outsourcing. Major activities linked to risk management should not be outsourced unless this is approved by the competent authority.

(63) The participation requirements for a CCP should be transparent, proportionate, and non-discriminatory and should allow for remote access to the extent that this does not expose the CCP to additional risks.

▼B

(64) Clients of clearing members that clear their OTC derivative contracts with CCPs should be granted a high level of protection. The actual level of protection depends on the level of segregation that those clients choose. Intermediaries should segregate their assets from those of their clients. For this reason, CCPs should keep updated and easily identifiable records, in order to facilitate the transfer of the positions and assets of a defaulting clearing member's clients to a solvent clearing member or, as the case may be, the orderly liquidation of the clients' positions and the return of excess collateral to the clients. The requirements laid down in this Regulation on the segregation and portability of clients' positions and assets should therefore prevail over any conflicting laws, regulations and administrative provisions of the Member States that prevent the parties from fulfilling them.

(65) A CCP should have a sound risk-management framework to manage credit risks, liquidity risks, operational and other risks, including the risks that it bears or poses to other entities as a result of interdependencies. A CCP should have adequate procedures and mechanisms in place to deal with the default of a clearing member. In order to minimise the contagion risk of such a default, the CCP should have in place stringent participation requirements, collect appropriate initial margins, maintain a default fund and other financial resources to cover potential losses. In order to ensure that it benefits from sufficient resources on an ongoing basis, the CCP should establish a minimum amount below which the size of the default fund is not generally to fall. This should not, however, limit the CCP's ability to use the entirety of the default fund to cover the losses caused by a clearing member's default.

(66) When defining a sound risk-management framework, a CCP should take into account its potential risk and economic impact on the clearing members and their clients. Although the development of a highly robust risk management should remain its primary objective, a CCP may adapt its features to the specific activities and risk profiles of the clients of the clearing members, and if deemed appropriate on the basis of the criteria specified in the regulatory technical standards to be developed by ESMA, may include in the scope of the highly liquid assets accepted as collateral, at least cash, government bonds, covered bonds in accordance with Directive 2006/48/EC subject to adequate haircuts, guarantees callable on first demand granted by a member of the ESCB, commercial bank guarantees under strict conditions, in particular relating to the creditworthiness of the guarantor, and the guarantor's capital links with CCP's clearing members. Where appropriate, ESMA may also consider gold as an asset acceptable as collateral. CCPs should be able to accept, under strict risk-management conditions, commercial bank guarantees from non-financial counterparties acting as clearing members.

▼B

(67) CCPs' risk-management strategies should be sufficiently sound so as to avoid risks for the taxpayer.

(68) Margin calls and haircuts on collateral may have procyclical effects. CCPs, competent authorities and ESMA should therefore adopt measures to prevent and control possible procyclical effects in risk-management practices adopted by CCPs, to the extent that a CCP's soundness and financial security is not negatively affected.

(69) Exposure management is an essential part of the clearing process. Access to, and use of, the relevant pricing sources should be granted to provide clearing services in general. Such pricing sources should include those relating to indices that are used as references to derivatives or other financial instruments.

(70) Margins are the primary line of defence for a CCP. Although CCPs should invest the margins received in a safe and prudent manner, they should make particular efforts to ensure adequate protection of margins to guarantee that they are returned in a timely manner to the non-defaulting clearing members or to an interoperable CCP where the CCP collecting these margins defaults.

(71) Access to adequate liquidity resources is essential for a CCP. It is possible for such liquidity to derive from access to central bank liquidity, creditworthy and reliable commercial bank liquidity, or a combination of both. Access to liquidity could result from an authorisation granted in accordance with Article 6 of Directive 2006/48/EC or other appropriate arrangements. In assessing the adequacy of liquidity resources, especially in stress situations, a CCP should take into consideration the risks of obtaining the liquidity by only relying on commercial banks credit lines.

(72) The 'European Code of Conduct for Clearing and Settlement' of 7 November 2006 established a voluntary framework for establishing links between CCPs. However, the post-trade sector remains fragmented along national lines, making cross-border trades more costly and hindering harmonisation. It is therefore necessary to lay down the conditions for the establishment of interoperability arrangements between CCPs to the extent these do not expose the relevant CCPs to risks that are not appropriately managed.

▼B

(73) Interoperability arrangements are important for greater integration of the post-trading market within the Union and regulation should be provided for. However, as interoperability arrangements may expose CCPs to additional risks, CCPs should have been, for three years, authorised to clear or recognised in accordance with this Regulation, or authorised under a pre-existing national authorisation regime, before competent authorities grant approval of such interoperability arrangements. In addition, given the additional complexities involved in an interoperability arrangement between CCPs clearing OTC derivative contracts, it is appropriate at this stage to restrict the scope of interoperability arrangements to transferable securities and money-market instruments. However, by 30 September 2014, ESMA should submit a report to the Commission on whether an extension of that scope to other financial instruments would be appropriate.

(74) Trade repositories collect data for regulatory purposes that are relevant to authorities in all Member States. ESMA should assume responsibility for the registration, withdrawal of registration and supervision of trade repositories.

(75) Given that regulators, CCPs and other market participants rely on the data maintained by trade repositories, it is necessary to ensure that those trade repositories are subject to strict operational, record-keeping and data-management requirements.

(76) Transparency of prices, fees and risk-management models associated with the services provided by CCPs, their members and trade repositories is necessary to enable market participants to make an informed choice.

(77) In order to carry out its duties effectively, ESMA should be able to require, by simple request or by decision, all necessary information from trade repositories, related third parties and third parties to which the trade repositories have outsourced operational functions or activities. If ESMA requires such information by simple request, the addressee is not obliged to provide the information but, in the event that it does so voluntarily, the information provided should not be incorrect or misleading. Such information should be made available without delay.

(78) Without prejudice to cases covered by criminal or tax law, the competent authorities, ESMA, bodies or natural or legal persons other than the competent authorities, which receive confidential information should use it only in the performance of their duties and for the exercise of their functions. However, this should not prevent the exercise, in accordance with national law, of the functions of national bodies responsible for the prevention, investigation or correction of cases of maladministration.

▼B

(79) In order to exercise its supervisory powers effectively, ESMA should be able to conduct investigations and on-site inspections.

(80) ESMA should be able to delegate specific supervisory tasks to the competent authority of a Member State, for instance where a supervisory task requires knowledge and experience with respect to local conditions, which are more easily available at national level. ESMA should be able to delegate the carrying out of specific investigatory tasks and on-site inspections. Prior to the delegation of tasks, ESMA should consult the relevant competent authority about the detailed conditions relating to such delegation of tasks, including the scope of the task to be delegated, the timetable for the performance of the task, and the transmission of necessary information by and to ESMA. ESMA should compensate the competent authorities for carrying out a delegated task in accordance with a regulation on fees to be adopted by the Commission by means of a delegated act. ESMA should not be able to delegate the power to adopt decisions on registration.

(81) It is necessary to ensure that competent authorities are able to request that ESMA examine whether the conditions for the withdrawal of a trade repository's registration are met. ESMA should assess such requests and take any appropriate measures.

(82) ESMA should be able to impose periodic penalty payments to compel trade repositories to put an end to an infringement, to supply complete and correct information required by ESMA or to submit to an investigation or an on-site inspection.

(83) ESMA should also be able to impose fines on trade repositories where it finds that they have committed, intentionally or negligently, an infringement of this Regulation. 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 use 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 trade repository 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.

(84) This Regulation should establish coefficients linked to aggravating and mitigating circumstances in order to give the necessary tools to ESMA to decide on a fine which is proportionate to the seriousness of the infringement committed by a trade repository, taking into account the circumstances under which that infringement has been committed.

▼B

(85) Before taking a decision 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.

(86) 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.

(87) 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.

(88) In the case of an infringement committed by a trade repository, ESMA should be empowered to take a range of supervisory measures, including requiring the trade repository to bring the infringement to an end, and, as a last resort, withdrawing the registration where the trade repository has seriously or repeatedly infringed this Regulation. 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 an opportunity to be heard in order to comply with their rights of defence.

(89) It is essential that Member States and ESMA protect the right to privacy of natural persons when processing personal data, in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1] and with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and of the free movement of such data [2].

(90) It is important to ensure international convergence of requirements for CCPs and trade repositories. This Regulation follows the existing recommendations developed by the Committee on Payment and Settlement Systems (CPSS) and International Organization of Securities Commissions (IOSCO) noting that the CPSS-IOSCO principles for financial market

[1] OJ L 281, 23.11.1995, p. 31.
[2] OJ L 8, 12.1.2001, p. 1.

▼B

infrastructure, including CCPs, were established on 16 April 2012. It creates a Union framework in which CCPs can operate safely. ESMA should consider these existing standards and their future developments when drawing up or proposing to revise the regulatory technical standards as well as the guidelines and recommendations foreseen in this Regulation.

(91) 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 amendments to the list of entities exempt from this Regulation, further rules of procedure relating to the imposition of fines or periodic penalty payments, including provisions on the rights of the 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; measures to amend Annex II in order to take account of developments in the financial markets; the further specification of the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(92) In order to ensure consistent harmonisation, power should be delegated to the Commission to adopt the ESAs' draft regulatory technical standards in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 for the application, for the purposes of this Regulation, of points (4) to (10) of Section C of Annex I to Directive 2004/39/EC and in order to specify: the OTC derivative contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provision of this Regulation; the types of indirect contractual arrangements that meet the conditions set out in this Regulation; the classes of OTC derivative contracts that should be subject to the clearing obligation, the date or dates from which the clearing obligation is to take effect, including any phase-in, the categories of counterparties to which the clearing obligation applies, and the minimum remaining maturity of the OTC derivative contracts entered into or novated before the date on which the clearing obligation takes effect; the details to be included in a competent authority's notification to ESMA of its authorisation of a CCP to clear a class of OTC derivative contract; particular classes of OTC derivative contracts, the degree of standardisation of the contractual terms and operational processes, the volume and the liquidity, and the availability of fair, reliable and generally accepted pricing

▼B

information; the details to be included in ESMA's register of classes of OTC derivative contracts subject to the clearing obligation; the details and type of the reports for the different classes of derivatives; criteria to determine which OTC derivative contracts are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity and values of the clearing thresholds, the procedures and the arrangements in regard to risk-mitigation techniques for OTC derivative contracts not cleared by a CCP; the risk-management procedures, including the required levels and type of collateral and segregation arrangements and the required level of capital; the notion of liquidity fragmentation; requirements regarding the capital, retained earnings and reserves of CCPs; the minimum content of the rules and governance arrangements for CCPs; the details of the records and information to be retained by CCPs; the minimum content and requirements for CCPs' business continuity policies and disaster recovery plans; the appropriate percentage and time horizons for the liquidation period and the calculation of historical volatility to be considered for the different classes of financial instruments taking into account the objective to limit pro-cyclicality and the conditions under which portfolio margining practices can be implemented; the framework for defining extreme but plausible market conditions which should be used when defining the size of the default fund and the resources of CCPs; the methodology for calculating and maintaining the amount of CCPs' own resources; the type of collateral that could be considered highly liquid, such as cash, gold, government and high-quality corporate bonds, covered bonds and the haircuts and the conditions under which commercial bank guarantees can be accepted as collateral; the financial instruments that can be considered highly liquid, bearing minimal credit and market risk, highly secured arrangements and concentration limits; the type of stress tests to be undertaken by CCPs for different classes of financial instruments and portfolios, the involvement of clearing members or other parties in the tests, the frequency and timing of the tests and the key information that the CCP is to disclose on its risk-management model and assumptions adopted to perform the stress tests; the details of the application by trade repositories for registration with ESMA; the frequency and the detail in which trade repositories are to disclose information relating to aggregate positions by class of OTC derivative contract; and the operational standards required in order to aggregate and compare data across repositories.

(93) Any obligation imposed by this Regulation which is to be further developed by means of delegated or implementing acts adopted under Article 290 or 291 TFEU should be understood as applying only from the date on which those acts take effect.

(94) As a part of its development of technical guidelines and regulatory technical standards, and in particular when setting the clearing threshold for non-financial counterparties under this Regulation, ESMA should organise public hearings of market participants.

▼B

(95) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with 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 ([1]).

(96) The Commission should monitor and assess the need for any appropriate measures to ensure the consistent and effective application and development of regulations, standards and practices falling within the scope of this Regulation, taking into consideration the outcome of the work performed by relevant international forums.

(97) In view of the rules regarding interoperable systems, it was deemed appropriate to amend Directive 98/26/EC to protect the rights of a system operator that provides collateral security to a receiving system operator in the event of insolvency proceedings against that receiving system operator.

(98) In order to facilitate efficient clearing, recording, settlement and payment, CCPs and trade repositories should accommodate in their communication procedures with participants and with the market infrastructures they interface with, the relevant international communication procedures and standards for messaging and reference data.

(99) Since the objectives of this Regulation, namely to lay down uniform requirements for OTC derivative contracts and for the performance of activities of CCPs and trade repositories, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, 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,

HAVE ADOPTED THIS REGULATION:

TITLE I

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter and scope

1. This Regulation lays down clearing and bilateral risk-management requirements for over-the-counter ('OTC') derivative contracts, reporting requirements for derivative contracts and uniform requirements for the performance of activities of central counterparties ('CCPs') and trade repositories.

([1]) OJ L 55, 28.2.2011, p. 13.

▼B

2. This Regulation shall apply to CCPs and their clearing members, to financial counterparties and to trade repositories. It shall apply to non-financial counterparties and trading venues where so provided.

3. Title V of this Regulation shall apply only to transferable securities and money-market instruments, as defined in point (18)(a) and (b) and point (19) of Article 4(1) of Directive 2004/39/EC.

4. This Regulation shall not apply to:

(a) the members of the ESCB and other Member States' bodies performing similar functions and other Union public bodies charged with or intervening in the management of the public debt;

(b) the Bank for International Settlements;

▼M2

(c) the central banks and public bodies charged with or intervening in the management of the public debt in the following countries:

(i) Japan;

(ii) United States of America.

▼B

5. With the exception of the reporting obligation under Article 9, this Regulation shall not apply to the following entities:

(a) multilateral development banks, as listed under Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC;

(b) public sector entities within the meaning of point (18) of Article 4 of Directive 2006/48/EC where they are owned by central governments and have explicit guarantee arrangements provided by central governments;

(c) the European Financial Stability Facility and the European Stability Mechanism.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 82 to amend the list set out in paragraph 4 of this Article.

To that end, by 17 November 2012 the Commission shall present to the European Parliament and the Council a report assessing the international treatment of public bodies charged with or intervening in the management of the public debt and central banks.

▼B

The report shall include a comparative analysis of the treatment of those bodies and of central banks within the legal framework of a significant number of third countries, including at least the three most important jurisdictions as regards volumes of contracts traded, and the risk-management standards applicable to the derivative transactions entered into by those bodies and by central banks in those jurisdictions. If the report concludes, in particular in regard to the comparative analysis, that the exemption of the monetary responsibilities of those third-country central banks from the clearing and reporting obligation is necessary, the Commission shall add them to the list set out in paragraph 4.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(1) 'CCP' means a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer;

(2) 'trade repository' means a legal person that centrally collects and maintains the records of derivatives;

(3) 'clearing' means the process of establishing positions, including the calculation of net obligations, and ensuring that financial instruments, cash, or both, are available to secure the exposures arising from those positions;

(4) 'trading venue' means a system operated by an investment firm or a market operator within the meaning of Article 4(1)(1) and 4(1)(13) of Directive 2004/39/EC other than a systematic internaliser within the meaning of Article 4(1)(7) thereof, which brings together buying or selling interests in financial instruments in the system, in a way that results in a contract in accordance with Title II or III of that Directive;

(5) 'derivative' or 'derivative contract' means a financial instrument as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC as implemented by Article 38 and 39 of Regulation (EC) No 1287/2006;

(6) 'class of derivatives' means a subset of derivatives sharing common and essential characteristics including at least the relationship with the underlying asset, the type of underlying asset, and currency of notional amount. Derivatives belonging to the same class may have different maturities;

▼B

(7) ‘OTC derivative’ or ‘OTC derivative contract’ means a derivative contract the execution of which does not take place on a regulated market as within the meaning of Article 4(1)(14) of Directive 2004/39/EC or on a third-country market considered as equivalent to a regulated market in accordance with Article 19(6) of Directive 2004/39/EC;

(8) ‘financial counterparty’ means an investment firm authorised in accordance with Directive 2004/39/EC, a credit institution authorised in accordance with Directive 2006/48/EC, an insurance undertaking authorised in accordance with Directive 73/239/EEC, an assurance undertaking authorised in accordance with Directive 2002/83/EC, a reinsurance undertaking authorised in accordance with Directive 2005/68/EC, a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC, an institution for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC and an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU;

(9) ‘non-financial counterparty’ means an undertaking established in the Union other than the entities referred to in points (1) and (8);

(10) ‘pension scheme arrangement’ means:

(a) institutions for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC, including any authorised entity responsible for managing such an institution and acting on its behalf as referred to in Article 2(1) of that Directive as well as any legal entity set up for the purpose of investment of such institutions, acting solely and exclusively in their interest;

(b) occupational retirement provision businesses of institutions referred to in Article 3 of Directive 2003/41/EC;

(c) occupational retirement provision businesses of life insurance undertakings covered by Directive 2002/83/EC, provided that all assets and liabilities corresponding to the business are ring-fenced, managed and organised separately from the other activities of the insurance undertaking, without any possibility of transfer;

(d) any other authorised and supervised entities, or arrangements, operating on a national basis, provided that:

(i) they are recognised under national law; and

(ii) their primary purpose is to provide retirement benefits;

▼B

(11) ‘counterparty credit risk’ means the risk that the counterparty to a transaction defaults before the final settlement of the transaction’s cash flows;

(12) ‘interoperability arrangement’ means an arrangement between two or more CCPs that involves a cross-system execution of transactions;

(13) ‘competent authority’ means the competent authority referred to in the legislation referred to in point (8) of this Article, the competent authority referred to in Article 10(5) or the authority designated by each Member State in accordance with Article 22;

(14) ‘clearing member’ means an undertaking which participates in a CCP and which is responsible for discharging the financial obligations arising from that participation;

(15) ‘client’ means an undertaking with a contractual relationship with a clearing member of a CCP which enables that undertaking to clear its transactions with that CCP;

(16) ‘group’ means the group of undertakings consisting of a parent undertaking and its subsidiaries within the meaning of Articles 1 and 2 of Directive 83/349/EEC or the group of undertakings referred to in Article 3(1) and Article 80(7) and (8) of Directive 2006/48/EC;

(17) ‘financial institution’ means an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points (2) to (12) of Annex I to Directive 2006/48/EC;

(18) ‘financial holding company’ means a financial institution, the subsidiary undertakings of which are either exclusively or mainly credit institutions or financial institutions, at least one of such subsidiary undertakings being a credit institution, and which is not a mixed financial holding company within the meaning of Article 2(15) of Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate ([1]);

(19) ‘ancillary services undertaking’ means an undertaking the principal activity of which consists in owning or managing property, managing data-processing services, or a similar activity which is ancillary to the principal activity of one or more credit institution;

([1]) OJ L 35, 11.2.2003, p. 1.

