



[Index](#) [Previous](#) [Next](#) [Full text](#)

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[Document stages in plenary](#)

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[Explanations of votes](#)

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## Texts adopted

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**Derivatives, central counterparties and trade repositories \*\*\*I**

[P7\\_TA-PROV\(2011\)0310](#)

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- [Text](#)
- [Consolidated text](#)

► **Proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (COM(2010)0484 – C7-0265/2010 – 2010/0250(COD))**



►  
(Ordinary legislative procedure: first reading)



The proposal was amended on 5 July 2011 as follows <sup>(1)</sup>

[Amendment No 1 unless indicated otherwise]

**AMENDMENTS BY PARLIAMENT <sup>(2)</sup>**

► **to the Commission proposal**



<sup>(1)</sup> The matter was then referred back to committee pursuant to Rule 57(2), second subparagraph (**A7-0223/2011**).

<sup>(2)</sup> \* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol ¶ .

► **REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 Economic and Social Committee<sup>(1)</sup>,

Having regard to the opinion of the European Central Bank<sup>(2)</sup>,

Acting in accordance with the ordinary legislative procedure,

## Whereas:

- (1) At the request of the Commission, a report published on 25 February 2009 by a high-level group of experts chaired by J. de Larosière concluded that the supervisory framework needed to be strengthened to reduce the risk and severity of future financial crisis and recommended far-reaching reforms to the structure of supervision of the financial sector in the Union, including the creation of a European System of Financial Supervisors, comprising three European Supervisory Authorities, one each for the banking, insurance and occupational pensions and the securities and markets sectors, and the creation of a European Systemic Risk Board.
- (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.
- (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, namely the European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>(3)</sup> (EBA), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council<sup>(4)</sup>, (EIOPA) and the European Supervisory Authority (European Securities and Markets Authority) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>(5)</sup> (ESMA) **Those authorities have a crucial role to play in safeguarding the stability of the financial sector. It is therefore essential to continuously ensure that the development of their work is a matter of high political priority and that they are adequately resourced.**
- (4) Over-the-counter (OTC) derivatives 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, the G20 Leaders agreed that all standardised OTC derivative contracts should be cleared through central counterparties (CCP) by the end of 2012 and that OTC derivative contracts should be reported to trade repositories. In June 2010, the 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 derivatives in an internationally consistent and non-discriminatory way **with a view to improving the OTC derivatives market and creating more powerful tools to hold firms to account for the risks they take**. The Commission will endeavour to ensure that those commitments are implemented in a similar way by our international partners.
- (6) 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 derivatives.
- (7) ESMA should act within the scope of this Regulation by safeguarding the stability of financial markets in emergency situations and ensuring the consistent application of Union rules by national supervisory authorities and settling disagreements between them. It is also entrusted with developing legally binding regulatory technical standards and has a central role in the authorisation and monitoring of CCPs and trade repositories.
- (8) 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<sup>(6)</sup>.
- (8a) The Commission, in its Communication of 2 February 2011 entitled 'Tackling the challenges in commodity markets and on raw materials', identified the increased financialisation of international raw material markets as a strategic challenge to Union's economies. The Commission reaffirmed the need for more transparency in the trading of raw materials as well as the positive potential effect of position limits in derivative trading in commodities. With a view to achieving an effective decrease of the unhealthy high trading volume in raw material markets, the Commission should, in particular, assess the effects of restricting admission to trade on raw materials stock exchanges to physical traders only, excluding financial institutions. In the incoming reviews of Directive 2004/39/EC and Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>(7)</sup>, the Commission should, in particular, address the problem of price volatility on food and agricultural markets and provide for appropriate requirements to prevent systemic risks and manipulative practices, including margin requirements, position limits and punitive disgorgement of profits.**
- (9) Incentives to promote the use of CCPs have not proven to be sufficient to ensure that standardised OTC derivatives are in fact cleared. Mandatory CCP clearing requirements for those OTC derivatives that can be cleared are therefore necessary.
- (10) 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.

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

(12) This Regulation sets out the criteria for determining the eligibility to the clearing obligation. In view of its pivotal role, ESMA should decide, **after consulting the Commission and the European Systemic Risk Board established by Regulation (EU) No 1092/2010 of the European Parliament and the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board** <sup>(8)</sup> (ESRB), whether a class of derivatives meets the eligibility criteria, **whether the clearing obligation should be applied** and from when the clearing obligation should take effect, **including, where appropriate, any 'phase-in' implementation standards**. **A gradual implementation of the clearing obligation could be either in terms of proportion of the eligible classes that are to be cleared, or in terms of the types of market participants that are to comply with the clearing obligation**. **Bilateral clearing should continue to be authorised if the requirements for clearing are not met for certain categories of derivatives within a class of derivatives, as is sometimes the case for covered bonds.**

**(12a) In determining whether a class of derivatives is to be subject to clearing requirements, ESMA should aim for a reduction in systemic risk and avoidance of systemic repercussions. This includes taking into account in the assessment factors such as the future date from which the clearing obligation takes effect, the interconnectedness of the relevant class of derivative in the market, the level of contractual and economic standardisation of contracts, the effect on the performance and competitiveness of EU companies in the global markets, the operational and risk management ability of CCPs to handle the volume and obligations of this directive, the degree of settlement risk and counterparty credit risk and the impact of cost on the real economy and investment in particular.**

**(12b) The characteristics of the foreign exchange market (daily volume of the transaction, currency pairs, importance of third country transactions, settlement risk addressed through a robust existing mechanism) call for an appropriate regime that would rely notably on preliminary international convergence and mutual recognition of the relevant infrastructure.**

**(12c) In drafting delegated acts and technical implementing standards, special consideration should be given to the needs of long-term savings institutions to provide long-term savings products to consumers. To that end this Regulation should not result in excessive costs for long-term savings institutions. One of the tools by which to achieve that objective is the proper application of the proportionality principle.**

**(12d) For long-term savings institutions, the posting of government and high-quality corporate bonds as an alternative to cash should be permitted to cover initial and variation margins.**

(13) For an OTC derivative contract to be cleared, it is necessary for both parties to that contract to consent. Therefore, 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. **Nevertheless, the Commission and ESMA should ensure that mandatory clearing arrangements also protect investors.**

**(13a) In general, the obligations under this Regulation should apply only to future transactions, thereby making a smooth transition possible and enhancing the stability of the system while reducing the need for subsequent adjustments. In that connection, clearing and reporting obligations should be dealt with in different ways. Whilst a retrospective clearing obligation is hardly feasible on legal grounds, given the need for post-collateralisation, the same is not true of a retrospective reporting obligation. In this case, on the basis of the results of an impact study, and using rules tailored to classes of derivatives, technical requirements and remaining periods to maturity, a retrospective reporting obligation could be laid down.**

(14) OTC derivatives that are not considered suitable for CCP clearing still entail counterparty credit risk and therefore, rules should be established to manage that risk. Those rules should be only applicable to the market participants that are subject to the clearing obligation.

**(14a) It is important that necessarily different treatment of non-financial counterparties extends from this Regulation to 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** <sup>(9)</sup> **and Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions** <sup>(10)</sup>. **Counterparties who are not mandated to clear centrally should not face higher capital charges on continued bilateral arrangements.**

**(14b) The regulatory capital charge for financial counterparties dealing in OTC derivatives which are cleared bilaterally and not in a central clearing house should be able to be calculated in relation to the levels of potential loss associated with the risk of default, measured for each counterparty.**

(15) Rules on clearing and reporting obligations and rules on risk mitigation techniques for derivative contracts not cleared by a CCP should apply to financial counterparties, namely investment firms **authorised under** Directive 2004/39/EC, credit institutions **authorised under** Directive 2006/48/EC, insurance undertakings **authorised under** 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 assurance<sup>(11)</sup>, assurance undertakings **authorised under** Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance<sup>(12)</sup>, reinsurance undertakings

**authorised under** Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance<sup>(13)</sup>, undertakings for collective investments in transferable securities (UCITS) **authorised under** 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)<sup>(14)</sup>, and alternative investment funds **managed by alternative investment fund managers authorised or registered under** Directive 2011/61/EU<sup>(15)</sup> of the European Parliament and of the Council<sup>(16)</sup> on Alternative Investment Fund Managers<sup>(17)</sup>.

**(15a) The activities of UCITS which carry out only low-volume derivatives transactions should therefore be assessed in order to determine on what precise basis they should be classified as financial counterparties within the meaning of this Regulation. In that connection, steps should be taken to prevent distortions of competition and reduce the scope for abuse. For that reason, the clearing threshold for non-financial counterparties should not automatically be applied to UCITS. Instead, a narrowly defined derogation should be considered and introduced.**

**(15b) UCITS should be within the scope of this Regulation, as the diversified investment policies of UCITS also include transactions in derivative contracts. UCITS have in recent years considerably grown and represent an estimated 50 % of Union GDP, having also a global systemic importance considering their significant investment capacity.**

**(15c) Pension funds 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<sup>(18)</sup> with a risk-averse risk-profile and that use derivatives to hedge their pension liability risks should be made subject to the reporting obligations and the risk-mitigation techniques for OTC derivative contracts not cleared by a CCP as laid down in this Regulation. Those pensions should not, however, be subject to the clearing obligation in order to avoid disproportionate costs for pensioners.**

(16) Where appropriate, rules applicable to financial counterparties should also apply to non-financial counterparties. It is recognised that non-financial counterparties use OTC contracts in order to cover themselves against commercial risks directly linked to their commercial 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 derivatives and to the size of the exposures that it has in those instruments. **Non-financial counterparties should explain the use of derivatives through their annual report or other appropriate means.** When establishing the threshold for the clearing obligation, ESMA should consult all relevant authorities, such as regulators responsible for commodity markets, **and the non-financial counterparties**, in order to ensure that the particularities of those sectors are fully taken into account. Moreover, by 31 December 2013, the Commission should assess the systemic importance of the transactions of non-financial firms in OTC derivatives in different sectors, including in the energy sector. **Should a comparable set of EU rules tailored to individual sectors come into force, the Commission should immediately consider whether the sector should be removed from the scope of this Regulation and should put forward appropriate legislative proposals.**

**(16a) The clearing threshold for non-financial counterparties is a very important figure for all market participants. Both qualitative and quantitative criteria should be assessed and given a suitable weighting when the clearing threshold is set. In that connection, appropriate efforts should be made to standardise OTC contracts to a considerable extent and to recognise the importance of risk mitigation for non-financial counterparties in the context of their normal business activity. The introduction of thresholds based on the relevance of the undertaking for the market as a whole or for an OTC market segment could be supplemented by the use of operational risk ratios.**

**(16b) With a view to exempting small and medium-sized enterprises (SMEs) from the clearing obligation, consideration should also be given to sector-specific OTC clearing thresholds based on the total volume of contracts concluded by an undertaking. In addition, ESMA should examine whether a de minimis rule might be introduced for SMEs in connection with the reporting obligation.**

**(16c) The Commission should ensure that the necessary and appropriate use of OTC derivatives by non-financial counterparties to hedge market risks arising from business operations is not undermined in terms of pricing or availability by future legislative proposals.**

(17) A contract entered into by a fund, whether managed by a fund manager or not, should be considered within the scope of this Regulation.

(18) Central banks and other national bodies performing similar functions, other public bodies charged with or intervening in the management of the public debt, and multilateral development banks listed in Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC, **the Bank for International Settlements and certain of the public sector entities defined in Article 4(18) of Directive 2006/48/EC** should be excluded from the scope of this Regulation in order to avoid limiting their powers to intervene to stabilise the market, if and when required. **Consideration should be given in advance to the issue of whether it would be responsible to grant a derogation from clearing to public sector entities within the meaning of Article 4(18) of Directive 2006/48/EC which are owned by central governments and are covered by an explicit guarantee arrangement entered into by that central government which is equivalent to assumption of liability.**

(19) As not all market participants that are subject to the clearing obligation are able to become clearing members of the CCP (**or clients of clearing members**), they should have the possibility to access CCPs as clients **or through investment firms or credit institutions that are themselves clients**.

