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'I' ITEM NOTE

From: Presidency/General Secretariat of the Council

To: Permanent Representatives Committee

Subject: Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs

- Mandate for negotiations with the European Parliament

Delegations will find attached the latest Presidency compromise proposal for a negotiating mandate with regard to the above-mentioned proposal.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Central Bank¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure³,

¹ OJ C [...], [...], p. [...].

² OJ C , , p. .

³ Position of the European Parliament of ... (OJ ...) and decision of the Council of ...

Whereas:

- (1) Regulation (EU) No 648/2012 of the European Parliament and of the Council⁴ requires standardised OTC derivatives contracts to be cleared through a Central Counterparty (CCP) in line with similar requirements in other G20 countries. That Regulation also introduced strict prudential, organisational and business conduct requirements for CCPs and established arrangements for their prudential supervision in order to minimise risks to users of a CCP and underpin financial stability.
- (2) Since the adoption of Regulation (EU) No 648/2012, the volume of CCP activity in the Union and globally has grown rapidly in scale and in scope. The expansion in CCP activity is set to continue in the coming years with the introduction of additional clearing obligations and the rise in voluntary clearing by counterparties not subject to a clearing obligation. The Commission's proposal of 4 May 2017⁵ to amend Regulation (EU) No 648/2012 in a targeted manner, to improve its effectiveness and proportionality, will create further incentives for CCPs to offer central clearing of derivatives to counterparties and facilitate access to clearing to small financial and non-financial counterparties. Deeper and more integrated capital markets resulting from the Capital Markets Union (CMU) will further increase the need for cross-border clearing in the Union, thus further increasing the importance and the interconnectedness of CCPs within the financial system.

⁴ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L201, 27.7.2012, p.1).

⁵ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories, COM/2017/0208 final.

- (3) The number of CCPs currently established in the Union and authorised under Regulation (EU) No 648/2012 remains relatively limited, standing at 16 in August 2018. 32 third-country CCPs have been recognised under the equivalence provisions of that Regulation, allowing them also to offer their services to clearing members and trading venues established in the Union⁶. Clearing markets are well integrated across the Union but highly concentrated in certain asset classes and highly interconnected. The concentration of risk makes the failure of a CCP a low-probability but a potentially extremely high-impact event. In line with the G20 consensus, the Commission adopted a proposal for a Regulation on CCP Recovery and Resolution⁷ in November 2016 to ensure that authorities are appropriately prepared to address a failing CCP, safeguarding financial stability and limiting taxpayer costs.
- (4) Notwithstanding that legislative proposal and in light of the growing size, complexity and cross-border dimension of clearing in the Union and globally, the supervisory arrangements for Union and third-country CCPs should be revisited. By addressing identified problems at an early stage and establishing clear and coherent supervisory arrangements both for Union and third-country CCPs, the overall stability of the Union financial system would be reinforced and the potential risk of a CCP failure should be lowered even further.

⁶ In accordance with Regulation (EU) No 648/2012, ESMA provides a list of the third-country CCPs that have been recognised to offer services and activities in the Union. The third-country CCPs are established in 15 countries covered by CCP equivalence decisions adopted by the Commission, including Australia, Hong Kong, Singapore, Japan, Canada, Switzerland, South Korea, Mexico, South Africa and the US CFTC, Brazil, UAE, Dubai International Financial Centre (DIFC), India and New Zealand.

⁷ Proposal for a Regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365. COM(2016) 856 final.

- (5) In light of these considerations, the Commission adopted a Communication on 4 May 2017 on responding to challenges for critical financial market infrastructures and further developing the Capital Markets Union⁸, stating that further changes to Regulation (EU) No 648/2012 are necessary to improve the current framework that ensures financial stability and supports the further development and deepening of the CMU.
- (6) The supervisory arrangements under Regulation (EU) No 648/2012 rely mainly on the home-country authority. CCPs established in the Union are currently authorised and supervised by colleges of national supervisors, the European Securities and Markets Authority (ESMA), relevant members of the European System of Central Banks (ESCB), and other relevant authorities. The colleges rely on coordination and information-sharing by the national competent authority which bears the responsibility to enforce the provisions laid out in Regulation (EU) No 648/2012. Diverging supervisory practices for CCPs across the Union can create risks of regulatory and supervisory arbitrage, jeopardising financial stability and allowing for unhealthy competition. The Commission has drawn attention to these emerging risks and the need for greater supervisory convergence in its Communication on CMU of September 2016⁹ and in the public consultation on the operations of the European Supervisory Authorities (ESAs)¹⁰. Within the already existing general role of ESMA to fulfil a coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes, ESMA should thus in future in particular focus on supervisory areas which have a cross-border dimension or a possible cross-border impact. ESMA should determine the supervisory areas which have a cross-border dimension or a possible cross-border impact based on its expertise and experience in the application of this Regulation.

⁸ Communication from the Commission to the European Parliament, the Council, and the European Central Bank on Responding to challenges for critical financial market infrastructures and further developing the Capital Markets Union, Brussels, 4.5.2017, COM(2017) 225 final.

⁹ Communication on the "State of the Union 2016: Completing the Capital Market Union – Commission accelerates reform"; 14 September 2016.

¹⁰ Public consultation on the operations of the European Supervisory Authorities"; 21/03/2017 – 16/05/2017.

- (7) The functioning of the colleges of supervisors is crucial for effective supervision of CCPs. In order to ensure Union-wide coherence of the processes within the colleges of supervisors, the written agreements determining the practical arrangements for the functioning of colleges should be refined and more standardised. To further promote the role of the members of the colleges, they should be entitled to contribute to the agenda setting of the college meetings. To increase the transparency of colleges, the composition of the colleges should be publicly disclosed by the CCPs' competent authority and ESMA. In order to avoid any conflicts of interest, Regulation (EU) No 1024/2013 stipulates that the supervisory tasks of the ECB and tasks relating to the monetary policy and any other of its tasks should be carried out in full separation. This specific separation of responsibilities of the ECB should be acknowledged in cases where the ECB is member of the college due to its function as a competent authority of a clearing member within the Single Supervisory Mechanism and as a central bank of issue as a representative of the Eurosystem by vesting the ECB with two votes in the college.
- (8) To facilitate the access to information for competent authorities of clearing members and central banks of issue of Member States whose financial stability could be impacted by a CCP's financial distress, these competent authorities and central banks of issue should also be enabled to participate in the college of the respective CCP on an optional basis. In order to ensure an appropriate, effective and swift decision-making process, these central banks of issue and the competent authorities of clearing members should not have any voting right.

- (9) To strengthen the role of colleges, they should be able to provide opinions on additional supervisory areas of fundamental impact on a CCP's business operations, including on the assessment of shareholders and members with qualifying holdings of CCPs and outsourcing of operational functions, services or activities. In addition, following a request of any member of the college, the college should be able to include in its opinion in the context of the authorisation of a CCP or the extension of activities and services of a CCP recommendations aimed at addressing shortcomings in the CCP's risk management and increasing its resilience, subject to a majority decision of the college. The vote of the college on the inclusion of such recommendations should be carried out separately from the vote of the college on the opinion. In order to reinforce the impact of college opinions and recommendations, the competent authorities should duly consider them and provide reasoning in cases of significant deviations from these opinions or recommendations.
- (10) To further promote convergence on supervisory decisions, ESMA should receive new mandates to develop draft regulatory technical standards on the extension of activities and services and in order to specify the conditions concerning the review of models, stress testing and back testing. Furthermore, ESMA should be entitled to issue necessary guidelines to further specify the common procedures for the supervisory review and evaluation process in relation to CCPs.
- (11) In view of the global nature of financial markets and of the need to address inconsistencies in the supervision of Union and third-country CCPs, ESMA's ability to promote convergence in the supervision of CCPs should be enhanced. For this purpose, a permanent internal committee for CCPs ("CCP Supervisory Committee") should be created to handle tasks related to CCPs authorised within the Union and third-country CCPs. The establishment, the functions and composition of the CCP Supervisory Committee set up within ESMA should be a unique solution to bring together expertise in the field of CCP supervision and should not constitute a precedent for the European Supervisory Agencies.

- (12) The Chair of the CCP Supervisory Committee should be an independent professional appointed by the Board of Supervisors on the basis of merit, skills, knowledge of clearing, post-trading, prudential supervision and financial matters, as well as of experience relevant to CCP supervision and regulation. The Chair should be appointed following an open selection procedure respecting the principles of gender balance, experience and qualification. The term of office of the Chair of the CCP Supervisory Committee shall be five years and might be extended once. The term of office of the first Chair appointed following the entry into force of this Regulation should be three years. The Chair shall not hold any office at national, Union or international level and should act independently and objectively. Where the Chair no longer fulfils the conditions required for the performance of his or her duties or has been found guilty of serious misconduct, the Board of Supervisors should be able to remove him or her from office.
- (13) The CCP Supervisory Committee should be responsible for specific tasks assigned to it pursuant to Regulation (EU) No 648/2012 to ensure the proper functioning of the internal market as well as the financial stability of the Union and its Member States. The CCP Supervisory Committee should take its decisions by a simple majority of its members, each voting member should have one vote and the Chair should have a casting vote in case of a tie. The final decision-making power should remain with the ESMA's Board of Supervisors.
- (14) In order to ensure a coherent and consistent supervisory approach, the CCP Supervisory Committee shall convene in its EU CCP configuration ("CCP Supervisory Committee in its Convergence configuration" or "Supervisory Convergence Committee"), composed of the chair and the competent authorities of Member States with an authorised CCP. To facilitate access to information that could be relevant for carrying out their tasks, central banks of issue of Union currencies of the financial instruments cleared by authorised CCPs may, by request and on a voluntary basis, participate in the Supervisory Convergence Committee in relation to the areas of Union-wide assessments of the resilience of CCPs to adverse market developments and the regular exchange and discussion related to relevant market developments, including situations or events impacting or likely to impact the prudential or financial soundness or the resilience of CCPs. Those central banks of issue would be non-voting members of the Supervisory Convergence Committee.