▼B

(20) ‘qualifying holding’ means any direct or indirect holding in a CCP or trade repository which represents at least 10 % of the capital or of the voting rights, as set out in Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [1], taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the CCP or trade repository in which that holding subsists;

(21) ‘parent undertaking’ means a parent undertaking as described in Articles 1 and 2 of Directive 83/349/EEC;

(22) ‘subsidiary’ means a subsidiary undertaking as described in Articles 1 and 2 of Directive 83/349/EEC, including a subsidiary of a subsidiary undertaking of an ultimate parent undertaking;

(23) ‘control’ means the relationship between a parent undertaking and a subsidiary, as described in Article 1 of Directive 83/349/EEC;

(24) ‘close links’ means a situation in which two or more natural or legal persons are linked by:

(a) participation, by way of direct ownership or control, of 20 % or more of the voting rights or capital of an undertaking; or

(b) control or a similar relationship between any natural or legal person and an undertaking or a subsidiary of a subsidiary also being considered a subsidiary of the parent undertaking which is at the head of those undertakings.

A situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons.

(25) ‘capital’ means subscribed capital within the meaning of Article 22 of Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions [2] in so far it has been paid up, plus the related share premium accounts, it fully absorbs losses in going concern situations, and, in the event of bankruptcy or liquidation, it ranks after all other claims;

(26) ‘reserves’ means reserves as set out in Article 9 of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies [3] and profits and losses brought forward as a result of the application of the final profit or loss;

[1] OJ L 390, 31.12.2004, p. 38.
[2] OJ L 372, 31.12.1986, p. 1.
[3] OJ L 222, 14.8.1978, p. 11.

▼B

(27) ‘board’ means administrative or supervisory board, or both, in accordance with national company law;

(28) ‘independent member’ of the board means a member of the board who has no business, family or other relationship that raises a conflict of interests regarding the CCP concerned or its controlling shareholders, its management or its clearing members, and who has had no such relationship during the five years preceding his membership of the board;

(29) ‘senior management’ means the person or persons who effectively direct the business of the CCP or the trade repository, and the executive member or members of the board.

Article 3

Intragroup transactions

1. In relation to a non-financial counterparty, an intragroup transaction is an OTC derivative contract entered into with another counterparty which is part of the same group provided that both counterparties are included in the same consolidation on a full basis and they are subject to an appropriate centralised risk evaluation, measurement and control procedures and that counterparty is established in the Union or, if it is established in a third country, the Commission has adopted an implementing act under Article 13(2) in respect of that third country.

2. In relation to a financial counterparty, an intragroup transaction is any of the following:

(a) an OTC derivative contract entered into with another counterparty which is part of the same group, provided that the following conditions are met:

(i) the financial counterparty is established in the Union or, if it is established in a third country, the Commission has adopted an implementing act under Article 13(2) in respect of that third country;

(ii) the other counterparty is a financial counterparty, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements;

(iii) both counterparties are included in the same consolidation on a full basis; and

(iv) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;

(b) an OTC derivative contract entered into with another counterparty where both counterparties are part of the same institutional protection scheme, referred to in Article 80(8) of Directive 2006/48/EC, provided that the condition set out in point (a)(ii) of this paragraph is met;

▼B

(c) an OTC derivative contract entered into between credit institutions affiliated to the same central body or between such credit institution and the central body, as referred to in Article 3(1) of Directive 2006/48/EC; or

(d) an OTC derivative contract entered into with a non-financial counterparty which is part of the same group provided that both counterparties are included in the same consolidation on a full basis and they are subject to an appropriate centralised risk evaluation, measurement and control procedures and that counterparty is established in the Union or in a third-country jurisdiction for which the Commission has adopted an implementing act as referred to in Article 13(2) in respect of that third country.

3. For the purposes of this Article, counterparties shall be considered to be included in the same consolidation when they are both either:

(a) included in a consolidation in accordance with Directive 83/349/EEC or International Financial Reporting Standards (IFRS) adopted pursuant to Regulation (EC) No 1606/2002 or, in relation to a group the parent undertaking of which has its head office in a third country, in accordance with generally accepted accounting principles of a third country determined to be equivalent to IFRS in accordance with Regulation (EC) No 1569/2007 (or accounting standards of a third country the use of which is permitted in accordance with Article 4 of that Regulation); or

(b) covered by the same consolidated supervision in accordance with Directive 2006/48/EC or Directive 2006/49/EC or, in relation to a group the parent undertaking of which has its head office in a third country, the same consolidated supervision by a third-country competent authority verified as equivalent to that governed by the principles laid down in Article 143 of Directive 2006/48/EC or in Article 2 of Directive 2006/49/EC.

TITLE II

CLEARING, REPORTING AND RISK MITIGATION OF OTC DERIVATIVES

Article 4

Clearing obligation

1. Counterparties shall clear all OTC derivative contracts pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation in accordance with Article 5(2), if those contracts fulfil both of the following conditions:

(a) they have been concluded in one of the following ways:

(i) between two financial counterparties;

(ii) between a financial counterparty and a non-financial counterparty that meets the conditions referred to in Article 10(1)(b);

▼B

(iii) between two non-financial counterparties that meet the conditions referred to in Article 10(1)(b);

(iv) between a financial counterparty or a non-financial counterparty meeting the conditions referred to in Article 10(1)(b) and an entity established in a third country that would be subject to the clearing obligation if it were established in the Union; or

(v) between two entities established in one or more third countries that would be subject to the clearing obligation if they were established in the Union, provided that the contract has a direct, substantial and foreseeable effect within the Union or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of this Regulation; and

(b) they are entered into or novated either:

(i) on or after the date from which the clearing obligation takes effect; or

(ii) on or after notification as referred to in Article 5(1) but before the date from which the clearing obligation takes effect if the contracts have a remaining maturity higher than the minimum remaining maturity determined by the Commission in accordance with Article 5(2)(c).

2. Without prejudice to risk-mitigation techniques under Article 11, OTC derivative contracts that are intragroup transactions as described in Article 3 shall not be subject to the clearing obligation.

The exemption set out in the first subparagraph shall apply only:

(a) where two counterparties established in the Union belonging to the same group have first notified their respective competent authorities in writing that they intend to make use of the exemption for the OTC derivative contracts concluded between each other. The notification shall be made not less than 30 calendar days before the use of the exemption. Within 30 calendar days after receipt of that notification, the competent authorities may object to the use of this exemption if the transactions between the counterparties do not meet the conditions laid down in Article 3, without prejudice to the right of the competent authorities to object after that period of 30 calendar days has expired where those conditions are no longer met. If there is disagreement between the competent authorities, ESMA may assist those authorities in reaching an agreement in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010;

(b) to OTC derivative contracts between two counterparties belonging to the same group which are established in a Member State and in a third country, where the counterparty established in the Union has been authorised to apply the exemption by its competent authority within 30 calendar days after it has been notified by the counterparty established in the Union, provided that the conditions laid down in Article 3 are met. The competent authority shall notify ESMA of that decision.

▼B

3. The OTC derivative contracts that are subject to the clearing obligation pursuant to paragraph 1 shall be cleared in a CCP authorised under Article 14 or recognised under Article 25 to clear that class of OTC derivatives and listed in the register in accordance with Article 6(2)(b).

For that purpose a counterparty shall become a clearing member, a client, or shall establish indirect clearing arrangements with a clearing member, provided that those arrangements do not increase counterparty risk and ensure that the assets and positions of the counterparty benefit from protection with equivalent effect to that referred to in Articles 39 and 48.

4. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provision of this Regulation as referred to in paragraph 1(a)(v), and the types of indirect contractual arrangements that meet the conditions referred to in the second subparagraph of paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 5

Clearing obligation procedure

1. Where a competent authority authorises a CCP to clear a class of OTC derivatives under Article 14 or 15, it shall immediately notify ESMA of that authorisation.

In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details to be included in the notifications referred to in the first subparagraph.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

2. Within six months of receiving notification in accordance with paragraph 1 or accomplishing a procedure for recognition set out in Article 25, ESMA shall, after conducting a public consultation and after consulting the ESRB and, where appropriate, the competent authorities of third countries, develop and submit to the Commission for endorsement draft regulatory technical standards specifying the following:

(a) the class of OTC derivatives that should be subject to the clearing obligation referred to in Article 4;

▼B

(b) the date or dates from which the clearing obligation takes effect, including any phase in and the categories of counterparties to which the obligation applies; and

(c) the minimum remaining maturity of the OTC derivative contracts referred to in Article 4(1)(b)(ii).

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

3. ESMA shall, on its own initiative, after conducting a public consultation and after consulting the ESRB and, where appropriate, the competent authorities of third countries, identify, in accordance with the criteria set out in points (a), (b) and (c) of paragraph 4 and notify to the Commission the classes of derivatives that should be subject to the clearing obligation provided in Article 4, but for which no CCP has yet received authorisation.

Following the notification, ESMA shall publish a call for a development of proposals for the clearing of those classes of derivatives.

4. With the overarching aim of reducing systemic risk, the draft regulatory technical standards for the part referred to in paragraph 2(a) shall take into consideration the following criteria:

(a) the degree of standardisation of the contractual terms and operational processes of the relevant class of OTC derivatives;

(b) the volume and liquidity of the relevant class of OTC derivatives;

(c) the availability of fair, reliable and generally accepted pricing information in the relevant class of OTC derivatives.

In preparing those draft regulatory technical standards, ESMA may take into consideration the interconnectedness between counterparties using the relevant classes of OTC derivatives, the anticipated impact on the levels of counterparty credit risk between counterparties as well as the impact on competition across the Union.

In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards further specifying the criteria referred to in points (a), (b) and (c) of the first subparagraph.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

▼B

5. The draft regulatory technical standards for the part referred to in paragraph 2(b) shall take into consideration the following criteria:

(a) the expected volume of the relevant class of OTC derivatives;

(b) whether more than one CCP already clear the same class of OTC derivatives;

(c) the ability of the relevant CCPs to handle the expected volume and to manage the risk arising from the clearing of the relevant class of OTC derivatives;

(d) the type and number of counterparties active, and expected to be active within the market for the relevant class of OTC derivatives;

(e) the period of time a counterparty subject to the clearing obligation needs in order to put in place arrangements to clear its OTC derivative contracts through a CCP;

(f) the risk management and the legal and operational capacity of the range of counterparties that are active in the market for the relevant class of OTC derivatives and that would be captured by the clearing obligation pursuant to Article 4(1).

6. If a class of OTC derivative contracts no longer has a CCP which is authorised or recognised to clear those contracts under this Regulation, it shall cease to be subject to the clearing obligation referred to in Article 4, and paragraph 3 of this Article shall apply.

Article 6

Public register

1. ESMA shall establish, maintain and keep up to date a public register in order to identify the classes of OTC derivatives subject to the clearing obligation correctly and unequivocally. The public register shall be available on ESMA's website.

2. The register shall include:

(a) the classes of OTC derivatives that are subject to the clearing obligation pursuant to Article 4;

(b) the CCPs that are authorised or recognised for the purpose of the clearing obligation;

(c) the dates from which the clearing obligation takes effect, including any phased-in implementation;

(d) the classes of OTC derivatives identified by ESMA in accordance with Article 5(3);

▼B

(e) the minimum remaining maturity of the derivative contracts referred to in Article 4(1)(b)(ii);

(f) the CCPs that have been notified to ESMA by the competent authority for the purpose of the clearing obligation and the date of notification of each of them.

3. Where a CCP is no longer authorised or recognised in accordance with this Regulation to clear a given class of derivatives, ESMA shall immediately remove it from the public register in relation to that class of OTC derivatives.

4. In order to ensure consistent application of this Article, ESMA may develop draft regulatory technical standards specifying the details to be included in the public register referred to in paragraph 1.

ESMA shall submit any such draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 7

Access to a CCP

1. A CCP that has been authorised to clear OTC derivative contracts shall accept clearing such contracts on a non-discriminatory and transparent basis, regardless of the trading venue.

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

2. A CCP shall accede to or refuse a formal request for access by a trading venue within three months of such a request.

3. Where a CCP refuses access under paragraph 2, it shall provide the trading venue with full reasons for such refusal.

4. Save where the competent authority of the trading venue and that of the CCP refuse access, the CCP shall, subject to the second subparagraph, grant access within three months of a decision acceding to the trading venue's formal request in accordance with paragraph 2.

▼B

The competent authority of the trading venue and that of the CCP may refuse access to the CCP following a formal request by the trading venue only where such access would threaten the smooth and orderly functioning of the markets or would adversely affect systemic risk.

5. ESMA shall settle any dispute arising from a disagreement between competent authorities in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010.

Article 8

Access to a trading venue

1. A trading venue shall provide trade feeds on a non-discriminatory and transparent basis to any CCP that has been authorised to clear OTC derivative contracts traded on that trading venue upon request by the CCP.

2. Where a request to access a trading venue has been formally submitted to a trading venue by a CCP, the trading venue shall respond to the CCP within three months.

3. Where access is refused by a trading venue, it shall notify the CCP accordingly, providing full reasons.

4. Without prejudice to the decision by competent authorities of the trading venue and of the CCP, access shall be made possible by the trading venue within three months of a positive response to a request for access.

Access of the CCP to the trading venue shall be granted only where such access would not require interoperability or threaten the smooth and orderly functioning of markets in particular due to liquidity fragmentation and the trading venue has put in place adequate mechanisms to prevent such fragmentation.

5. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the notion of liquidity fragmentation.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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.

▼B

Article 9

Reporting obligation

1. Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.

The reporting obligation shall apply to derivative contracts which:

(a) were entered into before 16 August 2012 and remain outstanding on that date;

(b) are entered into on or after 16 August 2012.

A counterparty or a CCP which is subject to the reporting obligation may delegate the reporting of the details of the derivative contract.

Counterparties and CCPs shall ensure that the details of their derivative contracts are reported without duplication.

2. Counterparties shall keep a record of any derivative contract they have concluded and any modification for at least five years following the termination of the contract.

3. Where a trade repository is not available to record the details of a derivative contract, counterparties and CCPs shall ensure that such details are reported to ESMA.

In this case ESMA shall ensure that all the relevant entities referred to in Article 81(3) have access to all the details of derivative contracts they need to fulfil their respective responsibilities and mandates.

4. A counterparty or a CCP that reports the details of a derivative contract to a trade repository or to ESMA, or an entity that reports such details on behalf of a counterparty or a CCP shall not be considered in breach of any restriction on disclosure of information imposed by that contract or by any legislative, regulatory or administrative provision.

No liability resulting from that disclosure shall lie with the reporting entity or its directors or employees.

▼B

5. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details and type of the reports referred to in paragraphs 1 and 3 for the different classes of derivatives.

The reports referred to in paragraphs 1 and 3 shall specify at least:

(a) the parties to the derivative contract and, where different, the beneficiary of the rights and obligations arising from it;

(b) the main characteristics of the derivative contracts, including their type, underlying maturity, notional value, price, and settlement date.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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.

6. In order to ensure uniform conditions of application of paragraphs 1 and 3, ESMA shall develop draft implementing technical standards specifying:

(a) the format and frequency of the reports referred to in paragraphs 1 and 3 for the different classes of derivatives;

(b) the date by which derivative contracts are to be reported, including any phase-in for contracts entered into before the reporting obligation applies.

ESMA shall submit those draft implementing technical standards to the Commission by 30 September 2012.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 10

Non-financial counterparties

1. Where a non-financial counterparty takes positions in OTC derivative contracts and those positions exceed the clearing threshold as specified under paragraph 3, that non-financial counterparty shall:

(a) immediately notify ESMA and the competent authority referred to in paragraph 5 thereof;

(b) become subject to the clearing obligation for future contracts in accordance with Article 4 if the rolling average position over 30 working days exceeds the threshold; and

▼B

(c) clear all relevant future contracts within four months of becoming subject to the clearing obligation.

2. A non-financial counterparty that has become subject to the clearing obligation in accordance with paragraph 1(b) and that subsequently demonstrates to the authority designated in accordance with paragraph 5 that its rolling average position over 30 working days does not exceed the clearing threshold, shall no longer be subject to the clearing obligation set out in Article 4.