(20) The introduction of a clearing obligation along with a process to establish which CCPs can be used for the purpose of that 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 clear transactions executed in different venues to the extent that those venues comply with the operational and technical requirements established by the CCP, **without reference to the contract documents on the basis of which the parties concluded the relevant OTC derivatives transaction, provided that the documents are consistent with market standards**. Generally, the Commission should continue to monitor closely the evolution of the OTC derivatives market and should, where necessary, intervene in order to prevent such competitive distortions from occurring in the internal market.

(21) In order to identify the relevant classes of OTC derivatives 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 OTC 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 over the threshold, in order to provide ESMA with comparative data. If such retrospective reporting is not feasible for any classes of OTC derivatives, an appropriate justification should be provided to the respective trade repository.**

(22) It is important that market participants report all details regarding OTC derivative contracts they have entered into to trade repositories. As a result, information on the risks inherent in OTC derivatives markets will be centrally stored and easily accessible to ESMA, the relevant competent authorities and the relevant central banks of the European System of Central Banks (ESCB). **The Commission and ESMA should consider extending the applicability of the reporting obligation to embedded derivatives.**

**(22a) Institutions for occupational retirement provision as defined in Article 6(a) of Directive 2003/41/EC or arrangements offering similar level of risk mitigation and recognised under national law for the purpose of retirement provision using derivative contracts that are objectively measurable as reducing risks directly related to the solvency of the institution that operate a pension scheme should be subject to the provisions for bilateral collateralisation as set out in this Regulation to be reviewed in 2014.**

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

**(23a) ESMA, EIOPA and EBA should be provided with adequate resources in order to effectively perform the tasks they are given in this Regulation.**

(24) The obligation to report any amendment to or termination of a contract should apply to the original counterparties to that contract and to any other entities reporting on behalf of the original counterparties. A counterparty or its employees, who reports the full details of a contract to a trade repository on behalf of another counterparty in accordance with this Regulation should not be in breach of any restriction on disclosure.

(25) There should be effective, proportionate and dissuasive penalties with regard to the clearing and reporting obligations. Member States should enforce those penalties in a manner that does not reduce the effectiveness of those rules. **Member States should ensure that the penalties imposed are publicly disclosed and that assessment reports on the effectiveness of existing rules are published at regular intervals.**

(26) Authorisation of a CCP should be conditional on a minimum amount of initial capital. Capital, together with retained earnings and reserves of a CCP, should be proportionate to the size and activity of the CCP at all times in order to ensure that it is adequately capitalised against operational or residual risks and that it is able to conduct an orderly winding down or restructuring of its operations if necessary.

(27) 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.

**(27a) The relevant competent authority should satisfy itself that a CCP maintains sufficient available financial resources (which should include a minimum contribution of own funds of the CCP), in accordance with guidelines issued by ESMA.**

(28) It is therefore necessary, for regulatory and harmonisation purposes, to ensure that financial counterparties only use CCPs which comply with the requirements laid down in this Regulation.

(29) Direct rules regarding the authorisation and supervision of CCPs are an essential corollary to the obligation to clear OTC derivatives. It is appropriate that competent authorities retain the responsibility for all aspects of the authorisation and the supervision of CCPs, including the responsibility to verify that the applicant CCP is compliant 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<sup>(19)</sup>, 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.

(30) Where a CCP risks insolvency, the fiscal responsibility may lie predominantly with the Member State in which it 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 **ESMA should be** involved in the authorisation and supervisory process. This will avoid divergent national measures or practices and obstacles to the internal market. **ESMA should involve**

**other competent authorities in the Member States concerned in the work of preparing recommendations and decisions.**

(31) It is necessary to reinforce provisions on exchange of information between competent authorities and to strengthen the duties of assistance and cooperation between them. ■ For the exchange of information, strict professional secrecy is needed. It is essential, due to the wide impact of OTC derivative contracts, that other **regulatory** authorities ■ have access to information necessary to the exercise of their functions.

**(31a) 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 the currency of a third country, or to require a CCP to have a banking licence in order to have access to day-to-day central bank liquidity.**

(32) In view of the global nature of financial markets, **agreements with CCPs established in third countries on the provision of clearing services within the Union are necessary**. **Such agreements should cover the authorisation by ESMA and the competent authority of the Member State in which the CCP concerned intends to provide clearing services of authorisation of a CCP established in a third country or the granting by the Commission of an exemption from the authorisation conditions and procedure**, provided that the Commission has recognised the legal and supervisory framework of that third country as equivalent to the Union framework and that the **requisite** conditions are met. 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 ensure financial stability.

**(32a) 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 trading partners.**

(33) CCPs 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 the board should be independent members. Those independent members should not act as independent members in more than one other CCP. Their remuneration should not be linked in any way with the performance of the CCP.** However, different governance arrangements and ownership structures of a CCP 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 should 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.

(34) A CCP may outsource functions other than its risk management functions, but only where those outsourced functions do not impact on the proper operation of the CCP and on its ability to manage risks. **Outsourcing of functions should be approved by the risk committee of the CCP.**

(35) The participation requirements for a CCP should therefore 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.

(36) Clients of clearing members that clear their OTC derivatives 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 addition, the accounts of members in default should be transferable to other members.**

**(36a) Any form of legal uncertainty regarding the effectiveness and enforceability of a CCP's rules and procedures governing the demarcation of the assets and obligations of the clearing members and their clients and the transfer of positions in response to pre-determined events would undermine the stability of a CCP. The events whose nature is such as to trigger a transfer of positions should be specified in advance in order to safeguard the scope of the protection provided.**

(37) 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 and maintain a default fund and other financial resources to cover potential losses. **The development of a highly robust risk management should remain the primary objective of a CCP. However, it may adapt its features to the specific activities and risk profiles of the clients of the clearing members, and if deemed appropriate, may include in the scope of the highly liquid assets accepted as collateral at least cash and government bonds subject to adequate haircuts.**

**(37a) CCPs' risk management strategies should be sound, and should not transfer risk to the taxpayer.**

**(37b) The Financial Stability Board has identified CCPs as systemically important institutions. There is no common practice internationally or within the Union regarding conditions under which CCPs may access central bank liquidity facilities or may need to be licensed as credit institutions. The implementation of the clearing obligation required by this Regulation may increase the systemic importance of CCPs and the need for liquidity. The Commission should therefore be invited to take into account the results of any ongoing work between central banks, to assess, in cooperation with the ESCB, the possible need for measures to facilitate CCPs' access to central bank liquidity facilities in one or more currencies and to report to the European Parliament and the Council.**

(38) 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.

(39) 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 related to indices that are used as references to derivatives or other financial instruments.

(40) 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.

**(40a) 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.**

(41) The 'European Code of Conduct for Clearing and Settlement' of 7 November 2006<sup>(20)</sup> established a voluntary framework for **setting up** links between CCPs and trade repositories. 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 interoperable arrangements between CCPs to the extent these do not expose the relevant CCPs to risks that are not appropriately managed.

(42) Interoperability arrangements **can, in general, be** tools for greater integration of the post-trading market within the Union and regulation should be provided for. However, interoperability arrangements may expose CCPs to additional risks. Given the additional complexities involved in an interoperability arrangement between CCPs clearing OTC derivative contracts, it is appropriate at this stage to **require a grace period of three years between receiving clearing authorisation for derivatives and eligibility to apply for authorisation for interoperability as well as to** restrict the scope of **subsequent** interoperability arrangements to cash securities. However, by 30 September 2014, ESMA should submit a report to the Commission on whether **and when** an extension of that scope to other financial instruments would be appropriate.

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

(44) 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 record-keeping and data management requirements.

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

**(45a) There are areas within financial services and trading of derivative contracts where commercial and intellectual property rights may also exist. In instances where these relate to products or services which have become or impact upon industry standards there should be a requirement for licences to be available on proportionate FRAND (Fair, Reasonable and Non-Discriminatory) terms.**

(46) ESMA should be able to propose to the Commission to impose periodic penalty payments. The purpose of those periodic penalty payments should be to achieve that an infringement established by ESMA is put to an end, that complete and correct information which ESMA has requested is supplied or that trade repositories, **CCPs, their members** or other persons submit to an investigation. Moreover, for deterrence purposes and to compel trade repositories, **CCPs and their members** to comply with this Regulation, the Commission should also be able to impose fines, following a request of ESMA, where intentionally or negligently, specific provisions of this Regulation have been breached. The fine should be dissuasive and proportionate to the nature and seriousness of the breach, the duration of the breach and the economic capacity of the trade repository, **CCP or member** concerned.

(47) In order to effectively survey trade repositories, **CCPs and their members**, ESMA should have the right to conduct investigations and on-site-inspections.

(48) 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 of the freedom of movement of such data<sup>(21)</sup>.

(49) It is important to ensure international convergence of requirements for CCPs and trade repositories. This Regulation follows the recommendations developed by CPSS-IOSCO and ESCB-CESR and creates a Union framework in which CCPs can operate safely. ESMA should consider these developments when drawing up the regulatory technical standards as well as the guidelines and recommendations foreseen in this Regulation.

(50) The **power** to adopt acts in accordance with Article 290 of the Treaty **on the Functioning of the European Union and the power to endorse regulatory technical standards in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 should be delegated to the Commission** in respect of the details to be included in the notification to ESMA and in the register and the criteria for the decision of ESMA on the eligibility for the clearing obligation, on the information and clearing threshold, on the maximum time lag regarding the contract, on liquidity, on the minimum content of governance rules, on details of record keeping, on minimum content of business continuity plan and the services guaranteed, on percentages and time horizon for margin requirements, on extreme market conditions, on highly liquid collateral and haircuts, on highly liquid financial instruments and concentration limits, on details for performance of tests, on details concerning the application of a trade repository for

registration with ESMA, on fines and on details concerning the information that a trade repository should make available, as referred to in this Regulation. In defining the delegated acts, the Commission should make use of the expertise of the relevant ESAs (ESMA, EBA and EIOPA). In view of the expertise of ESMA regarding issues concerning securities and securities markets, ESMA should play a central role in advising the Commission on the preparation of the delegated acts. However, where appropriate, ESMA should consult EBA and EIOPA. [Am. 16]

**(50a) As part of the preparation for the establishment 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.**

**(51) 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 the Member States of the Commission's exercise of implementing powers <sup>(22)</sup>.** [Am. 17]

((52) Since the objectives of this Regulation, namely to lay down uniform requirements for OTC derivative contracts and to also lay down uniform requirements 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.

(53) 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.

**(53a) To ensure coherent and effective legislation and due to the close links between trading and post-trading, this Regulation should be aligned with Directive 2004/39/EC, which will determine the appropriate trading venue requirements to be imposed on the venues on which derivatives as defined in EMIR are executed. Those requirements may include transparency, access, order execution, surveillance, robustness and system safety as well as other necessary requirements.**

**(53b) The sale of complex derivative products to local public authorities calls for special attention. The Commission should include specific proposals in the incoming review of Directive 2004/39/EC to address this concern. These proposals will include specific due diligence, information and disclosure requirements,**

**HAVE ADOPTED THIS REGULATION:**

**Subject matter, scope and definitions**

Article 1

Subject matter and scope

1. This Regulation lays down uniform requirements for derivative contracts, **specific provisions to improve the transparency and risk management of the OTC derivatives market as well as** uniform requirements for the performance of activities of CCPs and trade repositories.

**In order to ensure consistent application of this Regulation, ESMA shall develop draft regulatory technical standards to lay down guidelines for the interpretation and application, for the purposes of this Regulation, of points (4) to (10) of Section C of Annex I to Directive 2004/39/EC.**

**ESMA shall submit those draft regulatory technical standards to the Commission by 30 June 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. [Am.18]**

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

3. Title V 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. **The clearing obligations of this** Regulation shall not apply to:

- (a) the members of the ESCB and other national bodies performing similar functions and other public bodies charged with or intervening in the management of the public debt;
- (b) multilateral development banks, as listed under Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC.