(15) In the light of a coherent and consistent supervisory approach within the Union, the Supervisory Convergence Committee should be responsible for preparing certain specific decisions and carrying out certain specific tasks which are entrusted to ESMA within its coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, especially with regard to supervisory areas which have a cross-border dimension or a possible cross-border impact. In detail, ESMA should continue to conduct annual peer review analyses of all competent authorities in relation to the authorisation and the supervision of CCPs in accordance with Regulation (EU) No 1095/2010, should continue to initiate and coordinate annual Union-wide assessments of the resilience of CCPs to adverse market developments in accordance with Regulation (EU) No 1095/2010 and should further promote the regular exchange and discussion among competent authorities on supervisory activities and decisions of competent authorities in supervisory areas which are determined by the ESMA's Board of Supervisors as relevant and appropriate for this purpose, based on a proposal by the Supervisory Convergence Committee. In this respect, such relevant supervisory activities and decisions could include in particular supervisory areas where diverging supervisory practices can create risks of regulatory and supervisory arbitrage or jeopardize financial stability. ESMA should also be informed of all opinions adopted by colleges laid down in this Regulation, including the basis of decision-making which the opinion of the college relates to and any recommendations possibly adhered to those opinions by the college. ESMA should also be informed of relevant market developments, including situations or events impacting or likely to impact the prudential or financial soundness or the resilience of CCPs.

(16) In addition, a mandatory ex ante exchange and discussion regarding draft decisions of competent authorities of CCPs on certain supervisory areas of particular importance should take place within the Supervisory Convergence Committee, comprising the areas of access to a CCP, access to a trading venue, authorisation of a CCP, extension of activities and services as well as the review of models, stress testing and back testing. Moreover, on a voluntary basis and on the initiative of competent authorities of CCPs, all draft decisions regarding the authorisation and supervision of CCPs authorised in the respective Member State can be subject to an exchange on an ex ante basis. In cases where, as a result of the outcome of the exchange and discussion within the Supervisory Convergence Committee, ESMA detected a necessity to comment on a particular draft decision of the competent authority to promote a consistent and coherent application of the Article in question, ESMA should provide a non-binding opinion on the draft decisions, prepared by the Supervisory Convergence Committee and approved by a decision of the Board of Supervisors within 20 calendar days of receipt of the draft decision by the competent authority at the latest to avoid any delay of decision making by the competent authority. ESMA should not provide an opinion to express that, as a result of the outcome of the exchange and discussion within the Supervisory Convergence Committee, a diverging view regarding the draft decision of the competent authority has not been identified. The power for ESMA to provide opinions should ensure that the competent authority of the CCP would receive an additional reaction regarding draft decisions by a group of supervisors specialised and experienced in the supervision of CCPs. Such opinions by ESMA would not have any implication on the responsibility of the competent authority of the CCP to take the final decision, which means that the final content of the respective decision would remain at the full discretion of the competent authority of the CCP. Likewise, the opinion provided by ESMA would not interfere with the power of colleges to determine the content of their opinion at their own discretion, where applicable.

- (17) Where the activities of ESMA in the context of fulfilling its coordination role between competent authorities of CCPs and across colleges with a view to building a common supervisory culture and consistent supervisory practices expose a lack of convergence and consistency in the application of this Regulation, ESMA should be obliged to issue necessary guidelines or recommendations or provide opinions. To facilitate this process, the Supervisory Convergence Committee should be able to suggest to the ESMA's Board of Supervisors to consider the adoption of guidelines, recommendations and opinions by ESMA. The Supervisory Convergence Committee should also be entitled to submit opinions to the ESMA's Board of Supervisors regarding decisions to be taken by ESMA, which concern the tasks and activities of the competent authorities of CCPs, which means that the Supervisory Convergence Committee could provide for instance opinions on draft technical standards or draft guidelines developed by ESMA in the area of authorisation and supervision of CCPs.
- (18) To provide effective supervision in relation to third-country CCPs, the CCP Supervisory Committee should comprise a third country CCP configuration ("CCP Supervisory Committee in its third country configuration" or "Third country CCP Supervisory Committee") in order to prepare complete draft decisions for approval by the ESMA's Board of Supervisors and carry out the tasks entrusted to ESMA with regard to the provisions concerning the recognition and supervision of third-country CCPs laid down in this Regulation. As cooperation and information are essential, the Third country CCP Supervisory Committee should share with the ESMA third country CCP College relevant information, including the complete draft decisions it submits to the ESMA's Board of Supervisors, final decisions adapted by the ESMA's Board of Supervisors, agendas and minutes of the meetings of the Third country CCP Supervisory Committee and applications for recognition by CCPs established in a third country.

- (19) In order to ensure an appropriate, effective and swift decision-making process, and in order to include the full range of practical experience and operational expertise regarding the supervision of CCPs, the Third country CCP Supervisory Committee should be composed of the Chair, the competent authorities of CCPs of Member States with an authorised CCP as well as, on request, for preparation of decisions in relation to Tier 2 CCPs, the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the respective third country CCP. The Chair and the representatives of the competent authorities of CCPs which are members of the Third country CCP Supervisory Committee should have voting rights. The central banks of issue which are members of the Third country CCP Supervisory Committee should not have any voting rights.
- (20) The central banks of issue should be involved in the preparation of the decisions by the Third country CCP Supervisory Committee in order to ensure the proper exercise of their tasks related to the monetary policy and the smooth operation of payment systems. As ESMA decisions in relation to Tier 2 CCPs on margin requirements, liquidity risk control, collateral, settlement and approval of interoperability arrangements could be of particular relevance for those central banks' tasks, the Third country CCP Supervisory Committee should consult the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the third country CCPs on the basis of a 'comply or explain' mechanism. As regards ESMA decisions recommending to the Commission that a third country CCP is of such substantial systemic importance that it, as a last resort, should not be recognised, the Third country CCP Supervisory Committee should seek the agreement of the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by that CCP.

- (21) The ESMA's Board of Supervisors should adopt the draft decisions submitted by the Third country CCP Supervisory Committee, acting in accordance with the decision-making process set out in Regulation (EU) No 1095/2010. In order to ensure an effective and swift decision-making process, certain decisions which do not relate to the recognition, classification of third country CCPs, additional requirements imposed on Tier 2 CCPs, review or withdrawal of recognition or to the essential elements of the ongoing supervision of the third-country CCPs, where consultation with the central banks of issue is required, should be adopted by the Board of Supervisors within 3 working days.
- (22) ESMA should be able to conduct investigations and on-site inspections of Tier 2 CCPs and related third parties to whom those CCPs have outsourced operational functions, services or activities. Where relevant, the competent authorities responsible for the supervision of the clearing members established in the Union should be informed of the findings of such investigations and on-site inspections. Where relevant for the carrying out of their monetary policy tasks, the central banks of issue of the financial instruments cleared or to be cleared by the CCP should be able to request participation in such on-site inspections.
- (23) In order to facilitate the information sharing and cooperation between ESMA, the Member States competent authorities responsible for CCP supervision and the competent authorities responsible for supervision of entities on which the operations of the third country CCPs might have an impact, ESMA should establish the ESMA third country CCP College. The college should consist of the Chair of the CCP Supervisory Committee, the competent authorities supervising the CCPs established in the Union, the supervisors of the clearing members established in the Union, the trading venues served or to be served by the third country CCPs, the linked or to be linked central securities depositories, as well as the members of the ESCB. While the main task of the college is to facilitate information sharing, the college members may also request any specific matter in relation to third country CCPs to be discussed by the CCP Supervisory Committee.

- (24) In order to ensure effective supervision, the CCP Supervisory Committee should be supported by dedicated staff from ESMA in order to prepare the CCP Supervisory Committee meetings, prepare the analyses necessary to carry out the tasks of the CCP Supervisory Committee and to support the ESMA CCP Supervisory Committee in its international cooperation at administrative level.
- (25) In the view of developing an efficient and resilient supervisory approach on CCPs, the Commission shall review the functioning of the CCP Supervisory Committee and should submit a report to the European Parliament and to the Council together with any appropriate proposals within 42 months after the entry into force of this Regulation.
- (26) In order to enable ESMA to conduct its tasks with regards to third country CCPs effectively, third-country CCPs should pay supervisory fees for ESMA's supervisory and administrative tasks. These fees should cover the applications for recognition of third-country CCPs and the annual fees associated with the tasks under ESMA's responsibility. The Commission should specify further in a delegated act the types of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid by 'Tier 1' and 'Tier 2' CCPs which are recognised in the Union.
- (27) The supervisory arrangements in this Regulation for third-country CCPs offering clearing services within the Union also require revision. Access to information, the ability to conduct on-site inspections and investigations, the possibility to share information on third-country CCPs between relevant Union and Member State authorities as well as the possibility to enforce ESMA's decisions applicable to third-country CCPs needs to be improved to avoid important financial stability implications for Union entities. There is also a risk that changes to third-country CCP rules or to a third-country regulatory framework cannot be taken into account and could negatively affect the regulatory or supervisory outcomes leading to an unlevel playing field between Union and third-country CCPs.