3. In calculating the positions referred to in paragraph 1, the non-financial counterparty shall include all the OTC derivative contracts entered into by the non-financial counterparty or by other non-financial entities within the group to which the non-financial counterparty belongs, which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.

4. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards, after consulting the ESRB and other relevant authorities, specifying:

(a) criteria for establishing which OTC derivative contracts are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity referred to in paragraph 3; and

(b) values of the clearing thresholds, which are determined taking into account the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivatives.

After conducting an open public consultation, ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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.

After consulting the ESRB and other relevant authorities, ESMA shall periodically review the thresholds and, where necessary, propose regulatory technical standards to amend them.

5. Each Member State shall designate an authority responsible for ensuring that the obligation under paragraph 1 is met.

▼B

Article 11

Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP

1. Financial counterparties and non-financial counterparties that enter into an OTC derivative contract not cleared by a CCP, shall ensure, exercising due diligence, that appropriate procedures and arrangements are in place to measure, monitor and mitigate operational risk and counterparty credit risk, including at least:

(a) the timely confirmation, where available, by electronic means, of the terms of the relevant OTC derivative contract;

(b) formalised processes which are robust, resilient and auditable in order to reconcile portfolios, to manage the associated risk and to identify disputes between parties early and resolve them, and to monitor the value of outstanding contracts.

2. Financial counterparties and non-financial counterparties referred to in Article 10 shall mark-to-market on a daily basis the value of outstanding contracts. Where market conditions prevent marking-to-market, reliable and prudent marking-to-model shall be used.

3. Financial counterparties shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after 16 August 2012. Non-financial counterparties referred to in Article 10 shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after the clearing threshold is exceeded.

4. Financial counterparties shall hold an appropriate and proportionate amount of capital to manage the risk not covered by appropriate exchange of collateral.

5. The requirement laid down in paragraph 3 of this Article shall not apply to an intragroup transaction referred to in Article 3 that is entered into by counterparties which are established in the same Member State provided that there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between counterparties.

6. An intragroup transaction referred to in Article 3(2)(a), (b) or (c) that is entered into by counterparties which are established in different Member States shall be exempt totally or partially from the requirement laid down in paragraph 3 of this Article, on the basis of a positive decision of both the relevant competent authorities, provided that the following conditions are fulfilled:

(a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;

▼B

(b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

If the competent authorities fail to reach a positive decision within 30 calendar days of receipt of the application for exemption, ESMA may assist those authorities in reaching agreement in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010.

7. An intragroup transaction referred to in Article 3(1) that is entered into by non-financial counterparties which are established in different Member States shall be exempt from the requirement laid down in paragraph 3 of this Article, provided that the following conditions are fulfilled:

(a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;

(b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

The non-financial counterparties shall notify their intention to apply the exemption to the competent authorities referred to in Article 10(5). The exemption shall be valid unless either of the notified competent authorities does not agree upon fulfilment of the conditions referred to in point (a) or (b) of the first subparagraph within three months of the date of the notification.

8. An intragroup transaction referred to in Article 3(2)(a) to (d) that is entered into by a counterparty which is established in the Union and a counterparty which is established in a third-country jurisdiction shall be exempt totally or partially from the requirement laid down in paragraph 3 of this Article, on the basis of a positive decision of the relevant competent authority responsible for supervision of the counterparty which is established in the Union, provided that the following conditions are fulfilled:

(a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;

(b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

9. An intragroup transaction referred to in Article 3(1) that is entered into by a non-financial counterparty which is established in the Union and a counterparty which is established in a third-country jurisdiction shall be exempt from the requirement laid down in paragraph 3 of this Article, provided that the following conditions are fulfilled:

(a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;

▼B

(b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

The non-financial counterparty shall notify its intention to apply the exemption to the competent authority referred to in Article 10(5). The exemption shall be valid unless the notified competent authority does not agree upon fulfilment of the conditions referred to in point (a) or (b) of the first subparagraph within three months of the date of notification.

10. An intragroup transaction referred to in Article 3(1) that is entered into by a non-financial counterparty and a financial counterparty which are established in different Member States shall be exempt totally or partially from the requirement laid down in paragraph 3 of this Article, on the basis of a positive decision of the relevant competent authority responsible for supervision of the financial counterparty, provided that the following conditions are fulfilled:

(a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;

(b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

The relevant competent authority responsible for supervision of the financial counterparty shall notify any such decision to the competent authority referred to in Article 10(5). The exemption is valid unless the notified competent authority does not agree upon fulfilment of the conditions referred to in point (a) or (b) of the first subparagraph. If there is disagreement between the competent authorities, ESMA may assist those authorities in reaching an agreement in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010.

11. The counterparty of an intragroup transaction which has been exempted from the requirement laid down in paragraph 3 shall publicly disclose information on the exemption.

A competent authority shall notify ESMA of any decision adopted pursuant to paragraph 6, 8 or 10, or any notification received pursuant to paragraph 7, 9 or 10, and shall provide ESMA with the details of the intragroup transaction concerned.

12. The obligations set out in paragraphs 1 to 11 shall apply to OTC derivative contracts entered into between third country entities that would be subject to those obligations if they were established in the Union, provided that those contracts have a direct, substantial and foreseeable effect within the Union or where such obligation is necessary or appropriate to prevent the evasion of any provision of this Regulation.

▼B

13. ESMA shall regularly monitor the activity in derivatives not eligible for clearing in order to identify cases where a particular class of derivatives may pose systemic risk and to prevent regulatory arbitrage between cleared and non-cleared derivative transactions. In particular, ESMA shall, after consulting the ESRB, take action in accordance with Article 5(3) or review the regulatory technical standards on margin requirements laid down in paragraph 14 of this Article and in Article 41.

14. In order to ensure consistent application of this Article, ESMA shall draft regulatory technical standards specifying:

(a) the procedures and arrangements referred to in paragraph 1;

(b) the market conditions that prevent marking-to-market and the criteria for using marking-to-model referred to in paragraph 2;

(c) the details of the exempted intragroup transactions to be included in the notification referred to in paragraphs 7, 9 and 10;

(d) the details of the information on exempted intragroup transactions referred to in paragraph 11;

(e) the contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provision of this Regulation as referred to in paragraph 12;

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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. In order to ensure consistent application of this Article, the ESAs shall develop common draft regulatory technical standards specifying:

(a) the risk-management procedures, including the levels and type of collateral and segregation arrangements, required for compliance with paragraph 3;

▼M1
▼C1

———————

▼B

(c) the procedures for the counterparties and the relevant competent authorities to be followed when applying exemptions under paragraphs 6 to 10;

(d) the applicable criteria referred to in paragraphs 5 to 10 including in particular what should be considered as practical or legal impediment to the prompt transfer of own funds and repayment of liabilities between the counterparties.

▼B

The ESAs shall submit those common draft regulatory technical standards to the Commission by 30 September 2012.

Depending on the legal nature of the counterparty, power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with either Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 or (EU) No 1095/2010.

Article 12

Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the rules under this Title and shall take all measures necessary to ensure that they are implemented. Those penalties shall include at least administrative fines. The penalties provided for shall be effective, proportionate and dissuasive.

2. Member States shall ensure that the competent authorities responsible for the supervision of financial, and, where appropriate, non-financial counterparties disclose every penalty that has been imposed for infringements of Articles 4, 5 and 7 to 11 to the public, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. Member States shall, at regular intervals, publish assessment reports on the effectiveness of the penalty rules being applied. Such disclosure and publication shall not contain personal data within the meaning of Article 2(a) of Directive 95/46/EC.

By 17 February 2013, the Member States shall notify the rules referred to in paragraph 1 to the Commission. They shall notify the Commission of any subsequent amendment thereto without delay.

3. An infringement of the rules under this Title shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract. An infringement of the rules under this Title shall not give rise to any right to compensation from a party to an OTC derivative contract.

Article 13

Mechanism to avoid duplicative or conflicting rules

1. The Commission shall be assisted by ESMA in monitoring and preparing reports to the European Parliament and to the Council on the international application of principles laid down in Articles 4, 9, 10 and 11, in particular with regard to potential duplicative or conflicting requirements on market participants, and recommend possible action.

▼B

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

(a) are equivalent to the requirements laid down in this Regulation under Articles 4, 9, 10 and 11;

(b) ensure protection of professional secrecy that is equivalent to that set out in this Regulation; and

(c) are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 86(2).

3. An implementing act on equivalence as referred to in paragraph 2 shall imply that counterparties entering into a transaction subject to this Regulation shall be deemed to have fulfilled the obligations contained in Articles 4, 9, 10 and 11 where at least one of the counterparties is established in that third country.

4. The Commission shall, in cooperation with ESMA, monitor the effective implementation by third countries, for which an implementing act on equivalence has been adopted, of the requirements equivalent to those laid down in Articles 4, 9, 10 and 11 and regularly report, at least on an annual basis, to the European Parliament and the Council. Where the report reveals an insufficient or inconsistent application of the equivalent requirements by third country authorities, the Commission shall, within 30 calendar days of the presentation of the report, withdraw the recognition as equivalent of the third country legal framework in question. Where an implementing act on equivalence is withdrawn, counterparties shall automatically be subject again to all requirements laid down in this Regulation.

TITLE III

AUTHORISATION AND SUPERVISION OF CCPs

CHAPTER 1

Conditions and procedures for the authorisation of a CCP

Article 14

Authorisation of a CCP

1. Where a legal person established in the Union intends to provide clearing services as a CCP, it shall apply for authorisation to the competent authority of the Member State where it is established (the CCP's competent authority), in accordance with the procedure set out in Article 17.

▼B

2. Once authorisation has been granted in accordance with Article 17, it shall be effective for the entire territory of the Union.

3. Authorisation referred to in paragraph 1 shall be granted only for activities linked to clearing and shall specify the services or activities which the CCP is authorised to provide or perform including the classes of financial instruments covered by such authorisation.

4. A CCP shall comply at all times with the conditions necessary for authorisation.

A CCP shall, without undue delay, notify the competent authority of any material changes affecting the conditions for authorisation.

5. Authorisation referred to in paragraph 1 shall not prevent Member States from adopting or continuing to apply, in respect of CCPs established in their territory, additional requirements including certain requirements for authorisation under Directive 2006/48/EC.

Article 15

Extension of activities and services

1. A CCP wishing to extend its business to additional services or activities not covered by the initial authorisation shall submit a request for extension to the CCP's competent authority. The offering of clearing services for which the CCP has not already been authorised shall be considered to be an extension of that authorisation.

The extension of authorisation shall be made in accordance with the procedure set out under Article 17.

2. Where a CCP wishes to extend its business into a Member State other than that where it is established, the CCP's competent authority shall immediately notify the competent authority of that other Member State.

Article 16

Capital requirements

1. A CCP shall have a permanent and available initial capital of at least EUR 7,5 million to be authorised pursuant to Article 14.

2. A CCP's capital, including retained earnings and reserves, shall be proportionate to the risk stemming from the activities of the CCP. It shall at all times be sufficient to ensure an orderly winding-down or restructuring of the 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.

▼B

3. In order to ensure consistent application of this Article, EBA shall, in close cooperation with the ESCB and after consulting ESMA, develop draft regulatory technical standards specifying requirements regarding the capital, retained earnings and reserves of a CCP referred to in paragraph 2.

EBA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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 1093/2010.

Article 17

Procedure for granting and refusing authorisation

1. The applicant CCP shall submit an application for authorisation to the competent authority of the Member State where it is established.

2. The applicant CCP shall provide all information necessary to satisfy the competent authority that the applicant CCP has established, at the time of authorisation, all the necessary arrangements to meet the requirements laid down in this Regulation. The competent authority shall immediately transmit all the information received from the applicant CCP to ESMA and the college referred to in Article 18(1).

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

4. The competent authority shall grant authorisation only where it is fully satisfied that the applicant CCP complies with all the requirements laid down in this Regulation and that the CCP is notified as a system pursuant to Directive 98/26/EC.

The competent authority shall duly consider the opinion of the college reached in accordance with Article 19. Where the CCP's competent authority does not agree with a positive opinion of the college, its decision shall contain full reasons and an explanation of any significant deviation from that positive opinion.

The CCP shall not be authorised where all the members of the college, excluding the authorities of the Member State where the CCP is established, reach a joint opinion by mutual agreement, pursuant to Article 19(1), that the CCP not be authorised. That opinion shall state in writing the full and detailed reasons why the college consider that the requirements laid down in this Regulation or other Union law are not met.

▼B

Where a joint opinion by mutual agreement as referred to in the third subparagraph has not been reached and a majority of two-thirds of the college have expressed a negative opinion, any of the competent authorities concerned, based on that majority of two-thirds of the college, may, within 30 calendar days of the adoption of that negative opinion, refer the matter to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010.

The referral decision shall state in writing the full and detailed reasons why the relevant members of the college consider that the requirements laid down in this Regulation or other parts of Union law are not met. In that case the CCP's competent authority shall defer its decision on authorisation and await any decision on authorisation that ESMA may take in accordance with Article 19(3) of Regulation (EU) No 1095/2010, The competent authority shall take its decision in conformity with ESMA's decision. The matter shall not be referred to ESMA after the end of the 30-day period referred to in the fourth subparagraph.

Where all the members of the college, excluding the authorities of the Member State where the CCP is established, reach a joint opinion by mutual agreement, pursuant to Article 19(1), that the CCP not be authorised, the CCP's competent authority may refer the matter to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010.

The competent authority of the Member State where the CCP is established shall transmit the decision to the other competent authorities concerned.

5. ESMA shall act in accordance with Article 17 of Regulation (EU) No 1095/2010 in the event that the CCP's competent authority has not applied the provisions of this Regulation, or has applied them in a way which appears to be in breach of Union law.

ESMA may investigate an alleged breach or non-application of Union law upon request from any member of the college or on its own initiative, after having informed the competent authority.

6. While performing their duties, any action taken by any member of the college shall not, directly or indirectly, discriminate against any Member State or group of Member States as a venue for clearing services in any currency.

7. Within six months of the submission of a complete application, the competent authority shall inform the applicant CCP in writing, with a fully reasoned explanation, whether authorisation has been granted or refused.

Article 18

College

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, 49, 51 and 54.

▼B

2. The college shall consist of:

(a) ESMA;

(b) the CCP's competent authority;

(c) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States with the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period;

(d) the competent authorities responsible for the supervision of trading venues served by the CCP;

(e) the competent authorities supervising CCPs with which interoperability arrangements have been established;

(f) the competent authorities supervising central securities depositories to which the CCP is linked;

(g) the relevant members of the ESCB responsible for the oversight of the CCP and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established;

(h) the central banks of issue of the most relevant Union currencies of the financial instruments cleared.

3. The competent authority of a Member State which is not a member of the college may request from the college any information relevant for the performance of its supervisory duties.

4. The college shall, without prejudice to the responsibilities of competent authorities under this Regulation, ensure:

(a) the preparation of the opinion referred to in Article 19;

(b) the exchange of information, including requests for information pursuant to Article 84;

(c) agreement on the voluntary entrustment of tasks among its members;

(d) the coordination of supervisory examination programmes based on a risk assessment of the CCP; and

(e) the determination of procedures and contingency plans to address emergency situations, as referred to in Article 24.

5. The establishment and functioning of the college shall be based on a written agreement between all its members.

That agreement shall determine the practical arrangements for the functioning of the college, including detailed rules on voting procedures as referred to in Article 19(3), and may determine tasks to be entrusted to the CCP's competent authority or another member of the college.

▼B

6. In order to ensure the consistent and coherent functioning of colleges across the Union, ESMA shall develop draft regulatory technical standards specifying the conditions under which the Union currencies referred to in paragraph 2(h) 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 30 September 2012.

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

Article 19

Opinion of the college

1. Within four months of the submission of a complete application by the CCP in accordance with Article 17, the CCP's competent authority shall conduct a risk assessment of the CCP and submit a report to the college.

Within 30 calendar days of receipt, and on the basis of the findings in, that report, the college shall reach a joint opinion determining whether the applicant CCP complies with all the requirements laid down in this Regulation.

Without prejudice to the fourth subparagraph of Article 17(4) and if no joint opinion is reached in accordance with the second subparagraph, the college shall adopt a majority opinion within the same period.

2. ESMA shall facilitate the adoption of the joint opinion in accordance with its general coordination function under Article 31 of Regulation (EU) No 1095/2010.

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. ESMA shall have no voting rights on the opinions of the college.

Article 20

Withdrawal of authorisation

1. Without prejudice to Article 22(3), the CCP's competent authority shall withdraw authorisation where the CCP:

(a) has not made use of the authorisation within 12 months, expressly renounces the authorisation or has provided no services or performed no activity for the preceding six months;

▼B

(b) has obtained authorisation by making false statements or by any other irregular means;

(c) is no longer in compliance with the conditions under which authorisation was granted and has not taken the remedial action requested by the CCP's competent authority within a set time frame;

(d) has seriously and systematically infringed any of the requirements laid down in this Regulation.

2. Where the CCP's competent authority considers that one of the circumstances referred to in paragraph 1 applies, it shall, within five working days, notify ESMA and the members of college accordingly.

3. The CCP's competent authority shall consult the members of the college on the necessity to withdraw the authorisation of the CCP, except where a decision is required urgently.

4. Any member of the college may, at any time, request that the CCP's competent authority examine whether the CCP remains in compliance with the conditions under which authorisation was granted.

5. The CCP's competent authority may limit the withdrawal to a particular service, activity, or class of financial instruments.

6. The CCP's competent authority shall send ESMA and the members of the college its fully reasoned decision, which shall take into account the reservations of the members of the college.