**(ba) the Bank for International Settlements.**

**4a. Further derogations from this Regulation shall require the adoption of a specific regulation of the European**

Article 2

Definitions

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

- (1) 'central counterparty' or 'CCP' means an entity that legally interposes itself between the counterparties to the contracts traded within one or more financial markets, becoming the buyer to every seller and the seller to every buyer and which is responsible for the operation of a clearing system;
- (2) 'trade repository' means an entity that centrally collects and maintains the records of derivatives;
- (3) 'clearing' means the process **by which a third party interposes itself, directly or indirectly, between the transaction counterparties in order to assume their rights and obligations** ;
- (4) 'class of derivatives' means a **subset of derivatives sharing common and essential characteristics which include at least the relationship with the underlying asset, the type of underlying asset, the pay-off profile and currency of notional. Derivatives belonging to the same class may have different maturities** ;
- (5) 'OTC derivatives' means derivative contracts whose execution does not take place on a regulated market **or on a third-country market considered as equivalent to a regulated market or on any other organised trading venue established under 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 in a regulated market<sup>(23)</sup> that clears such contracts through a CCP** ;
- (5a) '**regulated market**' means a **multilateral system as defined in Article 4(1)(14) of Directive 2004/39/EC**;
- (5b) '**multilateral trading facility**' or '**MTF**' means a **multilateral system as defined in Article 4(1)(15) of Directive 2004/39/EC**;
- (6) 'financial counterparty' means **an undertaking established in the Union which is an authorised investment firm as set out in Directive 2004/39/EC, an authorised credit institution as defined in Directive 2006/48/EC, an authorised insurance undertaking as defined in Directive 73/239/EEC, an authorised assurance undertaking as defined in Directive 2002/83/EC, an authorised reinsurance undertaking as defined in Directive 2005/68/EC, an authorised UCITS as defined in Directive 2009/65/EC, an authorised institution for occupational retirement provision as defined in Directive 2003/41/EC or an authorised alternative investment fund as defined in Directive 2011/61/EU**;
- (7) 'non-financial counterparty' means an undertaking established in the Union other than the entities referred to in **points (1) and (6)** ;
- (7a) '**occupational pension scheme**' means a **pension scheme established pursuant to Directive 2003/41/EC, including the authorised entities responsible for managing IORP and acting on their behalf referred to in Article 2(1) of that Directive or the appointed investment managers pursuant to Article 19(1) of that Directive or any other arrangement recognised under national law as a scheme established for the purposes of retirement provision**;
- (8) 'counterparty credit risk' means the risk that the counterparty to a transaction defaults before the final settlement of the transaction's cash flows;
- (9) 'interoperability arrangement' means an arrangement between two or more CCPs that involves a cross-system execution of transactions;
- (10) 'competent authority' means the authority designated by each Member State in accordance with Article 18 **or one or more of the ESAs** ; [Am.5]
- (11) 'clearing member' means an undertaking which participates in a CCP and which is responsible for discharging the financial obligations arising from that participation;
- (12) 'client' means an undertaking with a **direct or indirect** contractual relationship with a clearing member of a CCP **or one of its affiliates** which enables that undertaking to clear transactions **through that clearing member's use of that** CCP;
- (13) '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<sup>(24)</sup> , 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;
- (14) 'parent undertaking' means a parent undertaking within the meaning of Articles 1 and 2 of the Seventh Council Directive 83/349/EEC based on the Article 54(3)(g) of the treaty on consolidated accounts<sup>(25)</sup> ;
- (15) 'subsidiary' means a subsidiary undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;
- (16) 'control' means control as defined in Article 1 of Directive 83/349/EEC;
- (17) 'close links' means a situation in which two or more natural or legal persons are linked by:
  - (a) participation which means the ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking,
  - (b) control which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1(1) and (2) of Directive 83/349/EEC, or a similar relationship between any natural or legal person and an

undertaking or any subsidiary undertaking of a subsidiary undertaking 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.

- (18) 'capital' means capital within the meaning of Article 22 of Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions 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 ranks after all other claims;
- (19) 'reserves' means reserves as set out in Article 9 of 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<sup>(26)</sup> and profits and losses brought forward as a result of the application of the final profit or loss;
- (20) 'the board' means the administrative or supervisory board, or both, in accordance with national company law;
- (21) 'independent member of the board' means a member of the board that has no **previous or present** business, family or other relationship that raises a conflict of interest with the CCP, its controlling shareholder(s) or management or its clearing members or management;
- (22) 'senior management' means the person or persons who effectively direct the business of the CCP and the executive member or members the board;
- (22a) 'third-country clearing counterparties' means undertakings established in third countries that are considered as equivalent to financial counterparties or to the non-financial counterparties referred to in Article 7(2); such equivalence shall be deemed to apply where an undertaking established in a third country would, were it established within the Union, be classified as a financial counterparty or a non-financial counterparty referred to in Article 7(2);**
- (22b) 'segregation' shall mean at least that the assets and positions of one person shall not be used to discharge the liabilities of or claims against any other person from whom it is intended that he is segregated, and shall not be available for such purposes, especially in the event of a clearing member's insolvency;**
- (22c) 'trade compression' means the process of legally substituting a given set of derivative contracts with a different set of contracts characterised, from the perspective of each participant to the process, by:**
  - (a) a lower number of contracts and aggregated notional value; and**
  - (b) the same or a similar risk profile as the original set of derivative contracts;**
- (22d) 'acting in concert' means acting in concert as defined in Article 10(a) of Directive 2004/109/EC.**

**2. In order to ensure consistent application of point (22a) of paragraph 1, ESMA shall develop draft regulatory technical standards specifying in greater detail the criteria to be used in the classification of undertakings from third countries as third-country clearing counterparties.**

**ESMA shall submit those draft regulatory technical standards to the Commission by 30 June 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. [AMM.19]**

## **Clearing, reporting and risk mitigation of OTC Derivatives**

### **Article 3**

#### **Clearing obligations**

1. A financial counterparty **or a non-financial counterparty referred to in Article 7(2)** shall clear all OTC derivative contracts which are considered eligible pursuant to Article 4 and are concluded with other financial counterparties **or non-financial counterparties referred to in Article 7(2)** in the relevant CCPs listed in the register as referred to in Article 4(4).

That clearing obligation shall also apply to financial counterparties and to the non-financial counterparties referred to in **the first subparagraph** which enter into eligible OTC derivative contracts with **third-country clearing counterparties** .

**OTC derivatives contracts entered into before the date from which the clearing obligation takes effect for that class of derivatives are exempted from the clearing obligation.**

**That clearing obligation shall apply to all OTC derivative contracts which, following publication of ESMA decision pursuant to Article 4(2)(a), are classified as derivatives eligible for the clearing obligation.**

**(1a) There shall be no clearing obligation in the case of derivative contracts between subsidiary undertakings of the same parent company or between a parent company and a subsidiary undertaking. 'Parent companies' and 'subsidiary companies' for the purposes of this provision shall be companies thus defined under the relevant EU rules. This derogation shall not affect the reporting obligation under Article 6 or the obligations in relation to risk mitigation techniques under Article 8.**

**The exemptions shall only apply where the parent company concerned has first notified the competent authority of its home Member State in writing that they intend to make use of the exemption. The notification shall be made not less than thirty calendar days before the use of the exemption. The competent authority shall ensure that the exemption is only used for derivative contracts that fulfil all of the following conditions:**

- (a) derivative contracts between subsidiary undertakings of the same parent company or between a parent company and a subsidiary undertaking are justified for economic reasons**
- (b) the use of the exemption does not increase systemic risk in the financial system**
- (c) there are no legal restrictions to capital flows between the subsidiary undertakings of the same parent company or between the parent company and the subsidiary undertaking.**

2. For the purpose of complying with the clearing obligation under paragraph 1, financial counterparties and the non-financial counterparties referred to in Article 7(2) shall become either a clearing member or **shall clear their transactions in the CCP through an investment firm or credit institution subject to the requirements of Directive 2004/39/EC.**

#### Article 4

##### Eligibility for the clearing obligation

1. Where a competent authority has authorised a CCP to clear a class of derivatives under Article 10 or 11, it shall immediately notify ESMA of that authorisation and request a decision on the eligibility for the clearing obligation referred to in Article 3.

**1a. Where a CCP established in a third country has been recognised in accordance with Article 23, the relevant competent authority of the third country shall make available to ESMA, in application of the cooperative arrangements as referred to in Article 23(4), the classes of derivative contracts for which that CCP has been granted the right to provide clearing services to clearing members and/or clients established in the Union.**

2. ESMA, after receiving the notification and request referred to in paragraph 1, shall, within six months, address a decision to the requesting competent authority stating the following:

- (a) whether that class of derivatives is eligible for the clearing obligation pursuant to Article 3;
- (b) the **future** date from which the clearing obligation takes effect, **including the timeframe in which counterparties or categories of counterparties become subject to the clearing obligation . This date shall be no earlier than the date on which the clearing obligation is imposed;**
- (ba) whether and subject to what conditions the clearing obligation applies in the case of transactions with persons in third countries.**

**Before taking a decision, ESMA shall conduct a public consultation with the market participants and non-market participants with expertise or interest in the subject and shall contact the ESRB and the competent authorities of third countries. A summary of this consultation shall be published within a month and additional information about the public consultations as well as other consultations shall be available on request.**

**2a. ESMA shall, on its own initiative, in accordance with the criteria set out in paragraph 3 and after conducting a public consultation and consulting the ESRB, and, where appropriate, the supervisory authorities of third countries, identify and notify to the Commission the classes of derivative contracts that should be considered eligible for the clearing obligation, but for which no CCP has yet received authorisation.**

**After identifying such a class of derivative contracts, ESMA shall publish a call for development of proposals for the clearing of that class of derivative contracts.**

3. ESMA shall base its decision on the following criteria:

- (a) reduction of systemic risk in the financial system, **including potential failures of highly interconnected counterparties to meet their payment obligations and a lack of transparency concerning positions;**
- (b) the liquidity of contracts;
- (c) **the availability of fair, reliable and generally accepted pricing sources.**

**In applying the above criteria ESMA shall also take account of international consensus.**

Before taking a decision, ESMA shall conduct a public consultation and, where appropriate, consult with the competent authorities of third countries.

4. ESMA shall promptly publish any decision under paragraph 2 in a register. That register shall contain the eligible classes of derivatives and the CCPs authorised to clear them. ESMA shall regularly update that register.

ESMA shall regularly review its decisions and shall amend them where necessary.

5. ESMA shall, on its own initiative and after consulting the ESRB, identify and notify to the Commission the **class** of derivatives contracts that should be included in its public register. **and eligible for the obligation to clear.** but for which no CCP has yet

received *authorisation*. Having identified such a category of class of derivatives, ESMA shall publish a call for the development of proposals by CCPs to clear them and publish a list for which such a call has been made.

**5a.** A class of derivatives shall cease to be considered eligible for the clearing obligation if there is no longer a CCP which is authorised or recognised by ESMA as authorised to clear them under this Regulation, or if no CCP is willing to clear that class of derivatives.

**6.** In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the following:

- (a) the details to be included in the notification referred to in paragraph 1;
- (b) the criteria referred to in paragraph 3;
- (c) the details to be included in the register referred to in paragraph 4.

The details in paragraph 4 shall at least correctly and unequivocally identify the class of derivatives subject to the clearing obligation.

**ESMA shall submit those draft regulatory technical standards to the Commission by 30 June 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.**

**Before taking a decision under paragraph 1, ESMA shall conduct a public consultation with the market participants .**  
[Am. 20]

#### **Article 4a**

**In order to promote effective and consistent global regulation of derivative contracts, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining an agreement on the effective equivalent legislation applicable to transactions executed in a third country by financial counterparties and non-financial counterparties referred to in Article 7.**

#### **Article 4b**

##### **Public register**

**1. For the purpose of the clearing obligation, ESMA shall establish and manage a public register. The register shall be publicly available on ESMA's website.**

**2. The register shall reflect at least:**

- (a) the classes of derivative contracts that are subject to the clearing obligation pursuant to Article 3;
- (b) the CCPs that can be used 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 derivatives identified by ESMA in accordance with Article 4(5).