- (28) A significant amount of financial instruments denominated in the currencies of the Member States are cleared by recognised third-country CCPs. This will increase substantially when the United Kingdom withdraws from the Union and the CCPs established there will no longer be governed by the requirements of this Regulation. Cooperation arrangements agreed in the supervisory colleges will no longer be subject to the safeguards and procedures of this Regulation, including the Court of Justice of the European Union. This implies significant challenges for Union and Member State authorities in safeguarding financial stability.
- (29) As part of its commitment to integrated financial markets, the Commission should continue to determine, by way of equivalence, decisions that the legal and supervisory frameworks of third countries fulfil the requirements of Regulation (EU) No 648/2012. In order to enhance the implementation of the current equivalence regime in relation to CCPs, the Commission should be able to, if necessary, specify further the criteria for assessing the equivalence of third-country CCP regimes. It is also necessary to empower ESMA with the monitoring of regulatory and supervisory developments in those third-country CCP regimes that have been deemed equivalent by the Commission. This is in order to ensure that the equivalence criteria and any specific conditions set for their use continue to be satisfied by third countries. ESMA should report its findings to the Commission and to the competent authorities responsible for the supervision of the clearing members established in the Union on a confidential basis.

- (30) The Commission is currently able to amend, suspend, review or revoke an equivalence decision at any time, in particular where developments occur in a third country which materially affect the elements assessed in accordance with the equivalence requirements under this Regulation. Where a third country's relevant authorities no longer cooperate with ESMA or other Union supervisors in good faith or fail to comply on a continuous basis with the applicable equivalence requirements, the Commission is also able to, inter alia, put an authority of the third country on notice or publish a specific recommendation. Where the Commission decides at any time to revoke a third country's equivalence, it is able to delay the date of application of that decision in order to address the risks to financial stability or of market disruptions. In addition to those powers currently available, the Commission should also be able to set specific conditions to ensure that the equivalence criteria continue to be fulfilled on an ongoing basis by the third country to which an equivalence decision relates. The Commission should also be able to set conditions ensuring that ESMA is able to effectively exercise its responsibilities in relation to third-country CCPs recognised under this Regulation or in relation to monitoring of regulatory and supervisory developments in third countries that are of relevance for adopted equivalence decisions.
- (31) In view of the growing cross-border dimension of CCPs and of the interlinkages in the Union financial system, it is necessary to improve the ability of the Union to identify, monitor and mitigate the potential risks related to third-country CCPs. The role of ESMA should therefore be enhanced to effectively supervise third-country CCPs that apply for recognition to provide clearing services in the Union. The involvement of the Union central banks of issue in the recognition, supervision, review of recognition and withdrawal of recognition of third country CCPs that are active in the currency they issue should also be improved. Therefore, Union central banks of issue should be consulted on certain aspects affecting their monetary policy responsibilities in relation to financial instruments denominated in Union currencies which are cleared or to be cleared to a significant extent by CCPs located outside the Union.

- (32) Once the Commission has determined the legal and supervisory framework of a third country as equivalent to the Union framework, the process to recognise CCPs from that third country should take into account the risks those CCPs present for the financial stability of the Union or one of its Member States.
- (33) When considering the application of a third-country CCP for recognition, ESMA should assess the degree of systemic risk that the CCP presents to the financial stability of the Union or one of its Member States on the basis of objective and transparent criteria set out in this Regulation. A Commission delegated act should further specify these criteria.
- (34) CCPs that are not systemically important to the financial stability of the Union or one of its Member States should be considered as 'Tier 1' CCPs. CCPs that are systemically important, or likely to become systemically important, to the financial stability of the Union or one of its Member States should be considered as 'Tier 2' CCPs. ESMA should determine if a CCP is systemically-important or likely to become systemically important for the financial stability of the Union or one of its Member States taking into account five defined criteria. Where ESMA determines that a third-country CCP is not systemically important to the financial stability of the Union or one of its Member States, the existing recognition conditions under Regulation (EU) No 648/2012 should apply to that CCP. Where ESMA determines that a third-country CCP is systemically important, additional requirements for that CCP should be established. ESMA should only recognise such a CCP where that CCP complies with these requirements.
- (35) The additional requirements should include certain prudential requirements set out in Regulation (EU) No 648/2012 that aim to increase the safety and efficiency of a CCP. ESMA should be directly responsible for ensuring that a systemically important third-country CCP complies with those requirements. Related requirements should also enable ESMA to carry out full and effective supervision of that CCP.

- (36) In order to ensure the proper involvement of the central bank(s) of issue of all Union currencies of the financial instruments cleared or to be cleared by third country CCPs in the recognition process for systemically important third country CCPs, these CCPs should also fulfil additional requirements, related to the submission of information to the central bank of issue upon its reasoned request, cooperation of the CCPs with the central bank of issue in the context of stress tests carried out by ESMA , opening of an overnight deposit account with the central bank of issue and requirements in exceptional situations, that the central bank(s) of issue considers necessary. The access criteria and requirements of central bank of issue for opening an overnight deposit account should not amount to an obligation to relocate all or part of the clearing services of the CCP. The central bank(s) of issue should provide ESMA with confirmation whether or not the CCP complies with any additional requirements as quickly as possible and in any case within 150 working days from the CCP's application to ESMA or, if the additional requirements have been imposed after the recognition, within 90 working days after the imposition.
- (37) The transmission of monetary policy or the smooth functioning of payment systems may be affected by developments in centrally cleared markets in exceptional situations, such as stresses in the markets (especially the money and repurchase markets) on which the CCP relies to obtain liquidity; situations where CCPs' operations contribute to the drying up of liquidity in the market; serious malfunctions of payment or settlement arrangements that impede the CCP's ability to meet its payment obligations or increase its liquidity needs. The determination of such exceptional situations depends solely on monetary policy considerations and need not to coincide with any emergency situation relating to the CCP. In such situations, the prudential framework may therefore not fully mitigate the ensuing risks, in which case direct action by the central banks of issue to ensure the transmission of monetary policy or the smooth functioning of payment systems may be necessary.

- (38) In such exceptional situations, central banks of issue may need, to the extent allowed under their respective institutional frameworks, to impose temporary requirements relating to liquidity risks, settlement arrangements, margin requirements, collateral or interoperability arrangements. Non-compliance with such temporary requirements might trigger the withdrawal by ESMA of the recognition of the Tier 2 CCP. Those requirements could include, in particular, temporary enhancements to the liquidity risk management of a Tier 2 CCP, such as increase in liquidity buffer, increase in the frequency of the collection of intraday margins, and limits to cross-currency exposures, or specific modalities for depositing cash and settling payments in the currency of the central bank. The requirements should not extend to other areas of prudential supervision or amount automatically to withdrawal of recognition. Furthermore, the application of these requirements should only be a condition for recognition for a limited period of time of up to 6 months with a potential extension once to an additional period not exceeding 6 months. After expiration of this additional period, the application of these requirements should cease to be a condition for the recognition of a Tier 2 CCP.
- (39) Before the application of the requirements or before their possible extension, a central bank of issue should provide ESMA, the other central banks of issue of all Union currencies of the financial instruments cleared or to be cleared, the members of the ESMA third country CCP College with an explanation of how the requirements they intend to impose preserve the soundness and safety of the CCP and a justification of why the requirements are necessary and proportionate to ensure the transmission of monetary policy or the smooth functioning of payment systems. In order to avoid duplication and with a view to acting in a manner which takes due regard to and is aligned with the prudential requirements for CCPs laid down in this Regulation, the central bank of issue should cooperate and share information on a continuous basis with ESMA and the other central banks of issue of all Union currencies of the financial instruments cleared or to be cleared in relation to the temporary requirements applicable in exceptional situations.