7. The decision on the withdrawal of authorisation shall take effect throughout the Union.

Article 21

Review and evaluation

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 to which CCPs are, or might be, exposed.

2. The review and evaluation referred to in paragraph 1 shall cover all the requirements on CCPs laid down in this Regulation.

3. The competent authorities shall establish the frequency and depth of the review and evaluation referred to in paragraph 1 having regard to the size, systemic importance, nature, scale and complexity of the activities of the CCPs concerned. The review and evaluation shall be updated at least on an annual basis.

The CCPs shall be subject to on-site inspections.

▼B

4. The competent authorities shall regularly, and at least annually, inform the college of the results of the review and evaluation as referred to in paragraph 1, including any remedial action taken or penalty imposed.

5. The competent authorities shall require any CCP that does not meet the requirements laid down in this Regulation to take the necessary action or steps at an early stage to address the situation.

6. 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.

For the purposes of the first subparagraph, ESMA shall, at least annually:

(a) 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; and

(b) 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.

Where an assessment referred to in point (b) of the second subparagraph 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.

CHAPTER 2

Supervision and oversight of CCPs

Article 22

Competent authority

1. Each Member State shall designate the competent authority responsible for carrying out the duties resulting from this Regulation for the authorisation and supervision of CCPs established in its territory and shall inform the Commission and ESMA thereof.

Where a Member State designates more than one competent authority, it shall clearly determine the respective roles and shall designate a single authority to be responsible for coordinating cooperation and the exchange of information with the Commission, ESMA, other Member States' competent authorities, EBA and the relevant members of the ESCB, in accordance with Articles 23, 24, 83 and 84.

2. Each Member State shall ensure that the competent authority has the supervisory and investigatory powers necessary for the exercise of its functions.

▼B

3. Each Member State shall ensure that appropriate administrative measures, in conformity with national law, can be taken or imposed against the natural or legal persons responsible for non-compliance with this Regulation.

Those measures shall be effective, proportionate and dissuasive and may include requests for remedial action within a set time frame.

4. ESMA shall publish on its website a list of the competent authorities designated in accordance with paragraph 1.

CHAPTER 3

Cooperation

Article 23

Cooperation between authorities

1. Competent authorities shall cooperate closely with each other, with ESMA and, if necessary, with the ESCB.

2. Competent authorities shall, in the exercise of their general duties, duly consider the potential impact of their decisions on the stability of the financial system in all other Member States concerned, in particular the emergency situations referred to in Article 24, based on the available information at the time.

Article 24

Emergency situations

The CCP's competent authority or any other 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 and the stability of the financial system in any of the Member States where the CCP or one of its clearing members are established.

CHAPTER 4

Relations with third countries

Article 25

Recognition of a third-country CCP

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

▼B

2. ESMA, after consulting the authorities referred to in paragraph 3, may recognise a CCP established in a third country that has applied for recognition to provide certain clearing services or activities where:

(a) the Commission has adopted an implementing act in accordance with paragraph 6;

(b) the CCP is authorised in the relevant third country, and is subject to effective supervision and enforcement ensuring full compliance with the prudential requirements applicable in that third country;

(c) cooperation arrangements have been established pursuant to paragraph 7;

(d) the CCP is established or authorised in a third country that is considered as having equivalent systems for anti-money-laundering and combating the financing of terrorism to those of the Union in accordance with the criteria set out in the common understanding between Member States on third-country equivalence under Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing ([1]).

3. When assessing whether the conditions referred to in paragraph 2 are met, ESMA shall consult:

(a) the competent authority of a Member State in which the CCP provides or intends to provide clearing services and which has been selected by the CCP;

(b) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States which make or are anticipated by the CCP to make the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period;

(c) the competent authorities responsible for the supervision of trading venues located in the Union, served or to be served by the CCP;

(d) the competent authorities supervising CCPs established in the Union with which interoperability arrangements have been established;

(e) the relevant members of the ESCB of the Member States in which the CCP provides or intends to provide clearing services and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established;

([1]) OJ L 309, 25.11.2005, p. 15.

▼B

(f) the central banks of issue of the most relevant Union currencies of the financial instruments cleared or to be cleared.

4. The CCP referred to in paragraph 1 shall submit its application to ESMA.

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 has to provide additional information.

The recognition decision shall be based on the conditions set out in paragraph 2 and shall be independent of any assessment as the basis for the equivalence decision as referred to in Article 13(3).

ESMA shall consult the authorities and entities referred to in paragraph 3 prior to taking its decision.

Within 180 working days of the submission of a complete application, ESMA shall inform the applicant CCP in writing, with a fully reasoned explanation, whether the recognition has been granted or refused.

ESMA shall publish on its website a list of the CCPs recognised in accordance with this Regulation.

5. ESMA shall, after consulting the authorities and entities referred to in paragraph 3, review the recognition of the CCP established in a third country where that CCP has extended the range of its activities and services in the Union. That review shall be conducted in accordance with paragraphs 2, 3 and 4. ESMA may withdraw the recognition of that CCP where the conditions set out in paragraph 2 are no longer met and in the same circumstances as those described in Article 20.

6. The Commission may adopt an implementing act under Article 5 of Regulation (EU) No 182/2011, determining that the legal and supervisory arrangements of a third country ensure that CCPs authorised in that third country comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of this Regulation, that those CCPs are subject to effective supervision and enforcement in that third country on an ongoing basis and that the legal framework of that third country provides for an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes.

7. ESMA shall establish 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:

(a) the mechanism for the exchange of information between ESMA and the competent authorities of the third countries concerned, including access to all information requested by ESMA regarding CCPs authorised in third countries;

▼B

(b) the mechanism for prompt notification to ESMA where a third-country competent authority deems a CCP it is supervising to be in breach of the conditions of its authorisation or of other law to which it is subject;

(c) the mechanism for prompt notification to ESMA by a third-country competent authority where a CCP it is supervising has been granted the right to provide clearing services to clearing members or clients established in the Union;

(d) the procedures concerning the coordination of supervisory activities including, where appropriate, on-site inspections.

8. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the information that the applicant CCP shall provide ESMA in its application for recognition.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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.

TITLE IV

REQUIREMENTS FOR CCPs

CHAPTER 1

Organisational requirements

Article 26

General provisions

1. A CCP shall have 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.

2. A CCP shall adopt policies and procedures which are sufficiently effective so as to ensure compliance with this Regulation, including compliance of its managers and employees with all the provisions of this Regulation.

3. A CCP shall maintain and operate an organisational structure that ensures continuity and orderly functioning in the performance of its services and activities. It shall employ appropriate and proportionate systems, resources and procedures.

▼B

4. A CCP shall maintain a clear separation between the reporting lines for risk management and those for the other operations of the CCP.

5. A CCP shall adopt, implement and maintain a remuneration policy which promotes sound and effective risk management and which does not create incentives to relax risk standards.

6. A CCP shall maintain information technology systems adequate to deal with the complexity, variety and type of services and activities performed so as to ensure high standards of security and the integrity and confidentiality of the information maintained.

7. A CCP shall make its governance arrangements, the rules governing the CCP, and its admission criteria for clearing membership, available publicly free of charge.

8. The CCP shall be subject to frequent and independent audits. The results of those audits shall be communicated to the board and shall be made available to the competent authority.

9. In order to ensure consistent application of this Article, ESMA, after consulting the members of the ESCB, shall develop draft regulatory technical standards specifying the minimum content of the rules and governance arrangements referred to in paragraphs 1 to 8.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 27

Senior management and the board

1. The senior management of a CCP shall be of sufficiently good repute and shall have sufficient experience so as to ensure the sound and prudent management of the CCP.

2. A CCP shall have a board. At least one third, but no less than two, of the members of that board shall be independent. Representatives of the clients of clearing members shall be invited to board meetings for matters relevant to Articles 38 and 39. The compensation of the independent and other non-executive members of the board shall not be linked to the business performance of the CCP.

The members of a CCP's board, including its independent members, shall be of sufficiently good repute and shall have adequate expertise in financial services, risk management and clearing services.

▼B

3. A CCP shall clearly determine the roles and responsibilities of the board and shall make the minutes of the board meetings available to the competent authority and auditors.

Article 28

Risk committee

1. A CCP shall establish a risk committee, which shall be composed of representatives of its clearing members, independent members of the board and representatives of its clients. The risk committee may invite employees of the CCP and external independent experts to attend risk-committee meetings in a non-voting capacity. Competent authorities may request to attend risk-committee meetings in a non-voting capacity and to be duly informed of the activities and decisions of the risk committee. The advice of the risk committee shall be independent of any direct influence by the management of the CCP. None of the groups of representatives shall have a majority in the risk committee.

2. A CCP shall clearly determine the mandate, the governance arrangements to ensure its independence, the operational procedures, the admission criteria and the election mechanism for risk-committee members. The governance arrangements shall be publicly available and shall, at least, determine that the risk committee is chaired by an independent member of the board, reports directly to the board and holds regular meetings.

3. The risk committee shall advise the board on any arrangements that may impact the risk management of the CCP, such as a significant change in its risk model, the default procedures, the criteria for accepting clearing members, the clearing of new classes of instruments, or the outsourcing of functions. The advice of the risk committee is not required for the daily operations of the CCP. Reasonable efforts shall be made to consult the risk committee on developments impacting the risk management of the CCP in emergency situations.

4. Without prejudice to the right of competent authorities to be duly informed, the members of the risk committee shall be bound by confidentiality. Where the chairman of the risk committee determines that a member has an actual or potential conflict of interest on a particular matter, that member shall not be allowed to vote on that matter.

5. A CCP shall promptly inform the competent authority of any decision in which the board decides not to follow the advice of the risk committee.

Article 29

Record keeping

1. A CCP shall maintain, for a period of at least 10 years, all the records on the services and activity provided so as to enable the competent authority to monitor the CCP's compliance with this Regulation.

▼B

2. A CCP shall maintain, for a period of at least 10 years following the termination of a contract, all information on all contracts it has processed. That information shall at least enable the identification of the original terms of a transaction before clearing by that CCP.

3. A CCP shall make the records and information referred to in paragraphs 1 and 2 and all information on the positions of cleared contracts, irrespective of the venue where the transactions were executed, available upon request to the competent authority, to ESMA and to the relevant members of the ESCB.

4. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details of the records and information to be retained as referred to in paragraphs 1 to 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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. In order to ensure uniform conditions of application of paragraphs 1 and 2, ESMA shall develop draft implementing technical standards specifying the format of the records and information to be retained.

ESMA shall submit those draft implementing technical standards to the Commission by 30 September 2012.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 30

Shareholders and members with qualifying holdings

1. The competent authority shall not authorise a CCP unless it has been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and of the amounts of those holdings.

2. The competent authority shall refuse to authorise a CCP where it is not satisfied as to the suitability of the shareholders or members that have qualifying holdings in the CCP, taking into account the need to ensure the sound and prudent management of a CCP.

3. Where close links exist between the CCP and other natural or legal persons, the competent authority shall grant authorisation only where those links do not prevent the effective exercise of the supervisory functions of the competent authority.

▼B

4. Where the persons referred to in paragraph 1 exercise an influence which is likely to be prejudicial to the sound and prudent management of the CCP, the competent authority shall take appropriate measures to terminate that situation, which may include the withdrawal of the authorisation of the CCP.

5. The competent authority shall refuse authorisation where the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the CCP has close links, or difficulties involved in their enforcement, prevent the effective exercise of the supervisory functions of the competent authority.

Article 31

Information to competent authorities

1. A CCP shall notify its competent authority of any changes to its management, and shall provide the competent authority with all the information necessary to assess compliance with Article 27(1) and the second subparagraph of Article 27(2).

Where the conduct of a member of the board is likely to be prejudicial to the sound and prudent management of the CCP, the competent authority shall take appropriate measures, which may include removing that member from the board.

2. Any natural or legal person or such persons acting in concert (the 'proposed acquirer'), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a CCP or to further increase, directly or indirectly, such a qualifying holding in a CCP as a result of which the proportion of the voting rights or of the capital held would reach or exceed 10 %, 20 %, 30 % or 50 % or so that the CCP would become its subsidiary (the 'proposed acquisition'), shall first notify in writing the competent authority of the CCP in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 32(4).

Any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in a CCP (the 'proposed vendor') shall first notify the competent authority in writing thereof, indicating the size of such holding. Such a person shall likewise notify the competent authority where it has taken a decision to reduce a qualifying holding so that the proportion of the voting rights or of the capital held would fall below 10 %, 20 %, 30 % or 50 % or so that the CCP would cease to be that person's subsidiary.

The competent authority shall, promptly and in any event within two working days of receipt of the notification referred to in this paragraph and of the information referred to in paragraph 3, acknowledge receipt in writing thereof to the proposed acquirer or vendor.

▼B

The competent authority shall have a maximum of 60 working days as from the date of the written acknowledgement of receipt of the notification and all documents required to be attached to the notification on the basis of the list referred to in Article 32(4) (the assessment period), to carry out the assessment provided for in Article 32(1) (the assessment).

The competent authority shall inform the proposed acquirer or vendor of the date of the expiry of the assessment period at the time of acknowledging receipt.

3. The competent authority may, during the assessment period, where necessary, but no later than on the 50th working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed.

The assessment period shall be interrupted for the period between the date of request for information by the competent authority and the receipt of a response thereto by the proposed acquirer. The interruption shall not exceed 20 working days. Any further requests by the competent authority for completion or clarification of the information shall be at its discretion but may not result in an interruption of the assessment period.

4. The competent authority may extend the interruption referred to in the second subparagraph of paragraph 3 up to 30 working days where the proposed acquirer or vendor is either:

(a) situated or regulated outside the Union;

(b) a natural or legal person not subject to supervision under this Regulation or Directive 73/239/EEC, Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance [1] or Directives 2002/83/EC, 2003/41/EC, 2004/39/EC, 2005/68/EC, 2006/48/EC, 2009/65/EC or 2011/61/EU.

5. Where the competent authority, upon completion of the assessment, decides to oppose the proposed acquisition, it shall, within two working days, and not exceeding the assessment period, inform the proposed acquirer in writing and provide the reasons for that decision. The competent authority shall notify the college referred to in Article 18 accordingly. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. However, Member States may allow a competent authority to make such disclosure in the absence of a request by the proposed acquirer.

6. Where the competent authority does not oppose the proposed acquisition within the assessment period, it shall be deemed to be approved.

7. The competent authority may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

[1] OJ L 228, 11.8.1992, p. 1.

▼B

8. Member States shall not impose requirements for notification to, and approval by, the competent authority of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Regulation.

Article 32

Assessment

1. Where assessing the notification provided for in Article 31(2) and the information referred to in Article 31(3), the competent authority shall, in order to ensure the sound and prudent management of the CCP in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the CCP, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following:

(a) the reputation and financial soundness of the proposed acquirer;

(b) the reputation and experience of any person who will direct the business of the CCP as a result of the proposed acquisition;

(c) whether the CCP will be able to comply and continue to comply with this Regulation;

(d) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

Where assessing the financial soundness of the proposed acquirer, the competent authority shall pay particular attention to the type of business pursued and envisaged in the CCP in which the acquisition is proposed.

Where assessing the CCP's ability to comply with this Regulation, the competent authority shall pay particular attention to whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, to effectively exchange information among the competent authorities and to determine the allocation of responsibilities among the competent authorities.

2. The competent authorities may oppose the proposed acquisition only where there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or where the information provided by the proposed acquirer is incomplete.

3. Member States shall neither impose any prior conditions in respect of the level of holding that shall be acquired nor allow their competent authorities to examine the proposed acquisition in terms of the economic needs of the market.

▼B

4. Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that shall be provided to the competent authorities at the time of notification referred to in Article 31(2). The information required shall be proportionate and shall be adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.

5. Notwithstanding Article 31(2), (3) and (4), where two or more proposals to acquire or increase qualifying holdings in the same CCP have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

6. The relevant competent authorities shall cooperate closely with each other when carrying out the assessment where the proposed acquirer is one of the following:

(a) another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM authorised in another Member State;

(b) the parent undertaking of another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM authorised in another Member State;

(c) a natural or legal person controlling another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM authorised in another Member State.

7. The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. The competent authorities shall, upon request, communicate all relevant information to each other and shall communicate all essential information at their own initiative. A decision by the competent authority that has authorised the CCP in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer.

Article 33

Conflicts of interest

1. A CCP shall maintain and operate effective written organisational and administrative arrangements to identify and manage any potential conflicts 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. It shall maintain and implement adequate procedures aiming at resolving possible conflicts of interest.

▼B

2. Where the organisational or administrative arrangements of a CCP to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of a clearing member or client are prevented, it shall clearly disclose the general nature or sources of conflicts of interest to the clearing member before accepting new transactions from that clearing member. Where the client is known to the CCP, the CCP shall inform the client and the clearing member whose client is concerned.

3. Where the CCP is a parent undertaking or a subsidiary, the written arrangements shall also take into account any circumstances, of which the CCP 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.

4. The written arrangements established in accordance with paragraph 1 shall include the following:

(a) the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of one or more clearing members or clients;

(b) procedures to be followed and measures to be adopted in order to manage such conflict.

5. A CCP shall take all reasonable steps to prevent any misuse of the information held in its systems and shall prevent the use of that information for other business activities. 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 a CCP shall not use confidential information recorded in that CCP for any commercial purposes without the prior written consent of the client to whom such confidential information belongs.

Article 34

Business continuity

1. A CCP shall establish, implement and maintain an adequate business continuity policy and disaster recovery plan aiming at ensuring the preservation of its functions, the timely recovery of operations and the fulfilment of the CCP's obligations. Such a plan shall at least allow 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.