**3. Where a competent authority, or the relevant competent authority of a third country, has withdrawn the authorisation to clear a given class of derivative contracts, ESMA shall immediately remove such CCP from the register in relation to that class of derivatives.**

**4. The register shall be regularly updated by ESMA.**

**5. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to specify the details to be included in the public register referred to in paragraph 1.**

**ESMA shall submit any such draft implementing technical standards to the Commission by 30 June 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 .**[Am. 19]

#### **Article 5**

##### **Access to a CCP**

**1. A CCP that has been authorised to clear eligible OTC derivative contracts shall accept clearing such contracts on a transparent, fair and non-discriminatory basis regardless of the venue of execution and based where possible on international open industry standards, insofar as this does not adversely affect risk mitigation . In order to avoid discriminatory practices, CCPs shall accept to clear transactions executed in different venues, to the extent that those venues comply with the operational, technical and legal requirements established by, or applicable to, the CCP as well as its access and risk management requirements, without reference to the contract documents on the basis of which the parties concluded the relevant OTC derivatives transaction.**

**1a. The CCP shall provide a clear negative or positive response to the trading venue requesting authorisation to clear an OTC derivative contract within three months of processing their request.**

**In the event of a CCP refusal to clear an OTC derivative contract from a trading venue, the venue receives a fully reasoned and explained response.**

**Following a rejected application, the trading venue may put in a new request for access following a minimum of three months waiting period.**

**In case of disagreement, ESMA shall settle any disputes between competent authorities in accordance with Article 19 of Regulation (EU) N°1095/2010.**

**1b. For the purpose of the reports to the Commission and the European Parliament referred to in Article 68, ESMA shall monitor access to CCPs and the effects on competitiveness of certain practices, including the use of exclusive licensing practices.**

Article 6

Reporting obligation

**1. All derivative contracts shall be reported to a trade repository registered in accordance with Article 51. Counterparties shall report the details of any derivative contract they have entered into and any material modification, novation or termination of the contract. The details shall be reported no later than the working day following the conclusion, modification, novation or termination of the contract, except where provided in acts adopted under paragraph 5. The agreed termination of a contract or lapsing of a transaction – as opposed to its premature termination – shall not be considered as a modification. Information concerning derivative transactions shall be reported no later than one business day after the execution of a transaction or after a subsequent modification. A ‘business day’ for these purposes means a day that is a business day for both contracting parties and, in the case of a contract subject to CCP clearing, for the CCP concerned. They shall also maintain for a period of five years a recordkeeping of all the information needed to report.**

**Third parties shall be authorised to carry out the reporting provided for in paragraph 1 for the original counterparties, provided it is ensured that no details of the contract are reported twice.**

**The reporting obligations under subparagraph 1 can be satisfied by the CCP where the derivative contracts subject to the clearing obligation are cleared. When derivative contracts are subject to a process of trade compression, the reporting obligations under subparagraph 1 shall be satisfied by the operator of the trade compression service.**

**ESMA shall be empowered to examine whether a retrospective reporting obligation in respect of OTC derivative contracts can be introduced if the information in question is essential to the supervisory authorities. ESMA shall take the following criteria into account in reaching its decision:**

- (a) the technical requirements for submission of a report (notably whether transactions have been recorded electronically);**
- (b) the remaining times to maturity of outstanding transactions.**

**Before taking a decision, ESMA shall conduct a public consultation with the market participants. [Ams. 14 and 15]**

**2. All reporting shall be carried out, where possible, based on international industry open standards.**

**3. A counterparty which is subject to the reporting obligation may delegate the reporting of the details of the derivative contract to the other counterparty or a third party.**

A counterparty that reports the full details of a contract to a trade repository on behalf of another counterparty 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 **fall on** the reporting entity or its directors or employees **or other persons acting on its behalf**.

**4. In order to ensure consistent application of this Article, ESMA shall, in cooperation with EBA, the ESCB and the ESRB, develop draft regulatory technical standards to determine the details and type of the reports referred to in paragraphs 1 and 2 for the different classes, groups or categories of derivatives and for any retrospective effect including the modalities for back-loading and reporting of electronically recorded trades for all derivatives as well as criteria and conditions for retrospective reporting of outstanding derivative contracts entered into prior to the entry into force of this Regulation.**

Those reports shall contain at least:

- (a) the parties to the contract and, where different, the beneficiary of the rights and obligations arising from it are appropriately identified;**

appropriately defined,

(b) the main characteristics of the contract, including the type, underlying, maturity, **exercise, delivery date, price data** and notional value **■** ;

**(ba) for derivatives that do not conform to a standard format, there shall be a placeholder format permitting competent authorities to detect the existence of such a trade and take any required regulatory measures;**

**(bb) a unique contract identifier.**

**ESMA, in coordination with EBA, EIOPA and the ESRB, shall submit those drafts to the Commission by 30 June 2012.**

**Where the draft regulatory technical standards concern wholesale energy products within the meaning of Regulation (EU) No .../2011 of the European Parliament and of the Council of ... [on energy market integrity and transparency] <sup>(27)</sup> <sup>(28)</sup> , ESMA shall consult the Agency for the Cooperation of Energy Regulators (ACER).**

**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. [Am. 19]**

**4a. In drafting the regulatory technical standards, ESMA shall be guided inter alia by the list of required reporting data in Annex I, Table I of Commission Regulation (EC) No 1287/2006 implementing Directive 2004/39/EC.**

5. In order to ensure uniform conditions of application of paragraphs 1 and 2, **ESMA shall, in coordination with EBA, EIOPA and the ESRB, develop draft implementing technical standards** to determine the format and frequency of the reports referred to in paragraphs 1 and 2 for the different classes of derivatives.

ESMA shall **submit such** draft implementing technical standards **■** to the Commission by 30 June 2012.

**Where the draft regulatory technical standards concern wholesale energy products within the meaning of Regulation (EU) No .../2011 of the European Parliament and of the Council of ... [on energy market integrity and transparency] <sup>(29)</sup> , ESMA shall consult the Agency for the ACER.**

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

## Article 7

### Non-financial counterparties

1. **A non-financial counterparty shall be subject to the reporting obligation set out in Article 6(1).**

2. Where a non-financial counterparty takes positions in OTC derivative contracts **such that the rolling average position over 50 business days exceeds** the threshold to be determined pursuant to paragraph 3(b), it shall be subject to the clearing obligation set out in Article 3 **■** .

**The clearing obligation shall subsist as long as the non-financial counterparty's net positions and exposures in OTC derivative contracts exceed the clearing threshold and shall end once these net positions and exposures are below the clearing threshold over a specified time period.**

The competent authority designated in accordance with Article 48 of Directive 2004/39/EC shall ensure that the obligation under the first subparagraph is met.

**Discharge of the clearing obligation referred to in subparagraph 1 shall be completed within six month.**

**2a. In calculating the positions referred to in paragraph 2, OTC derivative contracts entered into by a non-financial counterparty that are objectively measurable as directly linked to the hedging of commercial or treasury financing activity of that counterparty shall not be taken into account.**

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

**■**

(b) the clearing threshold;

**(ba) criteria for establishing which OTC derivative contracts are objectively measurable as directly linked to the commercial or treasury financing activity.**

Those thresholds shall be determined taking into account the systemic relevance of the sum of net positions and exposures by counterparty per class of derivatives.

**ESMA shall, after consulting EBA, the ESRB and other relevant authorities, submit those draft regulatory standards to the Commission by 30 June 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) 1095/2010. [Am. 19]**

***In preparing for determination of the clearing threshold and the criteria for establishing which OTC derivative contracts are objectively measurable as directly linked to commercial or treasury financing activity, ESMA will engage in public consultations and give non-financial counterparties the chance to state their views .***

5. The Commission, after consulting the ESAs and other relevant authorities, shall periodically review the thresholds referred to in paragraph 3 and amend them, where necessary.

#### Article 8

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

1. Financial counterparties or the non-financial counterparties referred to in Article 7(2), that enter into an OTC derivative contract not cleared by a CCP, shall ensure ***with due diligence*** that appropriate ***prudential*** procedures and arrangements are in place to measure, monitor and mitigate operational, ***market*** and credit risk, including at least:

- (a) ***adequate*** electronic means ensuring the timely confirmation of the terms of the OTC derivative contract;
- (b) ***standardised 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.

For the purposes of point (b), the value of outstanding contracts shall be marked-to-market on a daily basis and risk management procedures shall require the timely, accurate and appropriately segregated exchange of collateral or ***capital-backing commensurate with the risk, in accordance with the applicable regulatory capital requirements for financial counterparties*** .

Financial counterparties and ***the non-financial counterparties referred to in Article 7(2) shall offer counterparties the option of segregation of initial margin at the outset of the contract*** .

***ESMA shall regularly monitor the activity in derivatives not eligible for clearing in order to identify cases where a particular class of contracts may pose systemic risk. ESMA, after consulting ESRB, shall take action in order to prevent the further accumulation of contracts in such a class.***

***The competent authority and ESMA shall ensure that prudential procedures and arrangements aim to prevent regulatory arbitrage between cleared and non-cleared derivative transactions and reflect risk transfers arising from derivatives contracts.***

***ESMA and competent authorities shall review margin standards in order to prevent regulatory arbitrage in conformity with Article 37.***

***1b For pension scheme investments under Directive 2003/41/EC or a scheme where the law of the Member State recognises the scheme for retirement planning, resilient bilateral collateralisation of derivatives used for risk mitigation shall take account of counterparty creditworthiness. Capital requirements in prudential regulation shall be in line with those of centrally cleared contracts.***

2. ***In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying guidelines for appropriate prudential procedures and arrangements and margin standards referred in paragraph 1, as well as the maximum time lag between the conclusion of an OTC derivative contract and the confirmation referred to in paragraph 1(a).***

ESMA shall submit those draft regulatory technical standards to the Commission by 30 June 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. **[Am. 19]**

3. ***In order to ensure consistent application of this Article, the ESAs shall develop common draft regulatory technical standards specifying the arrangements and levels of collateral and capital required for compliance with paragraph 1(b) and the second subparagraph of paragraph 1.***

***The ESAs shall submit those common draft regulatory technical standards to the Commission by 30 June 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 Articles 10 to 14*** of Regulation (EU) No 1093/2010, of Regulation (EU) No 1094/2010 or Regulation (EU) No 1095/2010. **[Am. 19]**

#### Article 9

## Penalties

1. Member States – ***taking into consideration the Commission's Communication of 8 December 2010 on reinforcing sanctioning regimes in the financial services sector and after consulting ESMA*** – 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 3 to 8 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.***
- By 30 June 2012, 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. The Commission, with the assistance of ESMA, shall verify that the administrative penalties referred to in paragraph 1 and the thresholds referred to in Article 7 (1) and (2) are effectively and consistently applied.
- 3a. 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.***

## Conditions and Procedures for the Authorisation of a CCP

### Article 10

#### Authorisation of a CCP

1. Where a CCP that is a legal person established in the Union and has access to adequate liquidity intends to perform its services and activities, it shall apply for authorisation to the competent authority of the Member State where it is established. Such liquidity could result from access to central bank liquidity or to 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.
2. The authorisation shall be effective for the entire territory of the Union.
3. The authorisation ***to the CCP 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 the authorisation.
4. A CCP shall comply at all times with the conditions necessary for the initial authorisation.

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

5. ***In order to ensure consistent application of this Article, ESMA shall, after consulting EBA, develop draft*** regulatory technical standards specifying the criteria for adequate liquidity referred to in paragraph 1.

***ESMA shall, after consulting EBA, submit those draft regulatory technical standards to the Commission by 30 June 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. **[Am. 19]**

### Article 11

#### 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. The offering of clearing services in a different currency or in financial instruments that significantly differ in their risk characteristics from those for which the CCP has already been authorised shall be considered an extension of that authorisation.

The extension of an authorisation shall follow the procedure under Article 13.