- (40) The degree of risk posed by a systemically-important CCP to the financial system and stability of the Union varies. The requirements for systemically-important CCPs should therefore be applied in a manner proportionate to the risks that the CCP may present to the Union. Where ESMA, after consulting the ESRB, and in agreement with the central bank(s) of issue of all Union currencies of the financial instruments cleared or to be cleared by a third country CCP, concludes, on the basis of a fully reasoned assessment, including a quantitative technical assessment of the costs and benefits, that a third-country CCP, or some of its clearing services, are of such systemic importance that compliance with the additional requirements set out in this Regulation does not sufficiently address the financial stability risk, ESMA, as a measure of last resort, should be able to recommend to the Commission that that CCP or some of its clearing services should not be recognised. The Commission should be able to adopt an implementing act specifying that the third country CCP in question should not be able to provide some or all clearing services to clearing members and trading venues established in the Union unless that CCP is authorised in any Member State to do so in accordance with this Regulation. This implementing act should also set up appropriate adaptation period not exceeding two years, which might be extended once to an additional six months.
- (41) ESMA should regularly review the recognition of third-country CCPs as well as their classification as Tier 1 or Tier 2 CCPs. In this regard, ESMA should consider amongst others, the changes in the nature, size and complexity of the third-country CCP's business. Such reviews should take place at least every two years and more frequently where necessary. Where, following that review, ESMA determines that a Tier 1 CCP should be recognised as a Tier 2 CCP, ESMA should set an appropriate adaptation period not exceeding 18 months within which the CCP should comply with the requirements applicable to Tier 2 CCPs.
- (42) At the request of a Tier 2 CCP, ESMA should also be able to take into account the extent to which the compliance of a systemically important third-country CCP with the requirements applicable in that third country can be compared to the compliance of that CCP with the requirements of Regulation (EU) No 648/2012. The Commission should adopt a delegated act specifying further the modalities and conditions to assess such comparable compliance.

- (43) ESMA should have all the powers necessary to supervise recognised third country CCPs to ensure their ongoing compliance with the requirements of Regulation (EU) No 648/2012.
- (44) ESMA should be able to impose periodic penalty payments to compel third-country CCPs to end an infringement, to supply complete and correct information required by ESMA or to submit to an investigation or an on-site inspection.
- (45) ESMA should be able to impose fines on both Tier 1 and Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of this Regulation by providing incorrect or misleading information to ESMA. In addition, ESMA should be able to impose fines on Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of the additional requirements applicable to them in this Regulation. In case ESMA has assessed in accordance with Article 25a(1) the compliance of systemically-important third country CCPs with requirements that are comparable to the requirements referred to in Article 25(2b)(a) and set out in Article 16 and Titles IV and V, the acts of those CCPs should not be considered an infringement of this Regulation to the extent that they comply with these comparable requirements.
- (46) Fines should be imposed according to the level of seriousness of the infringement. Infringements should be divided into different groups for which specific fines should be allocated. In order to calculate the fine relating to a particular infringement, ESMA should apply a two-step methodology consisting of setting a basic amount and adjusting that basic amount, if necessary, by certain coefficients. The basic amount should be established by taking into account the annual turnover of the third-country CCPs concerned and the adjustments should be made by increasing or decreasing the basic amount through the application of the relevant coefficients in accordance with this Regulation.
- (47) This Regulation should establish coefficients linked to aggravating and mitigating circumstances in order to give the necessary tools to ESMA to decide on a fine which is proportionate to the seriousness of the infringement committed by a third country CCP, taking into account the circumstances under which that infringement has been committed.

- (48) The decision to impose fines or periodic penalty payments should be based on an independent investigation.
- (49) Before deciding whether to impose fines or periodic penalty payments, ESMA should give the persons subject to the proceedings the opportunity to be heard in order to respect their rights of defence.
- (50) ESMA should refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or from facts which are substantially the same, has acquired the force of *res judicata* as a result of criminal proceedings under national law.
- (51) ESMA's decisions imposing fines and periodic penalty payments should be enforceable and their enforcement should be subject to the rules of civil procedure which are in force in the State in the territory of which it is carried out. Rules of civil procedure should not include criminal procedural rules, but could include administrative procedural rules.
- (52) In the case of an infringement committed by a Tier 2 CCP, ESMA should be empowered to apply a range of supervisory measures, including requiring a Tier 2 CCP to bring the infringement to an end and, as a last resort, withdrawing the recognition where a Tier 2 CCP has seriously or repeatedly infringed this Regulation. The supervisory measures should be applied by ESMA taking into account the nature and seriousness of the infringement and should respect the principle of proportionality. Before taking a decision on supervisory measures, ESMA should give the persons subject to the proceedings an opportunity to be heard in order to comply with their rights of defence. When ESMA decides to withdraw recognition, ESMA should limit a potential market disruption by defining an appropriate adaptation period not exceeding 2 years.

- (53) The power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of the further specification of the type of fees, the matters for which fees are due, the amount of the fees to be paid and the manner in which they are to be paid; specifying the conditions under which the criteria are specified to determine if a third-country CCP is, or is likely to become, systemically important for financial stability of the Union or for one or more of its Member States; the further specification of the criteria to be used in its equivalence assessments of third countries; specify how and under what conditions certain requirements shall be complied with by third-country CCPs; further rules of procedure relating to the imposition of fines or periodic penalty payments, including provisions on the rights of defence, time limits, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalty payments or fines; measures to amend Annex IV in order to take account of developments in the financial markets.
- (54) To ensure uniform conditions for the implementation of this Regulation, and in particular with regard to the recognition of third-country CCPs and the equivalence of third countries' legal frameworks, implementing powers should be conferred on the Commission.
- (55) Since the objectives of this Regulation, namely to increase the safety and efficiency of CCPs by laying down uniform requirements for their activities, cannot be sufficiently achieved by the Member States but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (56) The use by ESMA of its power to recognise a third-country CCP as a Tier 1 or a Tier 2 CCP should be deferred until the criteria to allow the assessment of whether or not a third-country CCP is systemically important, or likely to become, for the financial system of the EU or one or more of its Member States are further specified.
- (57) Regulation (EU) No 648/2012 should therefore be amended accordingly.

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) No 648/2012

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

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

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

2. In Article 15, the following paragraph 3 is added:

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

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

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

3. Article 18 is amended as follows:

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

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

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

"(c) the competent authorities responsible for the supervision of the clearing members of the CCP which are established in the three Member States with the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period, including, where relevant, the ECB in the framework of the tasks concerning the prudential supervision of credit institutions within the single supervisory mechanism conferred upon it in accordance with Council Regulation (EU) No 1024/2013.¹¹"

(c) in paragraph 2, the following point (ca) is inserted:

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

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

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

¹¹ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63."

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

“The CCP’s competent authority shall publicly disclose on its website and notify to ESMA a list of the members of the college within 30 calendar days after the college’s establishment. The list shall be updated by the CCP’s competent authority without undue delay after any change to the composition of the college. ESMA shall publicly disclose on its website without undue delay lists of the members of each of the colleges established after reception of the notification by the CCPs competent authorities.”

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

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

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

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

(i) voting procedures as referred to in Article 19(3);

(ii) the procedures for setting the agenda of college meetings;

(iii) the frequency of the college meetings;

(iv) the format and scope of the information to be provided by the CCP’s competent authority to the college members, especially with regard to the information to be provided in accordance with Article 21(4);

(v) the appropriate minimum timeframes for the assessment of the relevant documentation by the college members;

(vi) the modalities of communication between college members;

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

4. Article 19 is amended as follows:

(a) in paragraph 1, the following subparagraph is added:

“At the request of any member of the college and upon adoption by a majority of the college according to paragraph 3, the opinion adopted by the college may include recommendations, in addition to the determination of whether the CCP complies with all the requirements laid down in this Regulation, aimed at addressing shortcomings in the CCP’s risk management and increasing its resilience.”

(b) paragraph 3 is replaced by the following:

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

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

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

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

(c) a new paragraph 4 is added:

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

5. Article 21 is amended as follows:

paragraph 6 is replaced by the following:

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

6. In Title III, Chapter 2, the following Article 21a is inserted:"

Article 21a

Fees

1. CCPs established in a third country shall pay the following fees:

(a) fees associated with applications for recognition pursuant to Article 25;

(b) annual fees associated with ESMA's tasks in accordance with this Regulation in relation to the CCPs recognised in accordance with Article 25.

2. The Commission shall adopt a delegated act in accordance with Article 82 to further specify the types of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid by the following entities:

(a) a CCP established in a third country which applies for recognition or is recognised in accordance with Article 25(2);

(b) a CCP established in a third country which applies for recognition or is recognised in accordance with Article 25(2b).”

7. Article 24 is replaced by the following:

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

8. The following Chapter 3A is inserted:

CHAPTER 3A

CCP Supervisory Committee

Article 24a

CCP Supervisory Committee

1. ESMA shall establish a permanent internal committee pursuant to Article 41 of Regulation (EU) No 1095/2010 which shall comprise:
 - (a) a third country CCP configuration in accordance with paragraph 2 which shall perform the tasks pursuant to paragraph 8 (“CCP Supervisory Committee in its third country configuration” or “Third country CCP Supervisory Committee”);
 - (b) an EU CCP configuration in accordance with paragraph 4 which shall perform the tasks pursuant to paragraph 6 (“CCP Supervisory Committee in its Convergence configuration” or “Supervisory Convergence Committee”).
2. The Third country CCP Supervisory Committee shall be composed of:
 - (a) the Chair, appointed in accordance with paragraph 5, who shall chair the committee and be voting;

- (b) the competent authorities of Member States referred to in Article 22 of this Regulation with an authorised CCP who shall be voting;
- (c) in respect of the preparation of all decisions pertaining to the Articles referred to in paragraph 8 in relation to Tier 2 CCPs and to Article 25(2a), for which the Third country CCP Supervisory Committee convenes, the central banks of issue referred to in point (f) of Article 25(3) that have requested membership of the Third country CCP Supervisory Committee. Membership shall be granted upon a one-off written request addressed to the Chair. Those central banks of issue will be non-voting members of the Third country CCP Supervisory Committee.