2. A CCP shall establish, implement and maintain an adequate procedure ensuring the timely and orderly settlement or transfer of the assets and positions of clients and clearing members in the event of a withdrawal of authorisation pursuant to a decision under Article 20.

▼B

3. In order to ensure consistent application of this Article, ESMA shall, after consulting the members of the ESCB, develop draft regulatory technical standards specifying the minimum content and requirements of the business continuity policy and of the disaster recovery plan.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 35

Outsourcing

1. Where a CCP outsources operational functions, services or activities, it shall remain fully responsible for discharging all of its obligations under this Regulation and shall ensure at all times that:

(a) outsourcing does not result in the delegation of its responsibility;

(b) the relationship and obligations of the CCP towards its clearing members or, where relevant, towards their clients are not altered;

(c) the conditions for authorisation of the CCP do not effectively change;

(d) outsourcing does not prevent the exercise of supervisory and oversight functions, including on-site access to acquire any relevant information needed to fulfil those mandates;

(e) outsourcing does not result in depriving the CCP from the necessary systems and controls to manage the risks it faces;

(f) the service provider implements equivalent business continuity requirements to those that the CCP must fulfil under this Regulation;

(g) the CCP retains the necessary expertise and resources to evaluate the quality of the services provided and the organisational and capital adequacy of the service provider, and to supervise the outsourced functions effectively and manage the risks associated with the outsourcing and supervises those functions and manages those risks on an ongoing basis;

(h) the CCP has direct access to the relevant information of the outsourced functions;

(i) the service provider cooperates with the competent authority in connection with the outsourced activities;

▼B

(j) the service provider protects any confidential information relating to the CCP and its clearing members and clients or, where that service provider is established in a third country, ensures that the data protection standards of that third country, or those set out in the agreement between the parties concerned, are comparable to the data protection standards in effect in the Union.

A CCP shall not outsource major activities linked to risk management unless such outsourcing is approved by the competent authority.

2. The competent authority shall require the CCP to allocate and set out its rights and obligations, and those of the service provider, clearly in a written agreement.

3. A CCP shall make all information necessary to enable the competent authority to assess the compliance of the performance of the outsourced activities with this Regulation available on request.

CHAPTER 2

Conduct of business rules

Article 36

General provisions

1. When providing services to its clearing members, and where relevant, to their clients, a CCP shall act fairly and professionally in accordance with the best interests of such clearing members and clients and sound risk management.

2. A CCP shall have accessible, transparent and fair rules for the prompt handling of complaints.

Article 37

Participation requirements

1. A CCP shall establish, where relevant per type of product cleared, the categories of admissible clearing members and the admission criteria, upon the advice of the risk committee pursuant to Article 28(3). Such criteria shall be non-discriminatory, transparent and objective so as to ensure fair and open access to the CCP and shall ensure that clearing members have sufficient financial resources and operational capacity to meet the obligations arising from participation in a CCP. Criteria that restrict access shall be permitted only to the extent that their objective is to control the risk for the CCP.

2. A CCP shall ensure that the application of the criteria referred to in paragraph 1 is met on an ongoing basis and shall have timely access to the information relevant for such assessment. A CCP shall conduct, at least once a year, a comprehensive review of compliance with this Article by its clearing members.

▼B

3. Clearing members that clear transactions on behalf of their clients shall have the necessary additional financial resources and operational capacity to perform this activity. The CCP's rules for clearing members shall allow it to gather relevant basic information to identify, monitor and manage relevant concentrations of risk relating to the provision of services to clients. Clearing members shall, upon request, inform the CCP about the criteria and arrangements they adopt to allow their clients to access the services of the CCP. Responsibility for ensuring that clients comply with their obligations shall remain with clearing members.

4. A CCP shall have objective and transparent procedures for the suspension and orderly exit of clearing members that no longer meet the criteria referred to in paragraph 1.

5. A CCP may only deny access to clearing members meeting the criteria referred to in paragraph 1 where duly justified in writing and based on a comprehensive risk analysis.

6. A CCP may impose specific additional obligations on clearing members, such as the participation in auctions of a defaulting clearing member's position. Such additional obligations shall be proportional to the risk brought by the clearing member and shall not restrict participation to certain categories of clearing members.

Article 38

Transparency

1. A CCP and its clearing members shall publicly disclose the prices and fees associated with the services provided. They shall disclose the prices and fees of each service provided separately, including discounts and rebates and the conditions to benefit from those reductions. A CCP shall allow its clearing members and, where relevant, their clients separate access to the specific services provided.

A CCP shall account separately for costs and revenues of the services provided and shall disclose that information to the competent authority.

2. A CCP shall disclose to clearing members and clients the risks associated with the services provided.

3. A CCP shall disclose to its clearing members and to its competent authority the price information used to calculate its end-of-day exposures to its clearing members.

A CCP shall publicly disclose the volumes of the cleared transactions for each class of instruments cleared by the CCP on an aggregated basis.

▼B

4. A CCP shall publicly disclose 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.

5. A CCP shall publicly disclose any breaches by clearing members of the criteria referred to in Article 37(1) and the requirements laid down in paragraph 1 of this Article, except where the competent authority, after consulting ESMA, considers that such 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.

Article 39

Segregation and portability

1. A CCP shall keep separate records and accounts that shall 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.

2. A CCP shall offer to keep 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 accounts of its clients (‘omnibus client segregation’).

3. A CCP shall offer to keep 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 (‘individual client segregation’). Upon request, the CCP shall offer clearing members the possibility to open more accounts in their own name or for the account of their clients.

4. A clearing member shall keep separate records and accounts that enable it to distinguish both in accounts held with the CCP and in its own accounts its assets and positions from the assets and positions held for the account of its clients at the CCP.

5. A clearing member shall offer its clients, at least, the choice between omnibus client segregation and individual client segregation and inform them of the costs and level of protection referred to in paragraph 7 associated with each option. The client shall confirm its choice in writing.

▼B

6. When a client opts for individual client segregation, any margin in excess of the client's requirement shall also be posted to the CCP and distinguished from the margins of other clients or clearing members and shall not be exposed to losses connected to positions recorded in another account.

7. CCPs and clearing members shall publicly disclose the levels of protection and the costs associated with the different levels of segregation that they provide and shall offer those services on reasonable commercial terms. Details of the different levels of segregation shall include a description of the main legal implications of the respective levels of segregation offered including information on the insolvency law applicable in the relevant jurisdictions.

8. A CCP shall have a right of use relating to the margins or default fund contributions collected via a security financial collateral arrangement, within the meaning of Article 2(1)(c) of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements [1] provided that the use of such arrangements is provided for in its operating rules. The clearing member shall confirm its acceptance of the operating rules in writing. The CCP shall publicly disclose that right of use, which shall be exercised in accordance with Article 47.

9. The requirement to distinguish assets and positions with the CCP in accounts is satisfied where:

(a) the assets and positions are recorded in separate accounts;

(b) the netting of positions recorded on different accounts is prevented;

(c) the assets covering the positions recorded in an account are not exposed to losses connected to positions recorded in another account.

10. Assets refer to collateral held to cover positions and include the right to the transfer of assets equivalent to that collateral or the proceeds of the realisation of any collateral, but does not include default fund contributions.

CHAPTER 3

Prudential requirements

Article 40

Exposure management

A CCP shall measure and assess 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. A CCP shall have access in a timely manner and on a non-discriminatory basis to the relevant pricing sources to effectively measure its exposures. This shall be done on a reasonable cost basis.

[1] OJ L 168, 27.6.2002, p. 43.

▼B

Article 41

Margin requirements

1. A CCP shall impose, call and collect margins to limit its credit exposures from its clearing members and, where relevant, from CCPs with which it has interoperability arrangements. Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant positions. They shall also be sufficient to cover losses that result from at least 99 % of the exposures movements over an appropriate time horizon and they shall ensure that a CCP fully collateralises its exposures with all its clearing members, and, where relevant, with CCPs with which it has interoperability arrangements, at least on a daily basis. A CCP shall regularly monitor and, if necessary, revise the level of its margins to reflect current market conditions taking into account any potentially procyclical effects of such revisions.

2. A CCP shall adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared and take into account the interval between margin collections, market liquidity and the possibility of changes over the duration of the transaction. The models and parameters shall be validated by the competent authority and subject to an opinion in accordance with Article 19.

3. A CCP shall call and collect margins on an intraday basis, at least when predefined thresholds are exceeded.

4. A CCP shall call and collect margins that are adequate to cover the risk stemming from the positions registered in each account kept in accordance with Article 39 with respect to specific financial instruments. A CCP may calculate margins with respect to a portfolio of financial instruments provided that the methodology used is prudent and robust.

5. In order to ensure consistent application of this Article, ESMA shall, after consulting EBA and the ESCB, develop draft regulatory technical standards specifying the appropriate percentage and time horizons for the liquidation period and the calculation of historical volatility, as referred to in paragraph 1, to be considered for the different classes of financial instruments, taking into account the objective to limit procyclicality, and the conditions under which portfolio margining practices referred to in paragraph 4 can be implemented.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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.

▼B

Article 42

Default fund

1. To limit its credit exposures to its clearing members further, a CCP shall maintain a pre-funded default fund to cover losses that exceed the losses to be covered by margin requirements laid down in Article 41, arising from the default, including the opening of an insolvency procedure, of one or more clearing members.

The CCP shall establish a minimum amount below which the size of the default fund is not to fall under any circumstances.

2. A CCP shall establish the minimum size of contributions to the default fund and the criteria to calculate the contributions of the single clearing members. The contributions shall be proportional to the exposures of each clearing member.

3. The default fund shall at least enable the CCP 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 is larger. A CCP shall develop scenarios of extreme but plausible market conditions. The scenarios shall 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. They shall take into account sudden sales of financial resources and rapid reductions in market liquidity.

4. A CCP may establish more than one default fund for the different classes of instrument that it clears.

5. In order to ensure consistent application of this Article, ESMA shall, in close cooperation with the ESCB and after consulting EBA, develop draft regulatory technical standards specifying the framework for defining extreme but plausible market conditions referred to in paragraph 3, that should be used when defining the size of the default fund and the other financial resources referred to in Article 43.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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.

▼B

Article 43

Other financial resources

1. A CCP shall maintain sufficient pre-funded available financial resources to cover potential losses that exceed the losses to be covered by margin requirements laid down in Article 41 and the default fund as referred to in Article 42. Such pre-funded financial resources shall include dedicated resources of the CCP, shall be freely available to the CCP and shall not be used to meet the capital required under Article 16.

2. The default fund referred to in Article 42 and the other financial resources referred to in paragraph 1 of this Article shall at all times enable the CCP to withstand the default of at least the two clearing members to which it has the largest exposures under extreme but plausible market conditions.

3. A CCP may require non-defaulting clearing members to provide additional funds in the event of a default of another clearing member. The clearing members of a CCP shall have limited exposures toward the CCP.

Article 44

Liquidity risk controls

1. A CCP shall at all times have access to adequate liquidity to perform its services and activities. To that end, it shall obtain the necessary credit lines or similar arrangements to cover its liquidity needs in case the financial resources at its disposal are not immediately available. A clearing member, parent undertaking or subsidiary of that clearing member together shall not provide more than 25 % of the credit lines needed by the CCP.

A CCP shall measure, on a daily basis, its potential liquidity needs. It shall take into account the liquidity risk generated by the default of at least the two clearing members to which it has the largest exposures.

2. In order to ensure consistent application of this Article, ESMA shall, after consulting the relevant authorities and the members of the ESCB, develop draft regulatory technical standards specifying the framework for managing the liquidity risk that CCPs are to withstand in accordance with paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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.

▼B

Article 45

Default waterfall

1. A CCP shall use the margins posted by a defaulting clearing member prior to other financial resources in covering losses.

2. Where the margins posted by the defaulting clearing member are not sufficient to cover the losses incurred by the CCP, the CCP shall use the default fund contribution of the defaulting member to cover those losses.

3. A CCP shall use contributions to the default fund of the non-defaulting clearing members and any other financial resources referred to in Article 43(1) only after having exhausted the contributions of the defaulting clearing member.

4. A CCP shall use dedicated own resources before using the default fund contributions of non-defaulting clearing members. A CCP shall not use the margins posted by non-defaulting clearing members to cover the losses resulting from the default of another clearing member.

5. In order to ensure consistent application of this Article, ESMA, shall, after consulting the relevant competent authorities and the members of the ESCB, develop draft regulatory technical standards specifying the methodology for calculation and maintenance of the amount of the CCP's own resources to be used in accordance with paragraph 4.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 46

Collateral requirements

1. A CCP shall accept highly liquid collateral with minimal credit and market risk to cover its initial and ongoing exposure to its clearing members. For non-financial counterparties, a CCP may accept bank guarantees, taking such guarantees into account when calculating its exposure to a bank that is a clearing member. It shall apply adequate haircuts to asset values that reflect the potential for their value to decline over the interval between their last revaluation and the time by which they can reasonably be assumed to be liquidated. It shall take into account the liquidity risk following the default of a market participant and the concentration risk on certain assets that may result in establishing the acceptable collateral and the relevant haircuts.

▼B

2. A CCP may accept, where appropriate and sufficiently prudent, the underlying of the derivative contract or the financial instrument that originates the CCP exposure as collateral to cover its margin requirements.

3. In order to ensure consistent application of this Article, ESMA shall, after consulting EBA, the ESRB and the ESCB, develop draft regulatory technical standards specifying:

(a) the type of collateral that could be considered highly liquid, such as cash, gold, government and high-quality corporate bonds and covered bonds;

(b) the haircuts referred to in paragraph 1; and

(c) the conditions under which commercial bank guarantees may be accepted as collateral under paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 47

Investment policy

1. A CCP shall invest its financial resources only in cash or in highly liquid financial instruments with minimal market and credit risk. A CCP's investments shall be capable of being liquidated rapidly with minimal adverse price effect.

2. The amount of capital, including retained earnings and reserves of a CCP which are not invested in accordance with paragraph 1, shall not be taken into account for the purposes of Article 16(2) or Article 45(4).

3. Financial instruments posted as margins or as default fund contributions shall, where available, be deposited with operators of securities settlement systems that ensure the full protection of those financial instruments. Alternatively, other highly secure arrangements with authorised financial institutions may be used.

4. Cash deposits of a CCP shall be performed through highly secure arrangements with authorised financial institutions or, alternatively, through the use of the standing deposit facilities of central banks or other comparable means provided for by central banks.

▼B

5. Where a CCP deposits assets with a third party, it shall ensure 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. A CCP shall have prompt access to the financial instruments when required.

6. A CCP shall not invest its capital or the sums arising from the requirements laid down in Article 41, 42, 43 or 44 in its own securities or those of its parent undertaking or its subsidiary.

7. A CCP shall take into account its overall credit risk exposures to individual obligors in making its investment decisions and shall ensure that its overall risk exposure to any individual obligor remains within acceptable concentration limits.

8. In order to ensure consistent application of this Article, ESMA shall, after consulting EBA and the ESCB, develop draft regulatory technical standards specifying the financial instruments that can be considered highly liquid, bearing minimal credit and market risk as referred to in paragraph 1, the highly secured arrangements referred to in paragraphs 3 and 4 and the concentration limits referred to in paragraph 7.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 48

Default procedures

1. A CCP shall have detailed procedures in place to be followed where a clearing member does not comply with the participation requirements of the CCP laid down in Article 37 within the time limit and in accordance with the procedures established by the CCP. The CCP shall set out in detail the procedures to be followed in the event the default of a clearing member is not declared by the CCP. Those procedures shall be reviewed annually.

2. A CCP shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall 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 that they cannot anticipate or control.

▼B

3. Where a CCP considers that the clearing member will not be able to meet its future obligations, it shall promptly inform the competent authority before the default procedure is declared or triggered. The competent authority shall promptly communicate that information to ESMA, to the relevant members of the ESCB and to the authority responsible for the supervision of the defaulting clearing member.

4. A CCP shall verify that its default procedures are enforceable. It shall take 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.

5. Where assets and positions are recorded in the records and accounts of a CCP as being held for the account of a defaulting clearing member's clients in accordance with Article 39(2), the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of its clients to another clearing member designated by all of those clients, on their request and without the consent of the defaulting clearing member. That other clearing member shall be obliged to accept those assets and positions only where it has previously entered into a contractual relationship with the clients by which it has committed itself to do so. If the transfer to that other clearing member has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of its clients.

6. Where assets and positions are recorded in the records and accounts of a CCP as being held for the account of a defaulting clearing member's client in accordance with Article 39(3), the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of the client to another clearing member designated by the client, on the client's request and without the consent of the defaulting clearing member. That other clearing member shall be obliged to accept these assets and positions only where it has previously entered into a contractual relationship with the client by which it has committed itself to do so. If the transfer to that other clearing member has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of the client.

▼B

7. Clients' collateral distinguished in accordance with Article 39(2) and (3) shall be used exclusively to cover the positions held for their account. Any balance owed by the CCP after the completion of the clearing member's default management process by the CCP shall be readily returned to those clients when they are known to the CCP or, if they are not, to the clearing member for the account of its clients.

Article 49

Review of models, stress testing and back testing

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 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 pursuant to Article 19.

ESMA shall ensure that information on the results of the stress tests is passed on to the ESAs to enable them to assess the exposure of financial undertakings to the default of CCPs.

2. A CCP shall regularly test the key aspects of its default procedures and take all reasonable steps to ensure that all clearing members understand them and have appropriate arrangements in place to respond to a default event.

3. A CCP shall publicly disclose key information on its risk-management model and assumptions adopted to perform the stress tests referred to in paragraph 1.