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

## Article 12

### Capital requirements

1. A CCP shall have a permanent **and** available initial capital of at least **EUR 10 million** to be authorised pursuant to Article 10.
2. Capital, together with retained earnings and reserves of a CCP, **shall be proportionate to the size and risk involved in the CCP's business operations**. It shall at all times be sufficient to ensure an orderly winding-down or restructuring of the activities over an appropriate time span and that the CCP is adequately protected against operational and residual risks.
3. **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 requirements regarding the capital, retained earnings and reserves of a CCP referred to in paragraph 2, including the frequency or timing when these shall be updated .**

**ESMA shall, in close cooperation with the ESCB and after consulting EBA, submit those draft regulatory technical standards by 30 June 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. [Am. 19]**

## Article 13

### Procedure for granting and refusing authorisation

1. The competent authority shall only grant authorisation where it is fully satisfied that the applicant CCP complies with all the requirements set out in this Regulation **and** the requirements adopted pursuant to 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<sup>(30)</sup> , **and on condition that a positive opinion as referred to in Article 15 has been delivered by ESMA .**
2. **For the initial authorisation, the applicant CCP shall provide all information necessary to enable the competent authority to satisfy itself that the applicant CCP has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations set out in this Regulation. The competent authority shall immediately transmit all information received from the applicant CCP to ESMA and the college referred to in Article 14(1).**
3. **For the initial authorisation, within four months of the submission of a complete application the competent authority shall inform the applicant CCP in writing whether the authorisation has been granted.**

**For authorisation for an extension of activities and services, within two months of the submission of a complete application the competent authority shall inform the applicant CCP in writing whether the authorisation has been granted.**

## Article 14

### Cooperation

1. The competent authority of the CCP's Member State of establishment shall, **in cooperation with ESMA, establish a college in order** to facilitate the exercise of the tasks referred to in Articles 10, 11, 46 and 48.

The college shall **be chaired by ESMA and** consist of **no more than seven members, including** the competent authority of the Member State of establishment of the CCP **and** the authority responsible for the oversight of the CCP and the central banks of issue of the most relevant currencies of the financial instruments cleared **as well as** the competent authorities responsible for the supervision of the clearing members of the CCP established in the three Member States with the largest contributions to the default fund of the CCP referred to in Article 40 on an aggregate basis.

2. The college shall, without prejudice to the responsibilities of the competent authorities under this Regulation, ensure:
  - (a) the preparation of the **█** opinion referred to in Article 15;
  - (b) the exchange of information, including requests for information pursuant to Article 21;
  - █**
  - (d) the **coordination** of supervisory examination programmes based on a risk assessment of the CCP;
  - (e) the improvement of efficiency of supervision by removing unnecessary duplication of supervisory requirements;
  - (f) consistency in the application of supervisory practices;
  - (g) the determination of procedures and contingency plans to address emergency situations, as referred to in Article 22.
3. The establishment and functioning of the college shall be based on a written agreement **among** all its members.

That agreement shall **in particular** determine the practical arrangements for **cooperation between the competent authority and ESMA** and may determine tasks to be entrusted to the competent authority of the Member State of establishment of a CCP or **ESMA .**

**If a majority of the members of the college considers that the competent authority of the Member State of establishment of the CCP is not exercising its responsibilities in an appropriate manner and that it constitutes a threat to financial stability, ESMA shall issue a decision as to whether it considers the supervision by the competent authority of the**

stability, ESMA shall issue a decision as to whether it considers the supervision by the competent authority of the

**Member State of establishment of the CCP to be appropriate and constitutes a threat to financial stability.**

**If ESMA considers that the supervision is inappropriate, ESMA may impose corrective measures on competent authorities in accordance with Regulation (EU) No. 1095/2010.**

**3a. 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 risk assessment referred to in Article 14(2) and Article 15(1).**

**ESMA shall, in close cooperation with the ESCB and after consulting EBA, submit those draft regulatory technical standards to the Commission by 30 June 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. [Am. 19]**

Article 15

Opinion of the college

**1. For the purposes of the initial authorisation, the competent authority of the Member State where the CCP is established shall conduct a risk assessment of the CCP and submit a report to ESMA within four months of the submission of a complete application by the CCP .**

**1a. For the purposes of authorization for extension of activities and services, the competent authority of the Member State where the CCP is established shall conduct a risk assessment of the extension of activities and services on the CCP and submit a report to the college within one month.**

**The college shall reach an opinion, on the basis of that report, as to whether the level of the risks assessed is conducive to the safe functioning of the CCP within one month of receiving it.**

**2. A positive or negative opinion of the college requires agreement among a simple majority of members, including the competent authority of the Member State where the CCP is established, with the assessment of the competent authority of the Member State where the CCP is established. In case of delay or disagreement, ESMA shall facilitate the adoption of a opinion in accordance with its settlement of disagreement powers under Article 19 of Regulation (EU) No 1095/2010 and its general coordination function under Article 21 of the same Regulation. █**

Article 16

Withdrawal of authorisation

**1. The competent authority of the Member State of establishment shall withdraw the authorisation in any of the following circumstances:**

- (a) where the CCP 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) where the CCP has obtained the authorisation by making false statements or by any other irregular means;
- (c) where the CCP is no longer in compliance with the conditions under which authorisation was granted;
- (d) has seriously and **repeatedly** infringed the requirements set out in this Regulation.

**1a. The procedure for the decision to withdraw the authorisation shall require a positive opinion of the same college as referred to in the original authorisation as well as a positive opinion from ESMA.**

**2. ESMA may, at any time, request that the competent authority of the Member State where the CCP is established examine whether the CCP is still in compliance with the conditions under which the authorisation is granted.**

**3. The competent authority may limit the withdrawal to a particular service, activity, or financial instrument. A decision on withdrawal shall apply throughout the territory of the Union.**

Article 17

Review and evaluation

The competent authorities shall, at least on an annual basis, review the arrangements, strategies, processes and mechanisms implemented by a CCP with respect to compliance with this Regulation and evaluate the market, operational and liquidity risks to which the CCP is, or might be, exposed.

The review and evaluation shall have regard to the size, systemic importance, nature, scale and complexity of the activities of the CCP **as well as the criteria identified in Article 4(3) .**

**The competent authority shall call upon a CCP which is not complying with the requirements of this Regulation to take the necessary measures.**

**The CCP shall be subject to on-site inspection by ESMA.**

## **Supervision and oversight of CCPs**

### Article 18

#### Competent authorities

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

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

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 where the provisions in this Regulation have not been complied with.

Those measures shall be effective, proportionate and dissuasive.

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

### **Article 18a**

#### **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 18, ESMA, or auditors and experts instructed by the competent authorities or ESMA. No confidential information they may receive in the course of their duties may be divulged to any person or authority whatsoever, 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 law or taxation or the other provisions of 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.**

**3. Without prejudice to cases covered by criminal law and 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 related 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.**

## **Cooperation**

### Article 19

#### Cooperation between authorities

1. Competent authorities shall cooperate closely with each other, **with ESMA and, if necessary, with the ESCB . ESMA shall be provided with adequate resources by the EU institutions in order to effectively perform the tasks it is allocated in this Regulation.**

2. The 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 22, based on the available information at the time.

## Article 21

### Exchange of information

1. Competent authorities shall provide ESMA and one another with the information required for the purposes of carrying out their duties under this Regulation.
2. Competent authorities and other bodies or natural and legal persons receiving confidential information in the exercise of their duties under this Regulation shall only use it in the course of their duties **and shall not be permitted to publish or otherwise make available any such confidential information for any other purpose except as expressly set out in this Regulation** .
3. ESMA shall transmit confidential information relevant to the performance of their tasks to the competent authorities responsible for the supervision of the CCPs. Competent authorities and other relevant authorities shall communicate the necessary information for the exercise of their duties set out in this Regulation to ESMA and other competent authorities.
4. Competent authorities shall communicate information to the central banks of the ESCB where such information is relevant for the exercise of their duties.

## Article 22

### Emergency situations

The competent authority or any other authority shall inform **ESMA** 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.

## Relations with third countries

### Article 23

#### Third countries

1. A CCP established in a third country may provide clearing services to entities established in the Union only where that CCP is recognised by **ESMA**.

**The authorisation or extension or withdrawal of the authorisation shall be subject to the conditions and procedures laid down in Articles 10 to 16.**

**Third-country CCPs shall be subject to review by a process of similar rigueur to the one EU CCPs are subject to.**

**The Commission may adopt a decision wholly or partially granting an exemption from authorisation conditions and procedures provided that this is done on a reciprocal basis and that the following conditions are met:**

- (a) **the Commission has adopted a decision in accordance with paragraph 3; and**
- (b) **comparable exemptions are granted, in the third country concerned, to CCPs established in the Union.**

2. ESMA shall, **in consultation with the competent authorities within the Union and with EBA and 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 whom interoperability arrangements have been established**, recognise a CCP from a third country, where the following conditions are met:

- (a) the Commission has adopted a **delegated act** in accordance with paragraph 3; **or**
  - (b) the CCP is authorised in, and is subject to, effective supervision in that third country;
- (ba) **the third country is the subject of a decision by the Commission stating that the standards to prevent money laundering and terrorist financing meet the Financial Action Task Force requirements and are to the same effect as the requirements set out in 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<sup>(31)</sup> ;**
  - (bb) **the third country has signed an agreement with the home Member State of the authorised CCP which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including, if any, multilateral tax agreements;**
  - (bc) **the risk management standards of the CCP have been reviewed by ESMA and assessed as compliant with the standards set under Title IV;**
  - (bd) **it has sufficient elements to consider that the third country's legal framework is not discriminatory vis-à-vis EU legal entities;**
  - (be) **the third country applies reciprocal access conditions for EU-based CCPs and a mutual recognition regime has**

*been implemented in that third country;*

*(bf) the conditions imposed on the third country's CCPs shall preserve a level playing field between EU CCPs and that third country's CCPs.*

3. The Commission **shall** adopt **delegated acts** in accordance with **Article -68 and on the basis of a joint opinion provided by ESMA , EBA, the ESCB and the competent authorities responsible for the supervision of the three clearing members established in the Member states with the largest contributions to the default fund of the CCP**, 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 resulting from this Regulation and that these CCPs are subject to effective supervision and enforcement in that third country on an ongoing basis.

4. **ESMA, EBA, the ESCB and the competent authorities responsible for the supervision of the three clearing members established in the Member States with the largest contributions to the default fund of the CCP** 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 3. Such arrangements shall specify at least:

- (a) the mechanism for the exchange of information between **ESMA, the competent authorities pursuant to paragraph 1** and the competent authorities of third countries concerned;
- (b) the procedures concerning the coordination of supervisory activities.

**(ba) the procedures relating to the withdrawal of the authorisation granted to the CCP.**

## **Organisational Requirements**

### Article 24

#### 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.
  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.
- 6a. A CCP shall ensure that trade or client information received in respect of OTC derivative contracts that are cleared pursuant to the requirements of this Regulation is used solely to meet its requirements and is not used or exploited commercially, other than with the prior written consent of the client to whom it belongs.**
7. A CCP shall make its governance arrangements and the rules governing the CCP, **including admission criteria for clearing membership**, available **publicly without charge** .
  8. The CCP shall be subject to frequent and independent audits. The results of these audits shall be communicated to the board and made available to the competent authority.
  9. **In order to ensure consistent application of this Article, ESMA 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 June 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 **No 1095/2010** . **[Am. 19]**

### Article 25

#### Senior Management and the Board

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

2. A CCP shall have a board of which at least one third, but no less than two, of its members are independent. **The clients of the clearing members shall be represented in the Board**. 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 the board, including its independent members, shall be of sufficiently good repute and have **adequate** expertise in financial services, risk management and clearing services.

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 26

### Risk committee

1. A CCP shall establish a risk committee, which shall be composed of **various groups of representatives, including** representatives of its clearing members, **the clients of its clearing members** and independent **experts** and **representatives** of the **competent authority of the CCP, provided that client representatives are different from clearing member representatives**. **None of the groups of representatives shall have a majority in the risk committee**. The risk committee may invite employees of the CCP to attend risk committee meetings in a non-voting capacity. The advice of the risk committee shall be independent from any direct influence by the management of the CCP.

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 **to the competent authorities** and shall, at least, determine that the risk committee is chaired by an independent **expert**, reports directly to the board **or, where there is a dual organisational structure, the executive board**, and holds regular meetings.

3. The risk committee shall advise the board **or, where there is a dual organisational structure, the executive board** on any arrangements that may impact the risk management of the CCP, such as, but not limited to, a significant change in its risk model, the default procedures, the criteria for accepting clearing members or the clearing of new classes of instruments **or 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** 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.

6. A CCP shall allow the clients of clearing members to be members of the risk committee or, alternatively, it shall establish appropriate consultation mechanisms that ensure that the interests of the clients of clearing members are adequately represented.