3. The Supervisory Convergence Committee shall be composed of:

- (a) the Chair, appointed in accordance with paragraph 5, who shall chair the committee and be voting;
- (b) the competent authorities of Member States referred to in Article 22 of this Regulation with an authorised CCP who shall be voting;
- (c) in the context of discussions pertaining to point (b) and sub-point (iv) of point (c) of paragraph 7, the central banks of issue of Union currencies of the financial instruments cleared by authorised CCPs that have requested membership of the Supervisory Convergence Committee. Membership shall be granted upon a one-off written request addressed to the Chair. Those central banks of issue will be non-voting members of the Supervisory Convergence Committee.

4. In Member States where more than one authority has been designated as competent in accordance with Article 22, each of the designated competent authorities of this Member State may decide to appoint one representative for the purposes of point (b) of paragraph 2 and point (b) of paragraph 3. For the voting procedures set out in paragraph 9, the representatives of the respective Member State shall together be considered as one voting member.

5. The Chair of the CCP Supervisory Committee shall be a full-time, independent professional. The Chair shall be appointed on the basis of merit, skills, knowledge of clearing, post-trading, prudential supervision and financial matters as well as of experience relevant to CCP supervision and regulation.

The Chair shall be appointed by the Board of Supervisors in accordance with Article 44 of Regulation (EU) 1095/2010, following an open selection procedure which shall respect the principles of gender balance, experience and qualification.

Where the Chair of the CCP Supervisory Committee no longer fulfils the conditions required for the performance of his or her duties as referred to in the first subparagraph or has been found guilty of serious misconduct, the Board of Supervisors shall adopt a decision to remove him or her from office.

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

By way of derogation from the previous subparagraph, the term of office of the first Chair appointed following the entry into force of this Regulation shall be three years and may be extended once for a period of five years.

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

6. In relation to CCPs authorised or applying for authorisation in the Union, the Supervisory Convergence Committee shall prepare decisions and carry out the tasks entrusted to ESMA in points (a) to (d) of paragraph 7.

In addition, the Supervisory Convergence Committee may:

- (a) based on its activities in accordance with points (a), (c) and (d) of paragraph 7, request the Board of Supervisors to consider whether the adoption of guidelines, recommendations and opinions by ESMA is necessary in order to address inconsistencies in the application of this Regulation among competent authorities and colleges. The Board of Supervisors shall duly consider such requests and provide an appropriate response;
- (b) submit to the Board of Supervisors opinions on the decisions to be taken by ESMA in accordance with Article 44 of Regulation (EU) No 1095/2010, excluding the decisions referred to in Articles 17 and 19 of that Regulation, relating to tasks that have been conferred on the competent authorities referred to in Article 22 as provided for in this Regulation.

7. ESMA shall fulfil a coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes, especially with regard to supervisory areas which have a cross-border dimension or a possible cross-border impact.

For the purposes of the first subparagraph, ESMA shall:

- (a) at least annually, conduct a peer review analysis of the supervisory activities of all competent authorities in relation to the authorisation and the supervision of CCPs in accordance with Article 30 of Regulation (EU) No 1095/2010;

- (b) at least annually, initiate and coordinate Union-wide assessments of the resilience of CCPs to adverse market developments in accordance with Article 32(2) of Regulation (EU) No 1095/2010;
- (c) promote the regular exchange and discussion among competent authorities designated in accordance with Article 22(1) related to
- (i) relevant supervisory activities and decisions that have been adopted by the competent authorities referred to in Article 22 when carrying out their duties in accordance with this Regulation regarding the authorisation and supervision of CCPs authorised in their territory;
 - (ii) draft decisions to be adopted by a competent authority in accordance with Articles 7, 8, 14, 15 and 49. ESMA shall provide an opinion to the relevant competent authority within 20 calendar days of receipt of the draft decision by that authority in cases where ESMA detected a necessity to comment on the draft decision to promote a consistent and coherent application of the Article in question;
 - (iii) on a voluntary basis and on the initiative of a competent authority referred to in Article 22, draft decisions to be adopted or supervisory activities to be undertaken by that competent authority when carrying out its duties in accordance with this Regulation regarding the authorisation and supervision of CCPs authorised in its territory. ESMA shall provide an opinion to the relevant competent authority within 20 calendar days of receipt of the draft decision by that authority in cases where ESMA detected a necessity to comment on the draft decision to promote a consistent and coherent application of the Article in question;
 - (iv) relevant market developments, including situations or events impacting or likely to impact the prudential or financial soundness or the resilience of CCPs authorised in accordance with Article 14 of this Regulation or its clearing members;
- (d) be informed of and discuss all opinions and recommendations adopted by colleges pursuant to Article 19, in order to contribute to the consistent and coherent functioning of the colleges and foster the coherence of the application of this Regulation among them.

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

Where the analysis referred to in point (a) or the exchange referred to in point (c) and (d) of the second subparagraph exposes a lack of convergence and consistency in the application of this Regulation, ESMA shall issue the necessary guidelines or recommendations pursuant to Article 16 of Regulation (EU) No 1095/2010 or provide opinions pursuant to Article 29 of Regulation (EU) No 1095/2010 to address these deficiencies. Where an assessment referred to in point (b) of the second subparagraph exposes shortcomings in the resilience of one or more CCPs, ESMA shall issue the necessary recommendations pursuant to Article 16 of Regulation (EU) No 1095/2010.

8. In relation to third-country CCPs, the Third country CCP Supervisory Committee shall prepare the decisions and carry out the tasks entrusted to ESMA in Articles 25, 25a, 25b, 25c, 25d, 25e, 25f, 25g, 25h, 25i, 25j, 25m and 25n of this Regulation.

The Third country CCP Supervisory Committee shall submit to the Board of Supervisors all complete draft decisions related to the first subparagraph for adoption in accordance with Article 24b and shall share with the ESMA third country CCP College the agendas of its meetings before these meetings take place, the minutes of its meetings, the complete draft decisions it submits to the Board of Supervisors and the final decisions adopted by the Board of Supervisors.

9. Decisions of the CCP Supervisory Committee shall be taken by a simple majority of its members. Each voting member shall have one vote. In case of a draw, the Chair shall have the casting vote.

With regard to decisions pursuant to Articles 41, 44, 46, 50 and 54 in relation to Tier 2 CCPs, the Third country CCP Supervisory Committee shall consult the central banks of issue referred to in point (f) of Article 25(3). Each central bank of issue may respond to the

Third country CCP Supervisory Committee's request for consultation within 10 working days as of the transmission of the draft decision. In emergency situations, the aforementioned period shall not exceed 24 hours. Where a central bank of issue proposes amendments or objects to the Third country CCP Supervisory Committee draft decisions pursuant to Articles 41, 44, 46, 50 and 54, it shall provide full and detailed reasons, in writing. Upon conclusion of the period for consultation, the Third country CCP Supervisory Committee shall duly consider the amendments proposed by the central banks of issue referred to in point (f) of Article 25(3).

Where the Third country CCP Supervisory Committee does not reflect in its draft decision the amendments proposed by a central bank of issue, the Third country CCP Supervisory Committee shall inform that central bank of issue in writing stating its full reasons for not taking into account the amendments proposed by a central bank of issue, providing an explanation for deviations from those amendments. The Third country CCP Supervisory Committee shall submit to the Board of Supervisors the amendments proposed by central banks of issue referred to in point (f) of Article 25 (3) and its explanations for not taking them into account together with its draft decision to be submitted to the Board of Supervisors for adoption.

With regard to decisions pursuant to Article 25(2c), the Third country CCP Supervisory Committee shall seek the agreement of the central banks of issue referred to in point (f) of Article 25(3) on those aspects of the draft decision which relate to the currency they issue. The agreement of each central bank of issue shall be deemed to be given, unless the central bank of issue proposes amendments or objects within 10 working days as of the transmission of the draft decision. Where the central bank of issue proposes amendments or objects to a draft decision, it shall provide full and detailed reasons, in writing. Where a central bank of issue referred in point (f) of Article 25(3) proposes amendments with respect to those aspects of the draft decision pursuant to Article 25(2c), which relate to the currency it issues, the Third country CCP Supervisory Committee may only adopt those aspects as amended. Where a central bank of issue objects with respect to those aspects of the draft

decision pursuant to Article 25(2c), which relate to the currency it issues, the Third country CCP Supervisory Committee shall not adopt those aspects.

10. The CCP Supervisory Committee shall be supported by dedicated staff from ESMA in order to:
 - (a) prepare the CCP Supervisory Committee meetings;
 - (b) prepare the analyses necessary to carry out the tasks of the CCP Supervisory Committee;
 - (c) support the ESMA CCP Supervisory Committee in its international cooperation at administrative level.
11. For the purposes of this Regulation, ESMA shall ensure structural separation between the CCP Supervisory Committee and other functions referred to in Regulation (EU) No 1095/2010.

Article 24b

Decision-making at the Board of Supervisors in relation to third country CCPs

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

Where the Third country CCP Supervisory Committee submits draft decisions to the Board of Supervisors in relation to third country CCPs pursuant to Articles other than those referred to in the first subparagraph, the Board of Supervisors shall decide on those draft

decisions in accordance with Article 44 of Regulation (EU) No 1095/2010 within 3 working days.