4. In order to ensure consistent 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:

(a) the type of tests to be undertaken for different classes of financial instruments and portfolios;

(b) the involvement of clearing members or other parties in the tests;

▼B

(c) the frequency of the tests;

(d) the time horizons of the tests;

(e) the key information referred to in paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 50

Settlement

1. A CCP shall, where practical and available, use central bank money to settle its transactions. Where central bank money is not used, steps shall be taken to strictly limit cash settlement risks.

2. A CCP shall clearly state 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.

3. Where a CCP has an obligation to make or receive deliveries of financial instruments, it shall eliminate principal risk through the use of delivery-versus-payment mechanisms to the extent possible.

▼M1

▼C1

CHAPTER 4

Calculations and reporting for the purposes of Regulation (EU) No 575/2013

Article 50a

Calculation of K_{CCP}

1. For the purposes of Article 308 of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms [1], a CCP shall calculate K_{CCP} as specified in paragraph 2 of this Article for all contracts and transactions it clears for all its clearing members falling within the coverage of the given default fund.

[1] OJ L 176, 27.6.2013,p.1.

▼C1

2. A CCP shall calculate the hypothetical capital (K_{CCP}) as follows:

$$K_{CCP} = \sum_i max\{EBRM_i - IM_i - DF_i; 0\} \cdot RW \cdot capital\ ratio$$

where:

$EBRM_i$ = exposure value before risk mitigation that is equal to the exposure value of the CCP to clearing member i arising from all the contracts and transactions with that clearing member, calculated without taking into account the collateral posted by that clearing member;

IM_i = the initial margin posted to the CCP by clearing member i;

DF_i = the pre-funded contribution of clearing member i;

RW = a risk weight of 20 %;

capital ratio = 8 %.

All values in the formula in the first subparagraph shall relate to the valuation at the end of the day before the margin called on the final margin call of that day is exchanged.

3. A CCP shall undertake the calculation required by paragraph 2 at least quarterly or more frequently where required by the competent authorities of those of its clearing members which are institutions.

4. For the purpose of paragraph 3, EBA shall develop draft implementing technical standards to specify the following:

(a) the frequency and dates of the calculation laid down in paragraph 2;

(b) the situations in which the competent authority of an institution acting as a clearing member may require higher frequencies of calculation and reporting than those referred to in point (a).

EBA shall submit those draft implementing technical standards to the Commission by 1 January 2014.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

▼C1

Article 50b

General rules for the calculation of K_{CCP}

For the purposes of the calculation laid down in Article 50a(2), the following shall apply:

(a) a CCP shall calculate the value of the exposures it has to its clearing members as follows:

(i) for exposures arising from contracts and transactions listed in Article 301(1)(a) and (d) of Regulation (EU) No 575/2013 it shall calculate them in accordance with the mark-to-market method laid down in Article 274 thereof;

(ii) for exposures arising from contracts and transactions listed in Article 301(1)(b), (c) and (e) of Regulation (EU) No 575/2013 it shall calculate them in accordance with the Financial Collateral Comprehensive Method specified in Article 223 of that Regulation with supervisory volatility adjustments, specified in Articles 223 and 224 of that Regulation. The exception set out in point (a) of Article 285(3) of that Regulation, shall not apply;

(iii) for exposures arising from transactions not listed in Article 301(1) of Regulation (EU) No 575/2013 and which entails settlement risk only it shall calculate them in accordance with Part Three, Title V of that Regulation;

(b) for institutions that fall under the scope of Regulation (EU) No 575/2013 the netting sets are the same as those defined in Part Three, Title II of that Regulation;

(c) when calculating the values referred to in point (a), the CCP shall subtract from its exposures the collateral posted by its clearing members, appropriately reduced by the supervisory volatility adjustments in accordance with the Financial Collateral Comprehensive Method specified in Article 224 of Regulation (EU) No 575/2013;

(e) where a CCP has exposures to one or more CCPs it shall treat any such exposures as if they were exposures to clearing members and include any margin or pre-funded contributions received from those CCPs in the calculation of K_{CCP};

▼C1

(f) where a CCP has in place a binding contractual arrangement with its clearing members that allows it to use all or part of the initial margin received from its clearing members as if they were pre-funded contributions, the CCP shall consider that initial margin as prefunded contributions for the purposes of the calculation in paragraph 1 and not as initial margin;

(h) when applying the Mark-to-Market Method as set out in Article 274 of Regulation (EU) No 575/2013, a CCP shall replace the formula in point (c)(ii) of Article 298(1) of that Regulation with the following:

$$PCE_{red} = 0.15 \cdot PCE_{gross} + 0.85 \cdot NGR \cdot PCE_{gross}$$

where the numerator of NGR is calculated in accordance with Article 274(1) of that Regulation and just before the variation margin is actually exchanged at the end of the settlement period, and the denominator is gross replacement cost;

(i) where a CCP cannot calculate the value of NGR as set out in point (c)(ii) of Article 298(1) of Regulation (EU) No 575/2013, it shall:

(i) notify those of its clearing members which are institutions and their competent authorities about its inability to calculate NGR and the reasons why it is unable to carry out the calculation;

(ii) for a period of three months, it may use a value of NGR of 0,3 to perform the calculation of PCE_{red} specified in point (h) of this Article;

(j) where, at the end of the period specified in point (ii) of point (i), the CCP would still be unable to calculate the value of NGR, it shall do the following:

(i) stop calculating K_{CCP};

(ii) notify those of its clearing members which are institutions and their competent authorities that it has stopped calculating K_{CCP};

(k) for the purpose of calculating the potential future exposure for options and swaptions in accordance with the Mark-to-Market Method specified in Article 274 of Regulation (EU) No 575/2013, a CCP shall multiply the notional amount of the contract by the absolute value of the option's delta$(\delta V / \delta p)$as set out in point (a) of Article 280(1) of that Regulation;

▼C1

(l) where a CCP has more than one default fund, it shall carry out the calculation laid down in Article 50a(2) for each default fund separately.

Article 50c

Reporting of information

1. For the purposes of Article 308 of Regulation (EU) No 575/2013, a CCP shall report the following information to those of its clearing members which are institutions and to their competent authorities:

(a) the hypothetical capital (K_{CCP});

(b) the sum of pre-funded contributions (DF_{CM});

(c) the amount of its pre-funded financial resources that it is required to use — by law or due to a contractual agreement with its clearing members — to cover its losses following the default of one or more of its clearing members before using the default fund contributions of the remaining clearing members (DF_{CCP});

(d) the total number of its clearing members (N);

(e) the concentration factor (β), as set out in Article 50d.

Where the CCP has more than one default fund, it shall report the information in the first subparagraph for each default fund separately.

2. The CCP shall notify those of its clearing members which are institutions at least quarterly or more frequently where required by the competent authorities of those clearing members.

3. EBA shall develop draft implementing technical standards to specify the following:

(a) the uniform template for the purpose of the reporting specified in paragraph 1;

(b) the frequency and dates of the reporting specified in paragraph 2;

(c) the situations in which the competent authority of an institution acting as a clearing member may require higher frequencies of reporting than those referred to in point (b).

EBA shall submit those draft implementing technical standards to the Commission by 1 January 2014.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

▼C1

Article 50d

Calculation of specific items to be reported by the CCP

For the purposes of Article 50c, the following shall apply:

(a) where the rules of a CCP provide that it use part or all of its financial resources in parallel to the pre-funded contributions of its clearing members in a manner that makes those resources equivalent to pre-funded contributions of a clearing member in terms of how they absorb the losses incurred by the CCP in the case of the default or insolvency of one or more of its clearing members, the CCP shall add the corresponding amount of those resources to DF_{CM};

(b) where the rules of a CCP provide that it use part or all of its financial resources to cover its losses due to the default of one or more of its clearing members after it has depleted its default fund, but before it calls on the contractually committed contributions of its clearing members, the CCP shall add the corresponding amount of those additional financial resources $(DF^{a}_{CCP})$to the total amount of pre-funded contributions (DF) as follows:

$$DF = DF_{CCP} + DF_{CM} + DF^{a}_{CCP}.$$

(c) a CCP shall calculate the concentration factor (β) in accordance with the following formula:

$$\beta = \frac{PCE_{red,1} + PCE_{red,2}}{\sum_i PCE_{red,i}}$$

where:

$PCE_{red,i}$ = the reduced figure for potential future credit exposure for all contracts and transaction of a CCP with clearing member *i*;

$PCE_{red,1}$ = the reduced figure for potential future credit exposure for all contracts and transaction of a CCP with the clearing member that has the largest PCE_{red} value;

$PCE_{red,2}$ = the reduced figure for potential future credit exposure for all contracts and transaction of a CCP with the clearing member that has the second largest PCE_{red} value.

▼B

TITLE V

INTEROPERABILITY ARRANGEMENTS

Article 51

Interoperability arrangements

1. A CCP may enter into an interoperability arrangement with another CCP where the requirements laid down in Articles 52, 53 and 54 are fulfilled.

2. When establishing an interoperability arrangement with another CCP for the purpose of providing services to a particular trading venue, the CCP shall have non-discriminatory access, both to the data that it needs for the performance of its functions from that particular trading venue, to the extent that the CCP complies with the operational and technical requirements established by the trading venue, and to the relevant settlement system.

3. Entering into an interoperability arrangement or accessing a data feed or a settlement system referred to in paragraphs 1 and 2 shall be rejected or restricted, directly or indirectly, only in order to control any risk arising from that arrangement or access.

Article 52

Risk management

1. CCPs that enter into an interoperability arrangement shall:

(a) put in place adequate policies, procedures and systems to effectively identify, monitor and manage the risks arising from the arrangement so that they can meet their obligations in a timely manner;

(b) agree on their respective rights and obligations, including the applicable law governing their relationships;

(c) identify, monitor and effectively manage credit and liquidity risks so that a default of a clearing member of one CCP does not affect an interoperable CCP;

(d) identify, monitor and address potential interdependences and correlations that arise from an interoperability arrangement that may affect credit and liquidity risks relating to clearing member concentrations, and pooled financial resources.

For the purposes of point (b) of the first subparagraph, CCPs shall use the same rules concerning the moment of entry of transfer orders into their respective systems and the moment of irrevocability as set out in Directive 98/26/EC, where relevant.

▼B

For the purposes of point (c) of the first subparagraph, the terms of the arrangement shall outline the process for managing the consequences of the default where one of the CCPs with which an interoperability arrangement has been concluded is in default.

For the purposes of point (d) of the first subparagraph, CCPs shall have robust controls over the re-use of clearing members' collateral under the arrangement, if permitted by their competent authorities. The arrangement shall outline how those risks have been addressed taking into account sufficient coverage and need to limit contagion.

2. Where the risk-management models used by the CCPs to cover their exposure to their clearing members or their reciprocal exposures are different, the CCPs shall identify those differences, assess risks that may arise therefrom and take measures, including securing additional financial resources, that limit their impact on the interoperability arrangement as well as their potential consequences in terms of contagion risks and ensure that these differences do not affect each CCP's ability to manage the consequences of the default of a clearing member.

3. Any associated costs that arise from paragraphs 1 and 2 shall be borne by the CCP requesting interoperability or access, unless otherwise agreed between the parties.

Article 53

Provision of margins among CCPs

1. A CCP shall distinguish in accounts the assets and positions held for the account of CCPs with whom it has entered into an interoperability arrangement.

2. If a CCP that enters into an interoperability arrangement with another CCP only provides initial margins to that CCP under a security financial collateral arrangement, the receiving CCP shall have no right of use over the margins provided by the other CCP.

3. Collateral received in the form of financial instruments shall be deposited with operators of securities settlement systems notified under Directive 98/26/EC.

4. The assets referred to in paragraphs 1 and 2 shall be available to the receiving CCP only in case of default of the CCP which has provided the collateral in the context of an interoperability arrangement.

5. In case of default of the CCP which has received the collateral in the context of an interoperability arrangement, the collateral referred to in paragraphs 1 and 2 shall be readily returned to the providing CCP.

▼B

Article 54

Approval of interoperability arrangements

1. An interoperability arrangement shall be subject to the prior approval of the competent authorities of the CCPs involved. The procedure under Article 17 shall apply.

2. The competent authorities shall grant approval of the interoperability arrangement only where the CCPs involved have been authorised to clear under Article 17 or recognised under Article 25 or authorised under a pre-existing national authorisation regime for a period of at least three years, the requirements laid down in Article 52 are met and the technical conditions for clearing transactions under the terms of the arrangement allow for a smooth and orderly functioning of financial markets and the arrangement does not undermine the effectiveness of supervision.

3. Where a competent authority considers that the requirements laid down in paragraph 2 are not met, it shall provide explanations in writing regarding its risk considerations to the other competent authorities and the CCPs involved. It shall also notify ESMA, which shall issue an opinion on the effective validity of the risk considerations as grounds for denial of the interoperability arrangement. ESMA's opinion shall be made available to all the CCPs involved. Where ESMA's opinion differs from the assessment of the relevant competent authority, that competent authority shall reconsider its position, taking into account ESMA's opinion.

4. By 31 December 2012, ESMA shall issue guidelines or recommendations with a view to establishing consistent, efficient and effective assessments of interoperability arrangements, in accordance with the procedure laid down in Article 16 of Regulation (EU) No 1095/2010.

ESMA shall develop drafts of those guidelines or recommendations after consulting the members of the ESCB.

TITLE VI

REGISTRATION AND SUPERVISION OF TRADE REPOSITORIES

CHAPTER 1

Conditions and procedures for registration of a trade repository

Article 55

Registration of a trade repository

1. A trade repository shall register with ESMA for the purposes of Article 9.

2. To be eligible to be registered under this Article, a trade repository shall be a legal person established in the Union and meet the requirements laid down in Title VII.

▼B

3. The registration of a trade repository shall be effective for the entire territory of the Union.

4. A registered trade repository shall comply at all times with the conditions for registration. A trade repository shall, without undue delay, notify ESMA of any material changes to the conditions for registration.

Article 56

Application for registration

1. A trade repository shall submit an application for registration to ESMA.

2. ESMA shall assess whether the application is complete within 20 working days of receipt of the application.

Where the application is not complete, ESMA shall set a deadline by which the trade repository is to provide additional information.

After assessing an application as complete, ESMA shall notify the trade repository accordingly.

3. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details of the application for registration referred to in paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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.

4. In order to ensure uniform conditions of application of paragraph 1, ESMA shall develop draft implementing technical standards specifying the format of the application for registration to ESMA.

ESMA shall submit those draft implementing technical standards to the Commission by 30 September 2012.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 57

Notification of and consultation with competent authorities prior to registration

1. If a trade repository which is applying for registration is an entity which is authorised or registered by a competent authority in the Member State where it is established, ESMA shall, without undue delay, notify and consult that competent authority prior to the registration of the trade repository.

▼B

2. ESMA and the relevant competent authority shall exchange all information that is necessary for the registration of the trade repository as well as for the supervision of the entity's compliance with the conditions of its registration or authorisation in the Member State where it is established.

Article 58

Examination of the application

1. ESMA shall, within 40 working days from the notification referred to in the third subparagraph of Article 56(2), examine the application for registration based on the compliance of the trade repository with Articles 78 to 81 and shall adopt a fully reasoned registration decision or decision refusing registration.

2. A decision issued by ESMA pursuant to paragraph 1 shall take effect on the fifth working day following its adoption.

Article 59

Notification of ESMA decisions relating to registration

1. Where ESMA adopts a registration decision or a decision refusing or withdrawing registration, it shall notify the trade repository within five working days with a fully reasoned explanation of its decision.

ESMA shall, without undue delay, notify the relevant competent authority referred to in Article 57(1) of its decision.

2. ESMA shall communicate any decision taken in accordance with paragraph 1 to the Commission.

3. ESMA shall publish on its website a list of trade repositories registered in accordance with this Regulation. That list shall be updated within five working days following the adoption of a decision under paragraph 1.

Article 60

Exercise of the powers referred to in Articles 61 to 63

The powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 61 to 63 shall not be used to require the disclosure of information or documents which are subject to legal privilege.

Article 61

Request for information

1. ESMA may by simple request or by decision require trade repositories and related third parties to whom the trade repositories have outsourced operational functions or activities to provide all information that is necessary in order to carry out its duties under this Regulation.

▼B

2. When sending a simple request for information under paragraph 1, ESMA shall:

(a) refer to this Article as the legal basis of the request;

(b) state the purpose of the request;

(c) specify what information is required;

(d) set a time limit within which the information is to be provided;

(e) inform the person from whom the information is requested that he is not obliged to provide the information but that in case of a voluntary reply to the request the information provided must not be incorrect and misleading; and

(f) indicate the fine provided for in Article 65 in conjunction with point (a) of Section IV of Annex I where the answers to questions asked are incorrect or misleading.

3. When requiring to supply information under paragraph 1 by decision, ESMA shall:

(a) refer to this Article as the legal basis of the request;

(b) state the purpose of the request;

(c) specify what information is required;

(d) set a time limit within which the information is to be provided;

(e) indicate the periodic penalty payments provided for in Article 66 where the production of the required information is incomplete;

(f) indicate the fine provided for in Article 65 in conjunction with point (a) of Section IV of Annex I, where the answers to questions asked are incorrect or misleading; and

(g) indicate 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 competent authority of the Member State where the persons referred to in paragraph 1 concerned by the request for information are domiciled or established.

▼B

Article 62

General investigations

1. In order to carry out its duties under this Regulation, ESMA may conduct necessary investigations of persons referred to in Article 61(1). 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 any person referred to in Article 61(1) 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.

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 66 where the production of the required records, data, procedures or any other material, or the answers to questions asked to persons referred to in Article 61(1) are not provided or are incomplete, and the fines provided for in Article 65 in conjunction with point (b) of Section IV of Annex I, where the answers to questions asked to persons referred to in Article 61(1) are incorrect or misleading.