## Article 27

### Record keeping

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

2. A CCP shall maintain, for a period of at least **five** years following the termination of a contract, all information on all contracts it has processed. That information shall at a minimum 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 and to ESMA.

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 and 2, **and, where appropriate, a longer time length for the maintenance of records**.

**ESMA shall submit those draft regulatory technical standards to the Commission by 30 June 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. **[Am. 19]**

5. In order to ensure uniform conditions of application of paragraphs 1 and 2, **ESMA shall develop draft implementing technical standards** to determine the format of the records and information to be retained. **ESMA shall submit those draft implementing technical standards to the Commission by 30 June 2012.**

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

## Article 28

### Shareholders and members with qualifying holdings

1. The competent authority shall not authorise a CCP until 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 authorisation to 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.
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 **or withdraw 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 29

### Information to competent authorities

1. A CCP shall notify the competent authority **of the Member State in which the CCP is established** of any changes to its management, and shall provide the competent authority with all the information necessary to assess whether the board members are of sufficiently good repute and sufficiently experienced.

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, including removing that member from the board.

2. Any natural or legal person or such persons acting in concert (hereinafter referred to as '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 (hereinafter referred to as 'the proposed acquisition'), shall first notify in writing the competent authorities 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 30(4).

Any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in a CCP (hereinafter referred to as '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 he has taken a decision to reduce his 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 his subsidiary.

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

The competent authority shall have a maximum of sixty 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 30(4) (hereinafter referred to as 'the assessment period'), to carry out the assessment provided for in Article 30(1) (hereinafter referred to as '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.

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 assessment period shall be interrupted. 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 of the following:

- (a) situated or regulated outside the Union;
- (b) a natural or legal person not subject to supervision under this Regulation or Directives 73/239/EEC, Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)<sup>(32)</sup>, 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<sup>(33)</sup> 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. 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.

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 30

### Assessment

1. Where assessing the notification provided for in Article 29(2) and the information referred to in Article 29(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 criteria:

- (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 the provisions set out in 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.

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 29(2). The information required shall be proportionate and 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 29(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 work in full consultation 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 31

### 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 directly or indirectly linked to them by control or close links and its clearing members or their clients or between them. It shall maintain and implement adequate resolution procedures **for the removal of** conflicts of interest .

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 will be 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. █

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 conflicts.

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. Sensitive information recorded in one CCP shall not be used for commercial use by any other natural or legal person that has a parent undertaking or a subsidiary relationship with that CCP.

## Article 32

### 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 a minimum 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 dates.

**1a. A CCP shall establish, implement and maintain an adequate procedure ensuring the timely and orderly settlement or transfer of clients' assets in the event of a withdrawal of authorisation consequent to a decision under Article 16.**

2. **In order to ensure consistent application of this Article, ESMA shall develop draft** regulatory technical standards specifying the minimum content of the business continuity plan and the minimum level of services that the disaster recovery plan shall guarantee.

**ESMA shall submit those draft regulatory technical standards to the Commission by 30 June 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. **[Am. 19]**

## Article 32a

### **Straight-through Processing**

**1. With the aim of promoting straight-through processing (STP) across the entire transaction flow, CCPs shall use or accommodate in their systems to the participants and market infrastructures they interface with, 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 in order to facilitate efficient clearing and settlement across systems.**

**2. In order to ensure consistent application, ESMA shall develop draft regulatory technical standards specifying the**

*process for defining which international communication procedures and standards for messaging and reference data are to be considered relevant for the purposes of paragraph 1.*

*ESMA shall submit those draft regulatory technical standards to the Commission by 30 June 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. [Am. 19]*

Article 33

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 comply at all times with the following conditions:

- (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 their clients are not altered;
- (c) the conditions for the 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 related information within the service provider** ;
- (e) outsourcing does not result in depriving the CCP from the necessary systems and controls to manage the risks it faces;
- (ea) the service provider implements equivalent business continuity requirements to those that would have to be fulfilled by the CCP under its domestic supervisory framework;**
- (f) 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 shall supervise those functions and manage those risks on an ongoing basis;
- (g) the CCP has direct access to the relevant information of the outsourced functions;
- (h) **when required, and without prejudice to the responsibility of the CCP for compliance with the requirements of this Regulation, the service provider cooperates with the competent authority in connection with the outsourced activities;**
- (i) the service provider protects any confidential information relating to the CCP and its clearing members and clients. **Where the service provider is established in a third country, the data protection standards of that third country shall be equivalent to the data protection standards in effect in the Union.**
- (ia) the business provider is subject in its country to an equivalent legal regime as the CCP in terms of business continuity and data protection;**
- (ib) activities linked to risk management are not outsourced.**

2. The competent authority shall require the CCP to clearly allocate and set out its rights and obligations, and those of the service provider, 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 the requirements of this Regulation available on request.

## Conduct of Business Rules

Article 34

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 35

Participation requirements

1. A CCP shall establish the categories of admissible clearing members and the admission criteria. 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 only be permitted to the extent that their objective is to control the risk for the CCP. **Financial institutions shall not be restricted from becoming clearing members in an uncompetitive or unreasonable way.**
2. A CCP shall ensure that the application of the criteria referred to in paragraph 1 is met on an on-going basis and shall have timely access to the information relevant for the assessment. A CCP shall conduct, at least once a year, a comprehensive review of the compliance with the provisions in this Article by its clearing members.
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 basic information**

**to identify, monitor and manage relevant concentrations of risk related 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 client supervision and obligations shall remain with clearing members. Those criteria shall be non-discriminatory.**

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 it is duly justified in writing and based on a comprehensive risk analysis.

6. A CCP may impose specific additional obligations on clearing members, such as, but not limited to, 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 36

### Transparency

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

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

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

**3a. A CCP shall publicly disclose the operational and technical requirements related to the communication protocols covering content and message formats it uses to interact with third-parties, including those referred to in Article 5.**

**3b. A CCP shall publicly disclose any breaches by clearing members of the criteria referred to in Article 35(1) and (2), except in the case that the competent authority, after consulting ESMA, considers that such disclosure would constitute a threat to financial stability or to market confidence.**

## Article 37

### Segregation and portability

1. A CCP shall keep records and accounts that shall enable it, at any time and without delay, to identify and segregate the assets and positions of one clearing member from the assets and positions of any other clearing member and from its own assets.

**Where a CCP deposits assets and funds with a third party, it shall ensure that assets and funds belonging to a clearing member are kept separately from the assets and funds belonging to the CCP or other clearing members and from assets and funds belonging to that third party.**

2. **A clearing member shall distinguish in separate accounts with the CCP the positions of the clearing member from those of its clients.**

**2a. Clearing members shall distinguish in separate accounts with the CCP the positions of each client (full segregation). Clients shall be given by clearing members the possibility to have their positions recorded in omnibus accounts with the CCP by making a written request to that effect.**

**3. The CCP and clearing members shall publically disclose the levels of protection and the costs associated with the different levels of segregation they provide. 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 relevant jurisdictions' applicable insolvency law. The CCP shall require the clearing members to inform their clients of these risks and costs.**

**3a. A CCP shall keep records that shall enable it, at any time and without delay, to identify the assets posted in relation to each account kept in accordance with this Article.**

**3b. A CCP shall structure its arrangements to ensure that where full segregation applies it can facilitate the transfer of the positions and collateral of clients of a defaulting member to one or more other participants.**

4. Provided that a client **has full segregation** , Annex III, Part 2, point 6 of Directive 2006/48/EC shall apply.

**5. Member States shall ensure that their insolvency laws include derogations sufficient to allow CCPs to meet the objectives and requirements of these provisions.**

**The relevant trigger events shall include insolvency of a clearing member and appropriate events, and failure to meet**

existing obligations.

*In order to ensure consistent application of this Article, ESMA shall develop draft technical standards specifying the relevant events in greater detail.*

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

*Power is delegated to the Commission to adopt the regulatory technical standards referred to in the third subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010. [Am. 19]*

## Prudential Requirements

### Article 38

#### Exposure management

A CCP shall measure and assess its liquidity and credit exposures to each clearing member and, where relevant, to another CCP with whom it has concluded an interoperable arrangement, on a near to real time basis. A CCP **shall, to the extent practicable, identify, monitor and manage the potential risks arising from clearing members clearing transactions on behalf of clients.** 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 and respecting international property rights.**

### Article 39

#### 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 which have interoperable arrangements. **Competent authorities shall ensure that CCPs respect minimum margin standards as specified in paragraph 5. These minimum standards shall be calibrated in accordance with the risk level and shall be regularly revised to reflect current market conditions and in particular in response to emergency situations where it is concluded that doing so will mitigate systemic risks.** Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant positions. They shall 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 which have interoperable arrangements, at least on a daily basis.

In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may recalibrate margin requirements in emergency situations when doing so will mitigate systemic risk.

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 15.

3. A CCP shall call and collect margins on an intraday basis, at least when pre-defined thresholds are breached.

**3a. A CCP shall call and collect margins that are adequate to cover the positions registered in each account kept in accordance with Article 37 with respect to specific financial instruments. A CCP may calculate margins with respect to a portfolio of financial instruments only when the price correlation among the financial instruments included in the portfolio is high and stable.**

5. **In order to ensure consistent application of this Article, ESMA shall, after consulting EBA, develop draft** regulatory technical standards specifying the appropriate percentage and time horizon, as referred to in paragraph 1, to be considered for the different classes of financial instruments **and the conditions referred to in paragraph 3a** .

**ESMA shall, after consulting EBA, submit those draft regulatory technical standards to the Commission by 30 June 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. **[Am. 19]**

### Article 40

#### Default fund

1. **To further limit its credit exposures to its clearing members, a** CCP shall maintain a default fund to cover losses **that exceed the losses to be covered by margin requirements as referred to in Article 39**, arising from the default, including the opening of an insolvency procedure, of one or more clearing members.

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, in order to ensure that the contributions to the default fund at least enable the CCP to withstand the default of the **two** clearing **members** to which it has the largest exposures.

**2a. 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. The size of the default fund shall include the margins calculated, in compliance with Article 39, on the positions stemming from the hypothesised scenarios.**

*In calculating credit exposures to its clearing members, a CCP shall take into account:*

- (a) the exposures of each clearing member, as registered on each account kept in accordance with Article 37; and*
- (b) whether or not profits on proprietary positions can be used to cover losses on clients' positions.*

3. A CCP may establish more than one default fund for the different classes of instruments it clears.

**3a. 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 details of default funds referred to in paragraphs 1 and 3.**

**ESMA shall, in close cooperation with the ESCB and after consulting EBA, submit those draft regulatory technical standards to the Commission by 30 June 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. [Am. 19]**

## Article 41

### Other risk controls

1. In addition to the capital required in Article 12, a CCP shall maintain sufficient available financial resources to cover potential losses that exceed the losses to be covered by margin requirements and the default fund. Such resources may include any other clearing fund provided by clearing members or other parties, loss sharing arrangements, insurance arrangements, the own funds of a CCP, parental guarantees or similar provisions. Such resources shall be freely available to the CCP and shall not be used to cover the operating losses.

2. **█** The default fund referred to in Article 40 and the other financial resources referred to in paragraph 1 shall at all times enable the CCP to withstand **potential losses in extreme but plausible market conditions. A CCP shall develop scenarios of such extreme but plausible market conditions.**

3. **A CCP shall measure its potential liquidity needs. A CCP shall at all times have access to adequate liquidity to perform its services and activities. To that end, a CCP 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. Each clearing member, parent undertaking or subsidiary of the clearing member may not provide more than 25 % of the credit lines needed by the CCP.**

4. 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.

5. **In order to ensure consistent application of this Article, ESMA shall, after consulting EBA, develop draft regulatory technical standards specifying the extreme conditions referred to in paragraph 2 that the CCP shall withstand.**

**ESMA shall, after consulting EBA, submit those draft regulatory technical standards to the Commission by 30 June 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. [Am. 19]**

**█**

## Article 42

### 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 these losses.

3. A CCP shall use contributions to the default fund and other contributions of non-defaulting clearing members only after having exhausted the contributions of the defaulting clearing member and **█** the CCP's own funds referred to in Article 41(1).