9. The following Articles 25, 25a, 25b, 25ba, 25c, 25d, 25e, 25f, 25g, 25h, 25i, 25j, 25k, 25l, 25m, 25n are inserted:

CHAPTER 4

Relations with third countries

Article 25

Recognition of a third-country CCP

1. A CCP established in a third country may provide clearing services to clearing members or trading venues established in the Union only where that CCP is recognised by ESMA.
2. ESMA, after consulting the authorities referred to in paragraph 3, may recognise a CCP established in a third country that has applied for recognition to provide certain clearing services or activities where:
 - (a) the Commission has adopted an implementing act in accordance with paragraph 6;
 - (b) the CCP is authorised in the relevant third country, and is subject to effective supervision and enforcement ensuring full compliance with the prudential requirements applicable in that third country;
 - (c) cooperation arrangements have been established pursuant to paragraph 7;
 - (d) the CCP is established or authorised in a third country that is not considered, by the Commission in accordance with Directive (EU) 2015/849 of the European Parliament and of the Council ⁽¹²⁾, as having strategic deficiencies in its national

¹² Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and

anti-money laundering and counter financing of terrorism regime that poses significant threats to the financial system of the Union;

- (e) the CCP has not been determined as systemically important or likely to become systemically important (Tier 1 CCP) in accordance with paragraph 2a.

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

- (a) the nature, size and complexity of the CCP's business, including the value in aggregate terms and in each Union currency of transactions cleared by the CCP, or the aggregate exposure of the CCP engaged in clearing activities to its clearing members, and to the extent possible their clients and indirect clients established in the Union, including where any of these persons have been designated by Member States as Other Systemically Important Institutions (O-SIIs) pursuant to Article 131(3) of Directive 2013/36/EU;
- (b) the effect that the failure of or a disruption to the CCP would have on financial markets, financial institutions, the broader financial system, or on the financial stability of the Union or of one or more of its Member States;
- (c) the CCP's clearing membership structure;
- (d) the availability of alternative clearing services in respective Union currency to clearing members, their clients and indirect clients established in the Union;
- (e) the CCP's relationship, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system to the extent that this is likely to have an effect on the financial stability of the Union or one of its Member States.

of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

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

- 2b. Where ESMA determines a CCP to be systemically important or likely to become systemically important (Tier 2 CCP) in accordance with paragraph 2a, it may only recognise that CCP where, in addition to the conditions referred to in Article 25(2)(a), (b), (c) and (d), the following conditions are fulfilled:
- (a) the CCP complies, at the moment of recognition and thereafter on an ongoing basis, with the requirements set out in Article 16 and in Titles IV and V. With regard to the CCP's compliance with Articles 41, 44, 46, 50 and 54 ESMA shall consult the central banks of issue referred to in point (f) of paragraph 3 in accordance with the procedure set out in the second subparagraph of Article 24a(9). ESMA shall take into account, in accordance with Article 25a(2), the extent to which a CCP's compliance with those requirements is satisfied by the CCP's compliance with the comparable requirements applicable in the third country;
 - (b) the central banks of issue referred to in point (f) of paragraph 3 have provided ESMA with written confirmation, within 150 working days of the submission of a complete application or according to review in paragraph 5, that the CCP complies with the following requirements that those central banks of issue may have imposed in the carrying out of their monetary policy tasks:
 - (i) to submit any information which the central bank of issue referred to in point (f) of paragraph 3 may require upon its reasoned request;
 - (ii) to fully and duly cooperate with the central bank of issue referred to in point (f) of paragraph 3 in the context of the assessment of the CCP's resilience to adverse market conditions carried out in accordance with Article 25b(2);

- (iii) to open or notify the intent to open, in accordance with relevant access criteria and requirements, an overnight deposit account with the central bank of issue.
- (iv) to comply with requirements, applied in exceptional situations by the central bank of issue, within its competences to address temporary systemic liquidity risks affecting the transmission of monetary policy or the smooth functioning of payment systems and relating to liquidity risk control, margin requirements, collateral, settlement arrangements or interoperability arrangements. These temporary requirements may include, in particular, enhancements to the liquidity risk management of a CCP, such as an increase in the liquidity buffer, an increase in the frequency of the collection of intraday margins, and limits to cross-currency exposures, or specific modalities for depositing cash with the central bank and settling payments in the currency of the central bank. The requirements shall preserve the financial soundness and safety of the CCP.

The application of these requirements shall be a condition for recognition for a limited period of time of up to 6 months. Where at the end of that period the central bank of issue considers that the exceptional situation persists, the application of the requirements for recognition purposes may be extended once to an additional period not exceeding 6 months.

Before imposing or extending those requirements, the central bank of issue shall inform ESMA, the other central banks of issue referred to point (f) of paragraph 3 and the members of the ESMA third country CCP College and provide them with an explanation of how the requirements it intends to impose preserve the soundness and financial safety of the CCP and with a justification of why the requirements are necessary and proportionate to ensure the transmission of monetary policy or the smooth functioning of payment systems in relation to the currency it issues. ESMA shall submit to the central bank of issue an opinion within 10 working days as of the

transmission of the draft requirement or draft extension. In emergency situations, the aforementioned period shall not exceed 24 hours. In its opinion ESMA shall consider in particular the effects of the requirements imposed on the soundness and financial safety of the CCP. The other central banks of issue referred to in point (f) of paragraph 3 may submit an opinion within the same deadline. Upon conclusion of the period for consultation, the central bank of issue shall duly consider the amendments proposed in the opinions of ESMA or the central banks of issue referred to in point (f) of paragraph (3).

The central bank of issue shall cooperate and share information with ESMA and the other central banks of issue referred to in point (f) of paragraph (3) in relation to the temporary requirements applicable in exceptional situations on a continuous basis, in particular in relation to the assessment of systemic liquidity risks and the effects of the imposed requirements on the soundness and financial safety of the CCP.

Where a central bank of issue referred to in point (f) of Article 25(3) imposes any of the requirements referred to in the first subparagraph after a Tier 2 CCP has been recognised, any such requirement shall be considered as a condition for recognition and the central banks of issue shall provide ESMA with written confirmation, within 90 working days, that the CCP complies with the requirement.

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

- (c) the CCP has provided ESMA with its unconditional written consent, signed by the legal representative of the CCP, to provide within 72 hours after service of a request by ESMA any documents, records, information and data held by such CCP at any time, and that ESMA may access any of the CCP's business premises, as well as a

reasoned legal opinion by an independent legal expert confirming that the consent provided is valid and enforceable under the relevant applicable laws;

- (d) the CCP has put in place all necessary measures and procedures that ensure the effective compliance with the requirements laid down in points (a) and (c);
- (e) the Commission has not adopted an implementing act in accordance with paragraph 2c.

2c. As a measure of last resort, ESMA, after consulting the ESRB and in agreement with the central banks of issue referred to in point (f) of paragraph 3 on aspects which relate to the currency they issue in accordance with the fourth subparagraph of Article 24a(9) and commensurate with the degree of systemic importance of the CCP in accordance with paragraph 2a, may, on the basis of a fully reasoned assessment, conclude that a CCP or some of its clearing services are of such substantial systemic importance that the CCP should not be recognised. In its assessment ESMA shall:

- (a) explain that compliance with the conditions set out in paragraph 2b does not sufficiently address the financial stability risk for the Union or for one of its Member States;
- (b) provide a quantitative technical assessment of the costs and benefits and consequences of a decision not to recognise the CCP.

On the basis of its assessment, ESMA shall recommend that the Commission adopt an implementing act confirming that that CCP or some of its clearing services should not be recognised in accordance with paragraph 2b.

After submission of the recommendation referred to in the second subparagraph, the Commission may adopt an implementing act specifying:

- (a) that following the adaptation period specified by the Commission in accordance with point (b), that third country CCP shall not provide some or all of its clearing services to clearing members and trading venues established in the Union unless it is authorised to do so in accordance with Article 14.
- (b) an appropriate adaptation period for the CCP, its clearing members and their clients. The adaptation period shall not exceed 2 years, and may be extended once by an additional 6 months;
- (c) the conditions under which that CCP may be temporarily recognised during the adaptation period referred to in point (b);

- (d) any measures that shall be taken during the adaptation period, in order to limit the potential costs to clearing members and their clients, in particular those established in the Union.

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

- (a) the characteristics of the services offered by the CCP and their substitutability;
- (b) based on the legal and economic consequences whether and to what extent outstanding cleared transactions shall be included within the scope of the implementing act;
- (c) the potential cost implications to clearing members and their clients, in particular those established in the Union.

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

- 3. When assessing whether the conditions referred to in paragraph 2 (a), (b), (c) and (d) are met, ESMA shall consult:
 - (a) the competent authority of a Member State in which the CCP provides or intends to provide clearing services and which has been selected by the CCP;
 - (b) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States which make or are anticipated by the CCP to make the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period;
 - (c) the competent authorities responsible for the supervision of trading venues located in the Union, served or to be served by the CCP;

- (d) the competent authorities supervising CCPs established in the Union with which interoperability arrangements have been established;
- (e) the relevant members of the ESCB of the Member States in which the CCP provides or intends to provide clearing services and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established;
- (f) the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the CCP.