3. The persons referred to in Article 61(1) 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 66, the legal remedies available under Regulation (EU) No 1095/2010 and the right to have the decision reviewed by the Court of Justice.

4. In good time before the investigation, ESMA shall inform the competent authority of the Member State where the investigation is to be carried out of the investigation and of the identity of the authorised persons. Officials of the competent authority concerned shall, upon the request of ESMA, assist those authorised persons in carrying out their duties. Officials of the competent authority concerned may also attend the investigations upon request.

5. If a request for records of telephone or data traffic referred to in point (e) of paragraph 1 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

▼B

6. Where authorisation as referred to in paragraph 5 is applied for, the national judicial authority shall control that the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the investigations. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the investigation or demand that it be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice following the procedure set out in Regulation (EU) No 1095/2010.

Article 63

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 or land of the legal persons referred to in Article 61(1). Where the proper conduct and efficiency of the inspection so require, ESMA may carry out the on-site inspection without prior announcement.

2. The officials and other persons authorised by ESMA to conduct an on-site inspection may enter any business premises or land of the legal persons subject to an investigation decision adopted by ESMA and shall have all the powers stipulated in Article 62(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. 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 66 where the persons concerned do not submit to the inspection. In good time before the inspection, ESMA shall give notice of the inspection to the competent authority of the Member State where the inspection is to be conducted.

4. The persons referred to in Article 61(1) 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 66, 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. ESMA shall take such decisions after consulting the competent authority of the Member State where the inspection is to be conducted.

▼B

5. Officials of, as well as those authorised or appointed by, the competent authority of the Member State where the inspection is to be conducted shall, at the request of ESMA, actively assist the officials and other persons authorised by ESMA. To that end, they shall enjoy the powers set out in paragraph 2. Officials of the competent authority of the Member State concerned may also attend the on-site inspections on request.

6. ESMA may also require competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in this Article and in Article 62(1) on its behalf. To that end, competent authorities shall enjoy the same powers as ESMA as set out in this Article and in Article 62(1).

7. Where the officials and other accompanying persons authorised by ESMA find that a person opposes an inspection ordered pursuant to this Article, the competent authority of the Member State concerned shall afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their on-site inspection.

8. If the on-site inspection provided for in paragraph 1 or the assistance provided for in paragraph 7 requires authorisation by a judicial authority according to national law, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

9. Where authorisation as referred to in paragraph 8 is applied for, the national judicial authority shall verify that ESMA's decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations. Such a request for detailed explanations may in particular relate to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures. However, the national judicial authority may not review the necessity for the inspection or demand to be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice following the procedure set out in Regulation (EU) No 1095/2010.

Article 64

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 I, 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 supervision or the registration process of the trade repository concerned and shall perform his functions independently from ESMA.

▼B

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 findings to ESMA.

In order to carry out his tasks, the investigation officer may exercise the power to request information in accordance with Article 61 and to conduct investigations and on-site inspections in accordance with Articles 62 and 63. When using those powers, the investigation officer shall comply with Article 60.

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

3. Upon completion of his investigation and before submitting the file with his 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 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 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 affecting third parties.

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 67, ESMA shall decide if one or more of the infringements listed in Annex I has 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 73 and impose a fine in accordance with Article 65.

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 further 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 shall adopt detailed rules on the limitation periods for the imposition and enforcement of penalties.

The rules referred to in the first subparagraph shall be adopted by means of delegated acts in accordance with Article 82.

▼B

8. ESMA shall refer matters for criminal prosecution to the relevant national authorities where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where 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 65

Fines

1. Where, in accordance with Article 64(5), ESMA finds that a trade repository has, intentionally or negligently, committed one of the infringements listed in Annex I, it shall adopt a decision imposing a fine in accordance with paragraph 2 of this Article.

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

2. The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in point (c) of Section I of Annex I and in points (c) to (g) of Section II of Annex I, and in points (a) and (b) of Section III of Annex I the amounts of the fines shall be at least EUR 10 000 and shall not exceed EUR 20 000;

(b) for the infringements referred to in points (a), (b) and (d) to (h) of Section I of Annex I, and in points (a), (b) and (h) of Section II of Annex I, the amounts of the fines shall be at least EUR 5 000 and shall not exceed EUR 10 000.

In order to decide whether the basic amount of the fines should be at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover of the preceding business year of the trade repository concerned. The basic amount shall be at the lower end of the limit for trade repositories whose annual turnover is below EUR 1 million, the middle of the limit for the trade repository whose turnover is between EUR 1 and 5 million and the higher end of the limit for the trade repository whose annual turnover is higher than EUR 5 million.

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 II.

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.

▼B

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 trade repository concerned in the preceding business year but, where the trade repository 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 trade repository constitutes more than one infringement listed in Annex I, only the higher fine calculated in accordance with paragraphs 2 and 3 and relating to one of those infringements shall apply.

Article 66

Periodic penalty payments

1. ESMA shall, by decision, impose periodic penalty payments in order to compel:

(a) a trade repository to put an end to an infringement in accordance with a decision taken pursuant to Article 73(1)(a); or

(b) a person referred to in Article 61(1):

(i) to supply complete information which has been requested by a decision pursuant to Article 61;

(ii) 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 62; or

(iii) to submit to an on-site inspection ordered by a decision taken pursuant to Article 63.

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 the period, ESMA shall review the measure.

▼B

Article 67

Hearing of the persons concerned

1. Before taking any decision on a fine or periodic penalty payment under Articles 65 and 66, 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.

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 68

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 65 and 66 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 65 and 66 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 competent authorities of the Member State concerned accordingly and shall set out the reasons for its decision.

4. Fines and periodic penalty payments imposed pursuant to Articles 65 and 66 shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision without other formality than verification of the authenticity of the decision by the authority which the government of each Member State shall designate for that purpose and shall make known to ESMA and to the Court of Justice.

When those formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent body.

Enforcement may be suspended only by a decision of the Court of Justice. However, the courts of the Member State concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

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

▼B

Article 69

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 70

Amendments to Annex II

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

Article 71

Withdrawal of registration

1. Without prejudice to Article 73, ESMA shall withdraw the registration of a trade repository where the trade repository:

(a) expressly renounces the registration or has provided no services for the preceding six months;

(b) obtained the registration by making false statements or by any other irregular means;

(c) no longer meets the conditions under which it was registered.

2. ESMA shall, without undue delay, notify the relevant competent authority referred to in Article 57(1) of a decision to withdraw the registration of a trade repository.

3. The competent authority of a Member State in which the trade repository performs its services and activities and which considers 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 registration of the trade repository concerned are met. Where ESMA decides not to withdraw the registration of the trade repository concerned, it shall provide full reasons.

4. The competent authority referred to in paragraph 3 shall be the authority designated under Article 22.

Article 72

Supervisory fees

1. ESMA shall charge fees to the trade repositories in accordance with this Regulation and in accordance with the delegated acts adopted pursuant to paragraph 3. Those fees shall fully cover ESMA's necessary expenditure relating to the registration and supervision of trade repositories and the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to this Regulation in particular as a result of any delegation of tasks in accordance with Article 74.

▼B

2. The amount of a fee charged to a trade repository shall cover all administrative costs incurred by ESMA for its registration and supervision activities and be proportionate to the turnover of the trade repository concerned.

3. The Commission shall adopt a delegated act in accordance with Article 82 to specify further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.

Article 73

Supervisory measures by ESMA

1. Where, in accordance with Article 64(5), ESMA finds that a trade repository has committed one of the infringements listed in Annex I, it shall take one or more of the following decisions:

(a) requiring the trade repository to bring the infringement to an end;

(b) imposing fines under Article 65;

(c) issuing public notices;

(d) as a last resort, withdrawing the registration of the trade repository.

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 undertaking'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 trade repository concerned, and shall communicate it to the competent authorities of the Member States and to the Commission. It shall publicly disclose any such decision on its website within 10 working days from 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 trade repository 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.

▼B

Article 74

Delegation of tasks by ESMA to competent authorities

1. Where necessary for the proper performance of a supervisory task, ESMA may delegate specific supervisory tasks to the competent authority of a Member State in accordance with the guidelines issued by ESMA pursuant to Article 16 of Regulation (EU) No 1095/2010. Such specific supervisory tasks may, in particular, include the power to carry out requests for information in accordance with Article 61 and to conduct investigations and on-site inspections in accordance with Article 62 and Article 63(6).

2. Prior to delegation of a task, ESMA shall consult the relevant competent authority. Such consultation shall concern:

(a) the scope of the task to be delegated;

(b) the timetable for the performance of the task; and

(c) the transmission of necessary information by and to ESMA.

3. In accordance with the regulation on fees adopted by the Commission pursuant to Article 72(3), ESMA shall reimburse a competent authority for costs incurred as a result of carrying out delegated tasks.

4. ESMA shall review the decision referred to in paragraph 1 at appropriate intervals. A delegation may be revoked at any time.

5. A delegation of tasks shall not affect the responsibility of ESMA and shall not limit ESMA's ability to conduct and oversee the delegated activity. Supervisory responsibilities under this Regulation, including registration decisions, final assessments and follow-up decisions concerning infringements, shall not be delegated.

CHAPTER 2

Relations with third countries

Article 75

Equivalence and international agreements

1. The Commission may adopt an implementing act determining that the legal and supervisory arrangements of a third country ensure that:

(a) trade repositories authorised in that third country comply with legally binding requirements which are equivalent to those laid down in this Regulation;

(b) effective supervision and enforcement of trade repositories takes place in that third country on an ongoing basis; and

▼B

(c) guarantees of professional secrecy exist, including the protection of business secrets shared with third parties by the authorities, and they are at least equivalent to those set out in this Regulation.

That implementing act shall be adopted in accordance with the examination procedure referred to in Article 86(2).

2. Where appropriate, and in any case after adopting an implementing act as referred to in paragraph 1, the Commission shall submit recommendations to the Council for the negotiation of international agreements with the relevant third countries regarding mutual access to, and exchange of information on, derivative contracts held in trade repositories which are established in that third country, in a way that ensures that Union authorities, including ESMA, have immediate and continuous access to all the information needed for the exercise of their duties.

3. After conclusion of the agreements referred to in paragraph 2, and in accordance with them, ESMA shall establish cooperation arrangements with the competent authorities of the relevant third countries. Those arrangements shall specify at least:

(a) a mechanism for the exchange of information between ESMA and any other Union authorities that exercise responsibilities in accordance with this Regulation on the one hand and the relevant competent authorities of third countries concerned on the other; and

(b) procedures concerning the coordination of supervisory activities.

4. ESMA shall apply Regulation (EC) No 45/2001 with regard to the transfer of personal data to a third country.

Article 76

Cooperation arrangements

Relevant authorities of third countries that do not have any trade repository established in their jurisdiction may contact ESMA with a view to establishing cooperation arrangements to access information on derivatives contracts held in Union trade repositories.

ESMA may establish cooperation arrangements with those relevant authorities regarding access to information on derivatives contracts held in Union trade repositories that these authorities need to fulfil their respective responsibilities and mandates, provided that guarantees of professional secrecy exist, including the protection of business secrets shared by the authorities with third parties.

Article 77

Recognition of trade repositories

1. A trade repository established in a third country may provide its services and activities to entities established in the Union for the purposes of Article 9 only after its recognition by ESMA in accordance with paragraph 2.

▼B

2. A trade repository referred to in paragraph 1 shall submit to ESMA its application for recognition together with all necessary information, including at least the information necessary to verify that the trade repository is authorised and subject to effective supervision in a third country which:

(a) has been recognised by the Commission, by means of an implementing act pursuant to Article 75(1), as having an equivalent and enforceable regulatory and supervisory framework;

(b) has entered into an international agreement with the Union pursuant to Article 75(2); and

(c) has entered into cooperation arrangements pursuant to Article 75(3) to ensure that Union authorities, including ESMA, have immediate and continuous access to all the necessary information.

Within 30 working days of receipt of the application, ESMA shall assess whether the application is complete. If the application is not complete, ESMA shall set a deadline by which the applicant trade repository has to provide additional information.

Within 180 working days of the submission of a complete application, ESMA shall inform the applicant trade repository in writing with a fully reasoned explanation whether the recognition has been granted or refused.

ESMA shall publish on its website a list of the trade repositories recognised in accordance with this Regulation.

TITLE VII

REQUIREMENTS FOR TRADE REPOSITORIES

Article 78

General requirements

1. A trade repository shall have robust governance arrangements, which include a clear organisational structure with well defined, transparent and consistent lines of responsibility and adequate internal control mechanisms, including sound administrative and accounting procedures, which prevent any disclosure of confidential information.

2. A trade repository shall maintain and operate effective written organisational and administrative arrangements to identify and manage any potential conflicts of interest concerning its managers, employees, or any person directly or indirectly linked to them by close links.

3. A trade repository shall establish adequate policies and procedures sufficient to ensure its compliance, including of its managers and employees, with all the provisions of this Regulation.

▼B

4. A trade repository shall maintain and operate an adequate organisational structure to ensure continuity and orderly functioning of the trade repository in the performance of its services and activities. It shall employ appropriate and proportionate systems, resources and procedures.

5. Where a trade repository offers ancillary services such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression services, the trade repository shall maintain those ancillary services operationally separate from the trade repository's function of centrally collecting and maintaining records of derivatives.

6. The senior management and members of the board of a trade repository shall be of sufficiently good repute and experience so as to ensure the sound and prudent management of the trade repository.

7. A trade repository shall have objective, non-discriminatory and publicly disclosed requirements for access by undertakings subject to the reporting obligation under Article 9. A trade repository shall grant service providers non-discriminatory access to information maintained by the trade repository, on condition that the relevant counterparties have provided their consent. Criteria that restrict access shall only be permitted to the extent that their objective is to control the risk to the data maintained by a trade repository.

8. A trade repository shall publicly disclose the prices and fees associated with services provided under this Regulation. It shall disclose the prices and fees of each service provided separately, including discounts and rebates and the conditions to benefit from those reductions. It shall allow reporting entities to access specific services separately. The prices and fees charged by a trade repository shall be cost-related.

Article 79

Operational reliability

1. A trade repository shall identify sources of operational risk and minimise them through the development of appropriate systems, controls and procedures. Such systems shall be reliable and secure and have adequate capacity to handle the information received.

2. A trade repository shall establish, implement and maintain an adequate business continuity policy and disaster recovery plan aiming at ensuring the maintenance of its functions, the timely recovery of operations and the fulfilment of the trade repository's obligations. Such a plan shall at least provide for the establishment of backup facilities.

3. A trade repository from which registration has been withdrawn shall ensure orderly substitution including the transfer of data to other trade repositories and the redirection of reporting flows to other trade repositories.

▼B

Article 80

Safeguarding and recording

1. A trade repository shall ensure the confidentiality, integrity and protection of the information received under Article 9.

2. A trade repository may only use the data it receives under this Regulation for commercial purposes if the relevant counterparties have provided their consent.

3. A trade repository shall promptly record the information received under Article 9 and shall maintain it for at least 10 years following the termination of the relevant contracts. It shall employ timely and efficient record keeping procedures to document changes to recorded information.

4. A trade repository shall calculate the positions by class of derivatives and by reporting entity based on the details of the derivative contracts reported in accordance with Article 9.

5. A trade repository shall allow the parties to a contract to access and correct the information on that contract in a timely manner.

6. A trade repository shall take all reasonable steps to prevent any misuse of the information maintained in its systems.

A natural person who has a close link with a trade repository or a legal person that has a parent undertaking or a subsidiary relationship with the trade repository shall not use confidential information recorded in a trade repository for commercial purposes.

Article 81

Transparency and data availability

1. A trade repository shall regularly, and in an easily accessible way, publish aggregate positions by class of derivatives on the contracts reported to it.

2. A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.

3. A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:

(a) ESMA;

(b) the ESRB;

▼B

(c) the competent authority supervising CCPs accessing the trade repository;

(d) the competent authority supervising the trading venues of the reported contracts;

(e) the relevant members of the ESCB;

(f) the relevant authorities of a third country that has entered into an international agreement with the Union as referred to in Article 75;

(g) supervisory authorities appointed under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids ([1]);

(h) the relevant Union securities and market authorities;

(i) the relevant authorities of a third country that have entered into a cooperation arrangement with ESMA as referred to in Article 76;

(j) the Agency for the Cooperation of Energy Regulators.

4. ESMA shall share the information necessary for the exercise of their duties with other relevant Union authorities.

5. In order to ensure consistent application of this Article, ESMA shall, after consulting the members of the ESCB, develop draft regulatory technical standards specifying the frequency and the details of the information referred to in paragraphs 1 and 3 as well as operational standards required in order to aggregate and compare data across repositories and for the entities referred to in paragraph 3 to have access to information as necessary. Those draft regulatory technical standards shall aim to ensure that the information published under paragraph 1 is not capable of identifying a party to any contract.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 82

Exercise of the delegation

1. The power to adopt delegated acts is conferred to the Commission subject to the conditions laid down in this Article.

([1]) OJ L 142, 30.4.2004, p. 12.

▼B

2. The delegation of power referred to in Article 1(6), 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. Before adopting a delegated act, the Commission shall endeavour to consult ESMA.

4. A delegation of power referred to in Article 1(6), 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 power specified in that decision. The decision to revoke shall take effect on the day following that of its publication in the *Official Journal of the European Union* or on a later date specified therein. It shall not affect the validity of any delegated acts already in force.