4. A CCP shall not be allowed to use the margins posted by non-defaulting clearing members to cover the losses resulting from the default of another clearing member.

#### Article 43

##### Collateral requirements

1. A CCP shall accept highly liquid collateral, **such as cash, gold, government and high-quality corporate bonds**, with minimal credit and market risk to cover its **initial and ongoing** exposure to its clearing members. **For non-financial counterparties, CCPs may accept bank guarantees taking into account such guarantees in 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. **These minimum standards shall be calibrated in accordance with the risk level and shall be regularly revised to reflect market conditions and in particular in response to emergency situations where it is concluded that doing so will mitigate systemic risk.**

2. A CCP may accept, where appropriate and sufficiently prudent, the underlying of the derivative contract or the financial instrument that originate 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 and the ESRB, develop draft** regulatory technical standards specifying the type of collateral that can be considered highly liquid and the haircuts referred to in paragraph 1.

**ESMA shall, after consulting EBA and the ESRB, submit those draft regulatory technical standards to the Commission by 30 June 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. **[Am. 19]**



#### Article 44

##### Investment policy

1. A CCP shall only invest its financial resources in highly liquid financial instruments with minimal market and credit risk **for example in reserves with an EU central bank**. The investments shall be capable of being liquidated rapidly with minimal adverse price effect.

**1a. The amount of capital, together with the earnings and reserves of a CCP which are not invested in accordance with paragraph 1, shall not be considered for the purposes of Article 12(2).**

2. Financial instruments posted as margins shall be deposited with operators of securities settlement systems that ensure non-discriminatory access to CCPs and the full protection of those instruments. A CCP shall have prompt access to the financial instruments when required. **CCPs shall have robust controls over the re-hypothecation of clearing members' collateral, subject to review by ESMA.**

3. A CCP shall not invest its capital or the sums arising from the requirements referred to in Articles 39, 40 and 41 in its own securities or those of its parent or subsidiary undertaking.

4. 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.

5. **In order to ensure consistent application of this Article, ESMA shall, after consulting, EBA, develop draft** regulatory technical standards specifying the highly liquid financial instruments referred to in paragraph 1 and the concentration limits referred to in paragraph 4.

**ESMA shall, after consulting EBA, submit those draft regulatory technical standards to the Commission by 30 June 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. **[Am. 19]**



#### Article 45

##### Default procedures

1. A CCP shall have **detailed** procedures in place to be followed where a clearing member does not comply with the requirements laid down in Article 35 within the time limit and according to the procedures established by the CCP. The CCP shall outline **in detail** the procedures to be followed in the event the insolvency of a clearing member is not established by the CCP.

***These 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.

3. The CCP shall promptly inform the competent authority. That competent authority shall immediately inform the authority responsible for the supervision of the defaulting clearing member where the CCP considers that the clearing member will not be able to meet its future obligations and when the CCP intends to declare its default.

4. A CCP shall establish that its default procedures are enforceable. It shall take all the 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 client's positions of the defaulting clearing member.

#### Article 46

##### 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 inform the competent authority of the results of the tests performed and shall obtain its validation before adopting any change to the models and parameters.

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

***2a ESMA shall provide information on the results of the stress tests referred to in paragraph 1 to the ESAs in order to enable them to assess the exposure of financial undertakings to the default of CCPs.***

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 ***and the outcome of the stress tests except in the case that the competent authority, after consulting ESMA, considers that such disclosure would constitute a threat to financial stability.***

4. ***In order to ensure consistent application of this Article, ESMA shall develop draft*** regulatory technical standards specifying the following:

- (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;
- (c) the frequency of the tests;
- (d) the time horizons of the tests;
- (e) the key information referred to in paragraph 3.

***ESMA shall, in consultation with EBA, submit those draft regulatory technical standards to the Commission by 30 June 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. [Am. 19]

#### Article 47

##### 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, the CCP shall eliminate principal risk through the use of delivery-versus-payment mechanisms to the extent possible.

#### Article 48

##### Interoperability arrangements

***1a.*** A CCP may enter into an interoperability arrangement with another CCP, where the requirements under Articles 49 and 50 are fulfilled.

*in order not to expose CCPs to additional risks, interoperability arrangements shall be restricted to transferable securities and money-market instruments, as defined under point 18(a) and (b) and point 19 of Article 4(1) of Directive 2004/39/EC for the purposes of this Regulation. However, by 30 September 2014, ESMA shall submit a report to the Commission on whether an extension of that scope to other financial instruments would be appropriate.*

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 to the data that it needs for the performance of its functions from that particular 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 only be restricted, directly or indirectly, to control any risk arising from that arrangement or access.

#### **Article 48a**

##### **CCP access to trade feeds**

**1. A CCP shall have the right to non-discriminatory access to the data feed of any particular trading venue and access to any relevant settlement system that it needs for the performance of its duties.**

**2. For the purpose of the reports to the Commission and the European Parliament referred to in Article 68, ESMA shall monitor access to CCPs and the effects on competitiveness of certain practices, including the use of exclusive licensing practices.**

#### Article 49

##### 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 additional 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 related 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.

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-hypothecation of clearing members' collateral under the arrangement, if permitted by their competent authorities. The arrangement shall outline how these risks have been addressed taking into account sufficient coverage and the need to limit contagion.

2. Where the risk management models used by the CCPs to cover their exposure to their clearing members as well as 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.

#### **Article 49a**

##### **Provision of margins among CCPs**

**1. A CCP shall segregate the collateral received by CCPs with which it has entered into an interoperability arrangement.**

**2. Collateral received in the form of cash shall be held in segregated accounts.**

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

**4. Collateral segregated under paragraphs 1, 2 and 3 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 segregated under paragraphs 1, 2 and 3 shall be readily returned to the providing CCP.**

#### Article 50

##### 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 13 shall apply.

2. The competent authorities shall only grant approval of the interoperability arrangement where the **CCPs involved have been authorised to clear under the procedure set out in Article 13 and have continuously fulfilled their role in clearing the derivative contracts under that authorisation in accordance with supervisory requirements for a period of at least three years, the requirements** set out in Article 49 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 set out 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 an interoperability arrangement. ESMA's opinion shall be made available to all the CCPs involved. Where ESMA's assessment differs from the assessment of the relevant competent authority, this authority shall reconsider its position, taking into account the opinion of ESMA.

4. By 30 June 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 8 of Regulation (EU) No 1095/2010.

## Conditions and Procedures for Registration of a Trade Repository

### Article 51

#### Registration of a Trade Repository

1. A trade repository shall register with ESMA for the purposes of Article 6.
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 of Title VII.
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 initial conditions for registration. A trade repository shall, without undue delay, notify ESMA of any material changes to the conditions for registration.

### Article 52

#### 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 ten 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 to ESMA referred to in paragraph 1.

**ESMA shall submit those draft regulatory technical standards to the Commission by 30 June 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. [Am. 19]

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

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

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

### Article 53

#### Examination of the application

1. ESMA shall, within 40 working days from the notification referred to in the third subparagraph of Article 52(2), examine the application for registration based on the compliance of the trade repository with the requirements set out in Articles 64 to 67 and adopt a fully reasoned decision for registration or refusal.

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

#### Article 54

##### Notification of the decision

1. Where ESMA adopts a decision to register, refuse registration or withdraw registration, it shall notify the trade repository within five working days with a fully reasoned explanation 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 55

##### Fines

1. ESMA may by decision impose on a trade repository a fine where, intentionally or negligently, the trade repository has infringed Article 63(1), Article 64, Article 65, Article 66 and Article 67(1) and (2) of this Regulation.

2. The fines referred to in paragraph 1 shall be dissuasive and proportionate to the nature and seriousness of the breach, the duration of the breach and the economic capacity of the trade repository concerned.

3. Notwithstanding paragraph 2, where the trade repository has directly or indirectly gained a quantifiable financial benefit from the breach, the amount of the fine has to be at least equal to that benefit.

4. ***In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards concerning:***

- (a) detailed criteria for establishing the amount of the fine;
- (b) the procedures for enquiries, associated measures and reporting, as well as rules of procedure for decision-making, including provisions on rights of defence, access to the file, legal representation, confidentiality and temporal provisions and the quantification and collection of the fines.

***ESMA shall submit those draft regulatory technical standards to the Commission by 30 June 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. [Am. 6]***

■

#### Article 56

##### Periodic penalty payments

1. ***ESMA's Board of Supervisors shall*** by decision impose periodic penalty payments in order to compel:

- (a) ***a trade repository*** to put an end to an infringement;
- (b) ***persons involved in trade repositories or related third parties*** to supply complete information which has been requested;
- (c) ***persons involved in trade repositories or related third parties*** 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;
- (d) ***persons involved in trade repositories or related third parties*** to submit to an on-site inspection.

2. The periodic penalty payments provided for shall be effective and proportionate. The amount of the periodic penalty payments shall be imposed for each day of delay.

***2a. Notwithstanding paragraph 2, the amount of the periodic penalty payments shall be 3 % of the average daily turnover in the preceding business year. It shall be calculated from the date stipulated in the decision imposing the periodic penalty payment.***

***2b. A periodic penalty payment shall be imposed for a maximum period of six months following the notification of ESMA's decision. Following that six-month period, ESMA shall consider the measures.***

#### Article 57

Hearing of the persons concerned

1. Before taking any decision on a fine or periodic penalty payment as provided for in Articles 55 and 56, **ESMA** shall give the persons concerned the opportunity to be heard on the matters to which the Commission has taken objection.

**ESMA** shall base its decisions only on objections on which the persons concerned have been able to comment.

2. The rights of defence of the persons concerned shall be fully respected in the proceedings.

Those persons 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 and **ESMA's** internal documents **[Am. 8]**

Article 58

Provisions common to fines and periodic penalty payments

1. **ESMA** shall disclose to the public every fine and periodic penalty payment that has been imposed in accordance with Articles 55 and 56.

2. Fines and periodic penalty payments imposed pursuant to Articles 55 and 56 are of an administrative nature.

**2a. Where ESMA decides to impose no fines or penalty payments, it shall inform the Commission, the competent authorities of the Member State, the European Parliament and the Council accordingly and shall set out the reasons for its decision. [Am. 9 Rev]**

Article 59

Review by the Court of Justice

The Court of Justice of the European Union shall have unlimited jurisdiction to review decisions whereby **ESMA** has imposed a fine or a periodic penalty payment. The Court of Justice may annul, reduce or increase the fine or periodic penalty payment imposed. **[Am. 10]**

Article 60

Withdrawal of registration

1. **ESMA** shall withdraw the registration of a trade repository in any of the following circumstances:

- (a) the trade repository expressly renounces the registration or has provided no services for the preceding six months;
- (b) the trade repository has obtained the registration by making false statements or by any other irregular means;
- (c) the trade repository no longer meets the conditions under which it was registered;
- (d) the trade repository has seriously or repeatedly infringed the provisions of this Regulation.

2. 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 withdrawal of registration are met. Where **ESMA** decides not to withdraw the registration of the trade repository concerned, it shall provide full reasons.

**2a. ESMA shall take all necessary steps to ensure the orderly substitution of the trade repository from which registration has been withdrawn, including the transfer of data to other trade repositories and the redirection of reporting flows to other trade repositories.**

Article 61

Surveillance of Trade Repositories

1. **ESMA** shall monitor the application of Articles 64 to 67.

2. In order to carry out the duties set out in Articles 51 to 60, 62 and 63, **ESMA** shall have the power to:

- (a) access any document in any form and to receive or take a copy thereof;
- (b) demand information from any person and, if necessary, summon and question a person with a view to obtaining information;
- (c) carry out on-site inspections with or without prior announcement;
- (d) require records of telephone and data traffic.

**Relations with third countries**

Article 62

## International agreements

The Commission shall, where appropriate, submit proposals to the Council for the negotiation of international agreements with one or more third countries regarding mutual access to, and exchange of information on, OTC derivative contracts held in trade repositories which are established in third countries, where that information is relevant for the exercise of the duties of competent authorities under this Regulation.