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

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

The recognition decision shall be based on the conditions set out in paragraph 2 for Tier 1 CCPs and in paragraphs 2 and 2b for Tier 2 CCPs and shall be independent of any assessment as the basis for the equivalence decision as referred to in Article 13(3).

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

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

5. ESMA shall, after consulting the authorities and entities referred to in paragraph 3, review the recognition of a CCP established in a third country where that CCP has extended the range of its activities and services in the Union and in any case at least every two years. That review shall be conducted in accordance with paragraphs 2, 2a, 2b, 3 and 4.

Where, following the review referred to in the first subparagraph, ESMA determines that a third country CCP that has been recognised as Tier 1 CCP should be recognised as a Tier 2 CCP, ESMA shall set an appropriate adaptation period which shall not exceed 18 months within which the CCP must comply with the requirements referred to in paragraph 2b. ESMA may extend that adaptation period up to an additional 6 months upon the reasoned request of the CCP or competent authority responsible for the supervision of the clearing members, where such extension is justified by exceptional circumstances and implications to the clearing members established in the Union.

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

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

6a. The Commission may adopt a delegated act in accordance with Article 82 to further specify the criteria referred to in points (a), (b) and (c) of paragraph 6.

6b. ESMA shall monitor the regulatory and supervisory developments in third countries for which implementing acts have been adopted pursuant to paragraph 6.

Where ESMA identifies any regulatory or supervisory development in those third countries that may impact the financial stability of the Union or of one of its Member States, it shall inform the Commission and the members of the ESMA third country CCP College referred to in Article 25ba confidentially and without delay.

ESMA shall submit a confidential report to the Commission and the members of the ESMA third country CCP College referred to in Article 25ba on the regulatory and supervisory developments in the third countries referred to in the first subparagraph on an annual basis.

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

- (a) the mechanism for the exchange of information between ESMA, the central banks of issue referred to in point (f) of paragraph 3 and the competent authorities of the third countries concerned, including access to all information requested by ESMA regarding CCPs authorised in third countries;
- (b) the mechanism for prompt notification to ESMA where a third-country competent authority deems a CCP it is supervising to be in breach of the conditions of its authorisation or of other law to which it is subject;
- (c) the mechanism for prompt notification to ESMA by a third-country competent authority where a CCP it is supervising has been granted the right to provide clearing services to clearing members or clients established in the Union;

- (d) the procedures concerning the coordination of supervisory activities, including the agreement of third-country authorities to allow investigations and on-site inspections in accordance with Articles 25d and 25e respectively.
- (e) the procedures necessary for the effective monitoring of regulatory and supervisory developments in a third country;
- (f) the procedures for third country authorities to assure the effective enforcement of decisions adopted by ESMA according to Articles 25b, 25c, 25d, 25e, 25f, 25g, 25h, 25i, 25j, 25m and 25n.
- (g) the procedures for third country authorities to inform ESMA, the ESMA third country CCP College referred to in Article 25ba, the central banks of issue referred to in point (f) of paragraph 3 without undue delay of any emergency situations relating to the CCP, including developments in financial markets, which may have an adverse effect on market liquidity and the stability of the financial system in the Union or one of its Member States and the procedures and contingency plans to address such situations.

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

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

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

Article 25a

Comparable compliance

1. The CCP referred to in Article 25(2b)(a) may submit a reasoned request that ESMA assesses its comparable compliance with the requirements referred to in Article 25(2b)(a) and set out in Article 16 and Titles IV and V. ESMA shall immediately transmit the request to the ESMA third country CCP College.
2. The request referred to in paragraph 1 shall provide the factual basis for a finding of comparability and the reasons why compliance with the requirements applicable in the third country satisfies the requirements set out in Article 16 and Titles IV and V.
3. The Commission, in order to ensure that the assessment referred to in paragraph 1 effectively reflects the regulatory objectives of the requirements set out in Article 16 and Titles IV and V and the Union's interests as a whole, shall adopt a delegated act to specify the following:
 - (a) the minimum elements to be assessed for the purposes of paragraph 1;
 - (b) the modalities and conditions to carry out the assessment.

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

Article 25b

Ongoing compliance with the conditions for recognition

1. ESMA shall be responsible for carrying out the duties resulting from this Regulation for the supervision on an ongoing basis of the compliance of recognised Tier 2 CCPs with the requirements referred to in Article 25(2b)(a). With regard to decisions pursuant to Articles

41, 44, 46, 50 and 54 ESMA shall consult the central banks of issue referred to in point (f) of Article 25(3) in accordance with the second subparagraph of Article 24a(9).

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

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

2. ESMA shall carry out assessments of the resilience of recognised CCPs to adverse market developments in accordance with Article 32(2) of Regulation (EU) No 1095/2010, in coordination with the assessments referred to in point b of Article 24a (7). Central banks of issue referred to in point (f) of Article 25(3) may contribute to such assessments in the carrying out of their monetary policy tasks.

Article 25ba

ESMA third country CCP College

1. ESMA shall establish a college for third country CCPs to facilitate the sharing of information in accordance with this Regulation.
2. The college shall consist of:
 - (a) the Chair of the CCP Supervisory Committee, who shall chair the college;
 - (b) the competent authorities responsible for supervision of CCPs designated by the Member States pursuant to Article 22; in Member States where more than one

authority has been designated as competent in accordance with Article 22, those authorities shall agree on a common representative.

- (c) the competent authorities responsible for the supervision of the clearing members established in the Union;
 - (d) the competent authorities responsible for the supervision of trading venues established in the Union, served or to be served by the CCPs;
 - (e) the competent authorities supervising central securities depositories established in the Union to which the CCPs are linked or intend to be linked;
 - (f) the members of the ESCB.
3. The college members may request the Third country CCP Supervisory Committee to discuss specific matters in relation to a CCP established in a third country. Such request shall be made in writing and shall include detailed reasoning for the request. The Third country CCP Supervisory Committee shall duly consider such requests and provide an appropriate response.
4. The establishment and functioning of the college shall be based on a written agreement between all its members. The obligation of professional secrecy according to Article 83 shall apply to all college members.

Article 25c

Request for information

1. ESMA may, by simple request or by decision, require recognised CCPs and related third parties to whom those CCPs have outsourced operational functions or activities to provide all necessary information to enable ESMA to carry out its duties under this Regulation.
2. When sending a simple request for information under paragraph 1, ESMA shall indicate all of the following:

- (a) the reference to this Article as the legal basis of the request;
- (b) the purpose of the request;
- (c) the information required;
- (d) the time limit to provide the information;
- (e) inform the person from whom the information is requested that there is no obligation to provide the information but that, in case of a voluntary reply to the request, the information provided must not be incorrect or misleading;
- (f) the fine provided for in Article 25g in conjunction with point (a) of Section V of Annex III, where the answers to questions asked are incorrect or misleading.

3. When requiring that information is provided under paragraph 1 by decision, ESMA shall indicate all of the following:

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

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

Article 25d

General investigations

1. In order to carry out its duties under this Regulation, ESMA may conduct necessary investigations of Tier 2 CCPs and related third parties to whom those CCPs have outsourced operational functions, services or activities. To that end, the officials and other persons authorised by ESMA shall be empowered to:
 - (a) examine any records, data, procedures and any other material relevant to the execution of its tasks irrespective of the medium on which they are stored;
 - (b) take or obtain certified copies of or extracts from such records, data, procedures and other material;
 - (c) summon and ask Tier 2 CCPs or their representatives or staff for oral or written explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers;
 - (d) interview any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation;
 - (e) request records of telephone and data traffic.

The ESMA third country CCP College referred to in Article 25ba shall be informed without undue delay of any findings that may be relevant for execution of their tasks.

2. The officials and other persons authorised by ESMA for the purposes of the investigations referred to in paragraph 1 shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the investigation. That authorisation shall also indicate the periodic penalty payments provided for in Article 25h where the production of the required records, data, procedures or any other material, or the answers to questions asked to Tier 2 CCPs are not provided or are incomplete, and the fines provided for in Article 25g in conjunction with point (b) of Section V of Annex III, where the answers to questions asked to Tier 2 CCPs are incorrect or misleading.
3. Tier 2 CCPs are required to submit to investigations launched on the basis of a decision of ESMA. The decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 25h, the legal remedies available under Regulation (EU) No 1095/2010 and the right to have the decision reviewed by the Court of Justice.
4. Prior to notifying a Tier 2 CCP of an investigation, ESMA shall inform the relevant third-country competent authority where the investigation is to be carried out of the investigation and of the identity of the authorised persons. Officials of the third-country competent authority concerned may, upon the request of ESMA, assist those authorised persons in carrying out their duties. Officials of the third-country competent authority concerned may also attend the investigations.

Article 25e

On-site inspections

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

The central banks of issue of the financial instruments cleared by the CCP may submit a request to ESMA to participate in such on-site inspections where relevant for the carrying out of their monetary policy tasks.

The ESMA third country CCP College referred to in Article 25ba shall be informed without undue delay of any findings that may be relevant for the execution of their tasks.

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

The officials and other persons authorised by ESMA to conduct an on-site inspection shall exercise their powers upon production of a written authorisation specifying the subject

matter and purpose of the inspection and the periodic penalty payments provided for in Article 25h where the persons concerned do not submit to the inspection.