5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

6. A delegated act adopted pursuant to Article 1(6), Article 64(7), Article 70, Article 72(3) and Article 85(2) shall enter into force only if no objection has been expressed by either the European Parliament or the Council within a period of three months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament or 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.

TITLE VIII

COMMON PROVISIONS

Article 83

Professional secrecy

1. The obligation of professional secrecy shall apply to all persons who work or have worked for the competent authorities designated in accordance with Article 22 and the authorities referred to in Article 81(3), for ESMA, or for auditors and experts instructed by the competent authorities or ESMA. No confidential information that those persons receive in the course of their duties shall be divulged to any person or authority, except in summary or aggregate form such that an individual CCP, trade repository or any other person cannot be identified, without prejudice to cases covered by criminal or tax law or to this Regulation.

2. Where a CCP has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings where necessary for carrying out the proceeding.

▼B

3. Without prejudice to cases covered by criminal or tax law, the competent authorities, ESMA, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Regulation may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Regulation or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them or in the context of administrative or judicial proceedings specifically relating to the exercise of those functions, or both. Where ESMA, the competent authority or another authority, body or person communicating information consents thereto, the authority receiving the information may use it for other non-commercial purposes.

4. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraphs 1, 2 and 3. However, those conditions shall not prevent ESMA, the competent authorities or the relevant central banks from exchanging or transmitting confidential information in accordance with this Regulation and with other legislation applicable to investment firms, credit institutions, pension funds, UCITS, AIFMs, insurance and reinsurance intermediaries, insurance undertakings, regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.

5. Paragraphs 1, 2 and 3 shall not prevent the competent authorities from exchanging or transmitting confidential information, in accordance with national law, that has not been received from a competent authority of another Member State.

Article 84

Exchange of information

1. Competent authorities, ESMA, and other relevant authorities shall, without undue delay, provide one another with the information required for the purposes of carrying out their duties.

2. Competent authorities, ESMA, other relevant authorities and other bodies or natural and legal persons receiving confidential information in the exercise of their duties under this Regulation shall use it only in the course of their duties.

3. Competent authorities shall communicate information to the relevant members of the ESCB where such information is relevant for the exercise of their duties.

TITLE IX

TRANSITIONAL AND FINAL PROVISIONS

Article 85

Reports and review

1. By 17 August 2015, the Commission shall review and prepare a general report on this Regulation. The Commission shall submit the report to the European Parliament and the Council, together with any appropriate proposals.

▼B

The Commission shall in particular:

(a) assess, in cooperation with the members of the ESCB, the need for any measure to facilitate the access of CCPs to central bank liquidity facilities;

(b) assess, in coordination with ESMA and the relevant sectoral authorities, the systemic importance of the transactions of non-financial firms in OTC derivatives and, in particular, the impact of this Regulation on the use of OTC derivatives by non-financial firms;

(c) assess, in the light of experience, the functioning of the supervisory framework for CCPs, including the effectiveness of supervisory colleges, the respective voting modalities laid down in Article 19(3), and the role of ESMA, in particular during the authorisation process for CCPs;

(d) assess, in cooperation with ESMA and ESRB, the efficiency of margining requirements to limit procyclicality and the need to define additional intervention capacity in this area;

(e) assess in cooperation with ESMA the evolution of CCP's policies on collateral margining and securing requirements and their adaptation to the specific activities and risk profiles of their users.

The assessment referred to in point (a) of the first subparagraph shall take into account any result of ongoing work between central banks at Union and international level. The assessment shall also take into account the principle of independence of central banks and their right to provide access to liquidity facilities at their own discretion as well as the potential unintended effect on the behaviour of the CCPs or the internal market. Any accompanying proposals shall not, either directly or indirectly, discriminate against any Member State or group of Member States as a venue for clearing services.

2. By 17 August 2014, the Commission shall prepare a report, after consulting ESMA and EIOPA, assessing the progress and effort made by CCPs in developing technical solutions for the transfer by pension scheme arrangements of non-cash collateral as variation margins, as well as the need for any measures to facilitate such solution. If the Commission considers that the necessary effort to develop appropriate technical solutions has not been made and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners remain unchanged, it shall be empowered to adopt delegated acts in accordance with Article 82 to extend the three-year period referred to in Article 89(1) once by two years and once by one year.

▼B

3. ESMA shall submit to the Commission reports:

(a) on the application of the clearing obligation under Title II and in particular the absence of clearing obligation for OTC derivative contracts entered into before the date of entry into force of this Regulation;

(b) on the application of the identification procedure under Article 5(3);

(c) on the application of the segregation requirements laid down in Article 39;

(d) on the extension of the scope of interoperability arrangements under Title V to transactions in classes of financial instruments other than transferable securities and money-market instruments;

(e) on the access of CCPs to trading venues, the effects on competitiveness of certain practices, and the impact on liquidity fragmentation;

(f) on ESMA's staffing and resources needs arising from the assumption of its powers and duties in accordance with this Regulation;

(g) on the impact of the application of additional requirements by Member States pursuant to Article 14(5).

Those reports shall be communicated to the Commission by 30 September 2014 for the purposes of paragraph 1. They shall also be submitted to the European Parliament and the Council.

4. The Commission shall, in cooperation with the Member States and ESMA, and after requesting the assessment of the ESRB, draw up an annual report assessing any possible systemic risk and cost implications of interoperability arrangements.

The report shall focus at least on the number and complexity of such arrangements, and the adequacy of risk-management systems and models. The Commission shall submit the report to the European Parliament and the Council, together with any appropriate proposals.

The ESRB shall provide the Commission with its assessment of any possible systemic risk implications of interoperability arrangements.

5. ESMA shall present an annual report to the European Parliament, the Council and the Commission on the penalties imposed by competent authorities, including supervisory measures, fines and periodic penalty payments.

Article 86

Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC [1]. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

[1] OJ L 191, 13.7.2001, p. 45.

▼B

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 87

Amendment to Directive 98/26/EC

1. In Article 9(1) of Directive 98/26/EC, the following subparagraph is added:

'Where a system operator has provided collateral security to another system operator in connection with an interoperable system, the rights of the providing system operator to that collateral security shall not be affected by insolvency proceedings against the receiving system operator.'.

2. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with point (1) by 17 August 2014. They shall forthwith inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to Directive 98/26/EC or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 88

Websites

1. ESMA shall maintain a website which provides details of the following:

(a) contracts eligible for the clearing obligation under Article 5;

(b) penalties imposed for breaches of Articles 4, 5 and 7 to 11;

(c) CCPs authorised to offer services or activities in the Union that are established in the Union, and the services or activities which they are authorised to provide or perform, including the classes of financial instruments covered by their authorisation;

(d) penalties imposed for breaches of Titles IV and V;

(e) CCPs authorised to offer services or activities in the Union established in a third country, and the services or activities which they are authorised to provide or perform, including the classes of financial instruments covered by their authorisation;

(f) trade repositories authorised to offer services or activities in the Union;

(g) fines and periodic penalty payments imposed in accordance with Articles 65 and 66;

(h) the public register referred to in Article 6.

▼B

2. For the purposes of points (b), (c) and (d) of paragraph 1, competent authorities shall maintain websites, which shall be linked to the ESMA website.

3. All websites referred to in this Article shall be publicly accessible and regularly updated, and shall provide information in a clear format.

Article 89

Transitional provisions

1. For three years after the entry into force of this Regulation, the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements as defined in Article 2(10). The transitional period shall also apply to entities established for the purpose of providing compensation to members of pension scheme arrangements in case of a default.

The OTC derivative contracts, which would otherwise be subject to the clearing obligation under Article 4, entered into by those entities during this period shall be subject to the requirements laid down in Article 11.

2. In relation to pension scheme arrangements referred to in Article 2(10)(c) and (d) the exemption referred to in paragraph 1 of this Article shall be granted by the relevant competent authority for types of entities or types of arrangements. After receiving the request, the competent authority shall notify ESMA and EIOPA. Within 30 calendar days of receipt of the notification ESMA, after consulting EIOPA, shall issue an opinion assessing compliance of the type of entities or the type of arrangements with Article 2(10)(c) or (d) as well as the reasons why an exemption is justified due to difficulties in meeting the variation margin requirements. The competent authority shall only grant an exemption where it is fully satisfied that the type of entities or the type of arrangements complies with Article 2(10)(c) or (d) and that they encounter difficulties in meeting the variation margin requirements. The competent authority shall adopt a decision within ten working days of receipt of ESMA's opinion, taking due account of that opinion. If the competent authority does not agree with ESMA's opinion, it shall give full reasons in its decision and shall explain any significant deviation therefrom.

ESMA shall publish on its website a list of types of entities and types of arrangements referred to in Article 2(10)(c) and (d) which has been granted an exemption in accordance with the first subparagraph. To further strengthen consistency in supervisory outcomes, ESMA shall conduct a peer review of the entities included on the list every year in accordance with Article 30 of Regulation (EU) No 1095/2010.

▼B

3. A CCP that has been authorised in its Member State of establishment to provide clearing services in accordance with the national law of that Member State before all the regulatory technical standards under Articles 4, 5, 8 to 11, 16, 18, 25, 26, 29, 34, 41, 42, 44, 45, 46, 47, 49, 56 and 81 are adopted by the Commission, shall apply for authorisation under Article 14 for the purposes of this Regulation within six months of the date of entry into force of all the regulatory technical standards under Articles 16, 25, 26, 29, 34, 41, 42, 44, 45, 47 and 49.

A CCP established in a third country, which has been recognised to provide clearing services in a Member State in accordance with the national law of that Member State before all the regulatory technical standards under Articles 16, 26, 29, 34, 41, 42, 44, 45, 47 and 49 are adopted by the Commission, shall apply for recognition under Article 25 for the purposes of this Regulation within six months of the date of entry into force of all the regulatory technical standards under Articles 16, 26, 29, 34, 41, 42, 44, 45, 47 and 49.

4. Until a decision is made under this Regulation on the authorisation or recognition of a CCP, the respective national rules on authorisation and recognition of CCPs shall continue to apply and the CCP shall continue to be supervised by the competent authority of its Member State of establishment or recognition.

5. Where a competent authority authorised a CCP to clear a given class of derivatives in accordance with the national law of its Member State before all the regulatory technical standards under Articles 16, 26, 29, 34, 41, 42, 45, 47 and 49 are adopted by the Commission, the competent authority of that Member State shall notify ESMA of that authorisation within one month of the date of entry into force of the regulatory technical standards under Article 5(1).

Where a competent authority recognised a CCP established in a third country to provide clearing services in accordance with the national law of its Member State before all the regulatory technical standards under Articles 16, 26, 29, 34, 41, 42, 45, 47 and 49 are adopted by the Commission, the competent authority of that Member State shall notify ESMA of that recognition within one month of the date of entry into force of the regulatory technical standards under Article 5(1).

▼M1

▼C1

5a. Until 15 months after the date of entry into force of the latest of the regulatory technical standards referred to in Articles 16, 25, 26, 29, 34, 41, 42, 44, 45, 47 and 49, or until a decision is made under Article 14 on the authorisation of the CCP, whichever is earlier, that CCP shall apply the treatment specified in the third subparagraph of this paragraph.

Until 15 months after the date of entry into force of the latest of the regulatory technical standards referred to in Articles 16, 26, 29, 34, 41, 42, 44, 45, 47 and 49, or until a decision is made under Article 25 on the recognition of the CCP, whichever is earlier, that CCP shall apply the treatment specified in the third subparagraph of this paragraph.

▼C1

Until the deadlines defined in the first two subparagraphs of this paragraph, and subject to the fourth subparagraph of this paragraph, where a CCP neither has a default fund nor has in place a binding arrangement with its clearing members that allows it to use all or part of the initial margin received from its clearing members as if they were pre-funded contributions, the information it is to report in accordance with Article 50c(1) shall include the total amount of initial margin it has received from its clearing members.

The deadlines referred to in the first and second subparagraphs of this paragraph may be extended by six months in accordance with a Commission implementing act adopted pursuant to Article 497(3) of Regulation (EU) No 575/2013.

▼B

6. A trade repository that has been authorised or registered in its Member State of establishment to collect and maintain the records of derivatives in accordance with the national law of that Member State before all the regulatory and implementing technical standards under Articles 9, 56 and 81 are adopted by the Commission, shall apply for registration under Article 55 within six months of the date of entry into force of those regulatory and implementing technical standards.

A trade repository established in a third country, which is allowed to collect and maintain the records of derivatives in a Member State in accordance with the national law of that Member State before all the regulatory and implementing technical standards under Articles 9, 56 and 81 are adopted by the Commission, shall apply for recognition under Article 77 within six months of the date of entry into force of those regulatory and implementing technical standards.

7. Until a decision is made under this Regulation on the registration or recognition of a trade repository, the respective national rules on authorisation, registration and recognition of trade repositories shall continue to apply and the trade repository shall continue to be supervised by the competent authority of its Member State of establishment or recognition.

8. A trade repository that has been authorised or registered in its Member State of establishment to collect and maintain the records of derivatives in accordance with the national law of that Member State before the regulatory and implementing technical standards under Articles 56 and 81 are adopted by the Commission, can be used to meet the reporting requirement under Article 9 until the time a decision is made on the registration of the trade repository under this Regulation.

A trade repository established in a third country which has been allowed to collect and maintain the records of derivatives in accordance with the national law of a Member State before all the regulatory and implementing technical standards under Articles 56 and 81 are adopted by the Commission, can be used to meet the reporting requirement under Article 9 until the time a decision is made on the recognition of the trade repository under this Regulation.

▼B

9. Notwithstanding Article 81(3)(f), where no international agreement is in place between a third country and the Union as referred to in Article 75, a trade repository may make the necessary information available to the relevant authorities of that third country until 17 August 2013 provided that it notifies ESMA.

Article 90

Staff and resources of ESMA

By 31 December 2012, 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.

Article 91

Entry into force

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

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

▼B

ANNEX I

List of infringements referred to in Article 65(1)

I. Infringements relating to organisational requirements or conflicts of interest:

(a) a trade repository infringes Article 78(1) by not having robust governance arrangements which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility and adequate internal control mechanisms, including sound administrative and accounting procedures, which prevent the disclosure of confidential information;

(b) a trade repository infringes Article 78(2) by not maintaining or operating effective written organisational and administrative arrangements to identify and manage any potential conflicts of interest concerning its managers, its employees, and any person directly or indirectly linked to them by close links;

(c) a trade repository infringes Article 78(3) by not establishing adequate policies and procedures sufficient to ensure compliance, including that of its managers and employees, with all the provisions of this Regulation;

(d) a trade repository infringes Article 78(4) by not maintaining or operating an adequate organisational structure to ensure continuity and orderly functioning of the trade repository in the performance of its services and activities;

(e) a trade repository infringes Article 78(5) by not separating operationally its ancillary services from its function of centrally collecting and maintaining records of derivatives;

(f) a trade repository infringes Article 78(6) by not ensuring that its senior management and the members of the board are of sufficiently good repute and experience so as to ensure the sound and prudent management of the trade repository;

(g) a trade repository infringes Article 78(7) by not having objective non-discriminatory and publicly disclosed requirements for access by services providers and undertakings subject to the reporting obligation under Article 9;

(h) a trade repository infringes Article 78(8) by not publicly disclosing the prices and fees associated with services provided under this Regulation, by not allowing reporting entities to access specific services separately or by charging prices and fees that are not cost related.

II. Infringements relating to operational requirements:

(a) a trade repository infringes Article 79(1) by not identifying sources of operational risk or by not minimising those risks through the development of appropriate systems, controls and procedures;

(b) a trade repository infringes Article 79(2) by not establishing, implementing or maintaining an adequate business continuity policy and disaster recovery plan aimed at ensuring the maintenance of its functions, the timely recovery of operations and the fulfilment of the trade repository's obligations;

▼B

(c) a trade repository infringes Article 80(1) by not ensuring the confidentiality, integrity or protection of the information received under Article 9;

(d) a trade repository infringes Article 80(2) by using the data that it receives under this Regulation for commercial purposes without the relevant counterparties having provided their consent;

(e) a trade repository infringes Article 80(3) by not promptly recording the information received under Article 9 or by not maintaining it for at least 10 years following the termination of the relevant contracts or by not employing timely and efficient record-keeping procedures to document changes to recorded information;

(f) a trade repository infringes Article 80(4) by not calculating the positions by class of derivatives and by reporting entity based on the details of the derivative contracts reported in accordance with Article 9;

(g) a trade repository infringes Article 80(5) by not allowing the parties to a contract to access and correct the information on that contract in a timely manner;

(h) a trade repository infringes Article 80(6) by not taking all reasonable steps to prevent any misuse of the information maintained in its systems.

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

(a) a trade repository infringes Article 81(1) by not regularly publishing, in an easily accessible way, aggregate positions by class of derivatives on the contracts reported to it;

(b) a trade repository infringes Article 81(2) by not allowing the entities referred to in Article 81(3) direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.

IV. Infringements relating to obstacles to the supervisory activities:

(a) a trade repository infringes Article 61(1) by providing incorrect or misleading information in response to a simple request for information by ESMA in accordance with Article 61(2) or in response to a decision by ESMA requiring information in accordance with Article 61(3);

(b) a trade repository provides incorrect or misleading answers to questions asked pursuant to Article 62(1)(c);

(c) a trade repository does not comply in due time with a supervisory measure adopted by ESMA pursuant to Article 73.

▼B

ANNEX II

List of the coefficients linked to aggravating and mitigating factors for the application of Article 65(3)

The following coefficients shall be applicable, cumulatively, to the basic amounts referred to in Article 65(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 trade repository, 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 data it maintains, 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 trade repository'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 trade repository'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 trade repository has brought quickly, effectively and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply;

(d) if the trade repository has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.