### Article 63

#### Equivalence and recognition

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 6 only where that trade repository is **separately established in the Union**, recognised by **ESMA**.
2. ESMA shall recognise a trade repository from a third country **only** where the following conditions are met:
  - (a) the trade repository is authorised in and is subject to effective surveillance in that third country;
  - (b) the Commission has adopted a decision in accordance with paragraph 3;
  - (c) the Union has entered into an international agreement with that third country, as referred to in Article 62;
  - (d) cooperation arrangements have been established pursuant to paragraph 4 to ensure that Union authorities have immediate and continuous access to all the necessary information.

**(da) the third country is the subject of a decision by the Commission stating that the standards to prevent money laundering and terrorist financing meet the Financial Action Task Force requirements and are to the same effect as the requirements set out in Directive 2005/60/EC;**

**(db) the third country has signed an agreement with the home Member State of the authorised CCP which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including, if any, multilateral tax agreements;**

**(dc) the relevant authorities of the third country that has entered into an international agreement with the Union as referred to in Article 62 provided that they agree to indemnify the trade repository and the EU authorities for any expenses arising from litigation relating to the information provided by the trade repository;**

**(dd) the third country applies reciprocal access conditions for EU-based trade repositories and a mutual recognition regime has been implemented in that third country.**
3. The Commission **shall be empowered to** adopt **delegated acts** in accordance with **Article -68** , determining that the legal and supervisory arrangements of a third country ensure that trade repositories authorised in that third country comply with legally binding requirements which are equivalent to the requirements set out in this Regulation and that these trade repositories are subject to effective supervision and enforcement in that third country on an ongoing basis.
4. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been considered equivalent to this Regulation in accordance with paragraph 3. Such arrangements shall ensure that Union authorities have immediate and continuous access to all the information needed for the exercise of their duties **and direct access to trade repositories in third-country jurisdictions** . Those arrangements shall specify at least:
  - (a) the mechanism for the exchange of information between ESMA, any other Union authorities that exercise responsibilities in accordance with this Regulation **■** , the competent authorities of third countries concerned **and the trade repositories of third countries concerned; this mechanism shall include on-site inspections of third-country trade repositories by ESMA** ;
  - (b) the procedures concerning the coordination of supervisory activities.

## Requirements for trade repositories

### Article 64

#### 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 establish adequate policies and procedures sufficient to ensure its compliance, including of its managers and employees, with all the provisions of this Regulation.
3. 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.
4. 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.

5. A trade repository shall have objective, non-discriminatory and publicly disclosed requirements for access and participation. 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.

6. A trade repository shall publicly disclose the prices and fees associated with the services it provides. It shall disclose the prices and fees of single services and functions 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 **not** be **higher than the cost incurred by the trade repository** .

#### Article 65

##### 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.

#### Article 66

##### Safeguarding and recording

1. A trade repository shall ensure the confidentiality, integrity and protection of the information received under Article 6. **No commercial use may be made of any information without the consent of both counterparties to the derivative contract.**

2. A trade repository shall promptly record the information received under Article 6 and shall maintain it for at least ten years following the termination of the relevant contracts. It shall employ timely and efficient record keeping procedures to document changes to recorded information.

3. 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 6.

4. A trade repository shall allow the parties to a contract to access and correct the information on that contract at all times.

5. A trade repository shall take all reasonable steps to prevent any misuse of the information maintained in its systems and shall prevent the use of that information held for other business activities.

Confidential information recorded in one trade repository shall not be used for commercial use by any other natural or legal person that has a parent undertaking or a subsidiary relationship with the trade repository.

#### Article 67

##### 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, **such reporting utilising international open industry standards where possible** .

**Trade repositories shall ensure that all the competent authorities have direct access to such details of derivative contracts as they require in order to carry out their tasks.**

2. A trade repository shall make the necessary information available to the following entities, **provided that access to such information is strictly necessary to enable them to fulfil their respective responsibilities and mandates** :

(a) ESMA;

**(aa) the ESRB;**

(b) the competent authorities supervising undertakings subject to the reporting obligation under Article 6;

(c) the competent authority supervising CCPs accessing the trade repository;

**(ca) the competent authority supervising the venues of execution of the reported contracts;**

(d) the relevant central banks of the ESCB;

**(da) the public in an aggregate way every week in a meaningful format to allow non-participants to be duly informed about concrete figures of volume, positions, prices and value, as well as trends, risks and other relevant information that increases the transparency of the OTC derivative markets.**

**Power is delegated to ESMA to establish and review the criteria for publication and to decide whether such publication is better issued by the relevant national or Union authorities.**

3. ESMA shall share the information necessary for the exercise of their duties with other relevant **competent** authorities.

4. **ESMA shall develop the standards for the publication of the information referred to in paragraph 1.**

4. *In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details of the information referred to in paragraphs 1 and 2 as well as operational standards required in order to aggregate and compare data across repositories and when it is necessary for the authorities referred to in paragraph 2 to have access to that information. 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 June 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. [Am. 19]*

#### **Article 67a**

*In order to ensure that they can fulfil their mission, trade repositories shall be adequately organised in order to be in a position to give to ESMA and relevant competent authorities direct and immediate access to the details of derivatives contracts as referred to in Article 6.*

#### **Transitional and final provisions**

#### **Article -68**

##### **Delegated acts**

- 1. The power to adopt delegated acts is conferred to the Commission subject to the conditions laid down in this Article.*
- 2. The delegation of power referred to in Articles 23 and 63 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 Articles 23 and 63 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 23 or 63 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.*

#### **Article 68**

##### **Reports and Review**

- 1. By 31 December 2013, the Commission shall review and report on the institutional and supervisory arrangements under Title III and in particular the role and responsibilities of ESMA. The Commission shall submit the report to the European Parliament and the Council, together with any appropriate proposals.*

*By the same date, the Commission shall, in coordination with ESMA and the relevant sectoral authorities, assess the systemic importance of the transactions of non-financial firms in OTC derivatives.*

- 2. ESMA shall submit reports to the Commission on the application of the clearing obligation under Title II and on **possible future provisions concerning** interoperability arrangements.*

*Those reports shall be communicated to the Commission by 30 September 2014.*

- 3. The Commission shall, in cooperation with the Member States and ESMA, and after requesting the assessment of the ESCB, 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 ESCB shall provide the Commission with its assessment of any possible systemic risk and cost implications of interoperability arrangements.*

- 3a. By ... <sup>(34)</sup>, the Commission, in cooperation with ESMA, shall prepare a first general report as well as a first report on specific elements concerning the implementation of this Regulation.*

**The Commission, in cooperation with ESMA, shall in particular assess the evolution of CCPs' policies on collateral margining and securing requirements and their adaptation to the specific activities and risk profiles of their users.**

#### **Article 68a**

**ESMA shall receive adequate additional funding to effectively perform the regulatory and supervisory tasks which are laid down in this Regulation.**

#### Article 69

##### Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC<sup>(35)</sup>. **That committee shall be a committee within the meaning of 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**<sup>(36)</sup>.

2. Where reference is made to this paragraph, Article 5 of **Regulation (EU) No 182/2011** shall apply, having regard to the provisions of Article 8 thereof.

#### Article 70

##### Amendment to Directive 98/26/EC

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.

"

#### **Article 70a**

##### **Maintenance of website by ESMA**

**1. ESMA shall maintain a website which provides the following information:**

- (a) contracts eligible for the clearing obligation under Article 4;**
- (b) penalties imposed for breaches of Articles 3 to 8;**
- (c) CCPs authorised to offer services or activities in the Union that are a legal person 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 IV;**
- (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) penalties and fines imposed in accordance with Articles 55 and 56;**
- (h) the public register referred to in Article 4b.**

**2. For the purposes of points (b), (c) and (d) of paragraph 1, Member States' competent authorities shall maintain websites, which shall be linked to by 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 71

##### Transitional provisions

1. A CCP that has been authorised in its Member State of establishment to provide services before the date of entry into force of this Regulation, **or a third-country CCP that has been authorised to provide services in a Member State in accordance with that Member State's national provisions** shall seek authorisation **under Article 10 or recognition under Article 23**, for the purposes of this Regulation, by ...<sup>(37)</sup>.

**1a. A trade repository that has been authorised in its Member State of establishment to collect and maintain the records of derivatives before the entry into force of this Regulation, or a trade repository established in a third country which is allowed to collect and maintain the records of derivatives transacted in a Member State in accordance with the national**

*law of that Member State before the entry into force of this Regulation, shall seek registration under Article 51 or recognition under Article 63 by ... (38) +.*

2. Derivative contracts that have been concluded prior to the date of application of this Regulation's registration of a trade repository for that particular type of contract shall be reported to that trade repository within 120 days of the date of registration of that trade repository by ESMA.

**2a. Derivative contracts that are objectively measurable as reducing risks directly related to the financial solvency of pension scheme investments under Directive 2003/41/EC or a scheme where the law of the Member State recognises the scheme for retirement planning shall be excluded from the clearing obligation set out in Article 3 for a period of three years after the entry into force of this regulation, where the posting of liquid collateral would result in an undue burden on the investor due to asset conversion requirements. If the report specified under Article 68 demonstrates that for such counterparties, this undue burden remains disproportionate, then the Commission is empowered to extend the derogation in order to ensure resolution of the remaining issues.**

***This derogation shall not affect the reporting obligation under Article 6 or the obligations in relation to risk mitigation techniques under Article 8(1b).***

**2b. The obligations of counterparties under Articles 3, 6 and 8 shall become effective six months after publication of the regulatory technical standards, implementing technical standards and guidelines related thereto drafted by ESMA and adopted by the Commission.**

## **Article 71a**

### **Staff and resources of ESMA**

***By 15 September 2011, ESMA shall assess the staffing and resources needs arising from the assumptions of its powers and duties in accordance with this Regulation and submit a report to the European Parliament, the Council and the Commission.***

## Article 72

### 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.

Done at [...],

*For the European Parliament For the Council*

*The President The President*

- 
- (1) OJ C 54, 19.2.2011, p. 44.  
(2) OJ C 57, 23.2.2011, p. 1  
(3) OJ L 331, 15.12.2010, p. 12.  
(4) OJ L 331, 15.12.2010, p. 48.  
(5) OJ L 331, 15.12.2010, p. 84.  
(6) OJ L 145, 30.4.2004, p. 1.  
(7) **OJ L 96, 12.4.2003, p. 16.**  
(8) **OJ L 331, 15.12.2010, p. 1.**  
(9) **OJ L 177, 30.6.2006, p. 1.**  
(10) **OJ L 177, 30.6.2006, p. 201.**  
(11) OJ L 228, 16.8.1973, p. 3.  
(12) OJ L 345, 19.12.2002, p. 1.  
(13) OJ L 323, 9.12.2005, p. 1.  
(14) OJ L 302, 17.11.2009, p. 32.  
(15) + **OJ please insert number, date and OJ reference.**  
(16) + OJ: please insert date.  
(17) OJ L ....  
(18) **OJ L 235, 23.9.2003, p. 10**  
(19) OJ L 166, 11.6.1998, p. 45.  
(20) [http://ec.europa.eu/internal\\_market/financial-markets/docs/code/code\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/code/code_en.pdf)  
(21) OJ L 281, 23.11.1995, p. 31.  
(22) **OJ L 55, 28.2.2011, p. 13.**  
(23) **OJ L 390, 31.12.2004, p. 38.**  
(24) OJ L 390, 31.12.2004, p. 38.  
(25) OJ L 193, 18.7.1983, p. 1.  
(26) OJ L 222, 14.8.1978, p. 11.  
(27) + **OJ: please insert number, date and title the Regulation (COM(2010)0726).**  
(28) **OJ L ...**  
(29) ++ **OJ: please insert the number of the Regulation (COM(2010)0726).**  
(30) OJ L 166, 11.6.1998, p. 45.  
(31) **OJ L 309, 25.11.2005, p. 15.**  
(32) OJ L 375, 31.12.1985, p. 3.  
(33) OJ L 228, 11.8.1992, p. 1.  
(34) + **OJ: please insert date: three years after the entry into force of this Regulation.**  
(35) OJ L 191, 13.7.2001, p. 45.  
(36) **OJ L 55, 28.2.2011, p. 13**

(37) + OJ: please insert date: *two years* after the entry into force of this Regulation.  
(38) ++ OJ: please insert date: *[one] year after the entry into force of this Regulation.*