4. Tier 2 CCPs shall submit to on-site inspections ordered by decision of ESMA. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the periodic penalty payments provided for in Article 25h, the legal remedies available under Regulation (EU) No 1095/2010 as well as the right to have the decision reviewed by the Court of Justice.
5. Officials of, as well as those authorised or appointed by, the competent authority of the third country where the inspection is to be conducted may, at the request of ESMA, actively assist the officials and other persons authorised by ESMA. Officials of the third-country competent authority may also attend the on-site inspections.
6. ESMA may also request third-country competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in this Article and in Article 25d(1) on its behalf.
7. Where the officials and other accompanying persons authorised by ESMA find that a person opposes an inspection ordered pursuant to this Article, the third-country competent authority concerned may afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, to enable them to conduct their on-site inspection.

Article 25f

Procedural rules for taking supervisory measures and imposing fines

1. Where, in carrying out its duties under this Regulation, ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III, ESMA shall appoint an independent investigation officer within ESMA to investigate the matter. The appointed officer shall not be involved or have been directly or indirectly involved in the recognition or supervision process of the CCP concerned and shall perform his functions independently from ESMA.
2. The investigation officer shall investigate the alleged infringements, taking into account any comments submitted by the persons who are subject to the investigations, and shall submit a complete file with his findings to ESMA.

In order to carry out his tasks, the investigation officer may exercise the power to request information in accordance with Article 25c and to conduct investigations and on-site inspections in accordance with Articles 25d and 25e. When using those powers, the investigation officer shall comply with Article 25c(4).

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

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

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

4. When submitting the file with his findings to ESMA, the investigation officer shall notify that fact to the persons who are subject to the investigations. The persons subject to the investigations shall be entitled to have access to the file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information affecting third parties.
5. On the basis of the file containing the investigation officer's findings and, when requested by the persons concerned, after having heard the persons subject to the investigations in accordance with Article 25i, ESMA shall decide if one or more of the infringements listed in Annex III have been committed by the persons who have been subject to the investigations and, in such a case, shall take a supervisory measure in accordance with Article 25n and impose a fine in accordance with Article 25g.
6. The investigation officer shall not participate in ESMA's deliberations or in any other way intervene in ESMA's decision-making process.
7. The Commission shall adopt delegated acts in accordance with Article 82 to specify further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of penalties.
8. ESMA shall refer matters for criminal prosecution to the appropriate authorities for investigation and possible criminal prosecution where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical fact or

facts which are substantially the same has already acquired the force of res judicata as the result of criminal proceedings under national law.

Article 25g

Fines

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

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

2. The basic amounts of the fines referred to in paragraph 1 shall be up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10% of the total annual turnover, as defined in relevant Union law, of a legal person in the preceding business year.
3. The basic amounts set out in paragraph 2 shall be adjusted, if need be, by taking into account aggravating or mitigating factors in accordance with the relevant coefficients set out in Annex IV. The relevant aggravating coefficients shall be applied one by one to the basic amount. If more than one aggravating coefficient is applicable, the difference between the basic amount and the amount resulting from the application of each individual aggravating coefficient shall be added to the basic amount.

The relevant mitigating coefficients shall be applied one by one to the basic amount. If more than one mitigating coefficient is applicable, the difference between the basic amount and

the amount resulting from the application of each individual mitigating coefficient shall be subtracted from the basic amount.

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

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

Article 25h

Periodic penalty payments

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

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

Article 25i

Hearing of the persons concerned

1. Before taking any decision on a fine or periodic penalty payment under Articles 25g and 25h, ESMA shall give the persons subject to the proceedings the opportunity to be heard on its findings. ESMA shall base its decisions only on findings on which the persons subject to the proceedings have had an opportunity to comment.
2. The rights of the defence of the persons subject to the proceedings shall be fully respected in the proceedings. They shall be entitled to have access to ESMA's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or ESMA's internal preparatory documents.

Article 25j

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

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

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

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

Article 25k

Review by the Court of Justice

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

Article 25l

Amendments to Annex IV

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

Article 25m

Withdrawal of recognition

1. Without prejudice to Article 25n and subject to the following paragraphs, ESMA after consulting the authorities and entities referred to in Article 25(3), shall withdraw a recognition decision adopted in accordance with Article 25 where the CCP concerned:
 - (a) has not made use of the recognition within 6 months, expressly renounces the recognition or has ceased to engage in business for more than six months;
 - (b) has obtained the recognition through false statements or by any other irregular means;
 - (c) has seriously and systematically infringed any of the conditions for recognition pursuant to Article 25(2b) or is no longer in compliance with any of these conditions and in any of those situations has not taken the remedial action requested by ESMA within an appropriately set timeframe of up to a maximum of 6 months;

- (d) the implementing act referred to in Article 25(6) has been withdrawn or suspended, or any of the conditions attached to it is no longer satisfied.

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

When determining the date of entry into effect of the decision to withdraw the recognition, ESMA shall endeavour to minimise potential market disruption and provide for an appropriate adaptation period which shall not exceed 2 years.

2. Before withdrawing the recognition according to point (c) of the first paragraph, ESMA shall take into account the possibility to apply measures under Article 25n paragraph 1, points (a) to (c).

Where ESMA determines that remedial action within the set timeframe of up to a maximum of 6 months under point (c) of the first paragraph has not been taken or that the action taken is not appropriate and after consulting the authorities referred to in Article 25(3), ESMA shall withdraw the recognition decision.

Where ESMA decides to withdraw the recognition of a third country CCP, ESMA shall inform that CCP and the relevant third-country authorities prior to withdrawing a recognition decision.

3. ESMA shall, without undue delay, notify the relevant third-country competent authority of a decision to withdraw the recognition of a recognised CCP.
4. Any of the authorities referred to in Article 25(3), which consider that one of the conditions referred to in paragraph 1 has been met, may request ESMA to examine whether the conditions for the withdrawal of recognition of a recognised CCP concerned are met. Where

ESMA decides not to withdraw the registration of the recognised CCP concerned, it shall provide full reasons to the requesting authority.

Article 25n

Supervisory measures

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

2. When taking the decisions referred to in paragraph 1, ESMA shall take into account the nature and seriousness of the infringement, having regard to the following criteria:
 - (a) the duration and frequency of the infringement;
 - (b) whether the infringement has revealed serious or systemic weaknesses in the CCP's procedures or in its management systems or internal controls;
 - (c) whether financial crime has been occasioned, facilitated or otherwise attributable to the infringement;
 - (d) whether the infringement has been committed intentionally or negligently.

3. Without undue delay, ESMA shall notify any decision adopted pursuant to paragraph 1 to the CCP concerned, and shall communicate it to the relevant third-country competent

authorities and the Commission. It shall publicly disclose any such decision on its website within 10 working days from the date when it was adopted.

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

10. Article 32 paragraph 1, the following subparagraph is added:

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

11. The last subparagraph of Article 35 paragraph 1 is replaced by the following:

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

12. Article 49 is amended as follows:

(a) Paragraph 1 is replaced by the following:

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

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

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

(b) The following paragraphs 1a, 1b, 1c, 1d and 1e are added:

“1a. Where a CCP intends to adopt any significant change to the models and parameters referred to in paragraph 1, it shall apply to the competent authority for validation of that change. The CCP shall enclose an independent validation of the intended change to its application. The competent authority shall confirm the receipt of the complete application to the CCP and ESMA.

1b. Within 50 working days of the receipt of the complete application, the competent authority shall conduct a risk assessment of the CCP and submit a report to ESMA and the college established in accordance with Article 18.

1c. Within 30 working days of the receipt of the report referred to in paragraph 1b, the college shall adopt a majority opinion in accordance with Article 19(3). Notwithstanding paragraph 1e, the competent authority may not adopt a decision to grant or refuse the validation of significant changes to models and parameters until such an opinion has been adopted by the college, unless the college has not adopted that opinion within the set deadline.

1d. Within 90 working days of the receipt of the application referred to in paragraph 1a, the competent authority shall inform the CCP in writing, with a fully reasoned explanation, whether the validation has been granted or refused.

1e. The CCP may not adopt any significant change to the models and parameters referred to in paragraph 1 before obtaining the validation by its competent authority. The competent authority, in agreement with ESMA, may allow for a provisional adoption of a significant change of those models or parameters prior to its validation where duly justified.

(c) The following paragraph 5 is added:

"5. In order to ensure consistent application of this Article, ESMA shall, after consulting EBA, other relevant competent authorities and the members of the ESCB, develop draft

regulatory technical standards specifying the conditions under which changes to the models and parameters referred to in paragraph 1 are significant and the procedure to consult the college established according to Article 18 on whether these conditions are met or not.

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

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

13. In Article 85 the following paragraphs 6 and 7 are added:

“6. ESMA shall, in cooperation with the ESRB and in agreement, in accordance with the fourth subparagraph of Article 24a(9), with the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the third country CCP to which the implementing act referred to in the third subparagraph of Article 25(2c) is addressed, submit a report to the Commission on the application of the provisions of that implementing act, in particular assessing whether the financial stability risk for the Union or for one or more of its Member States is sufficiently mitigated. ESMA shall submit its report to the Commission within 12 months of the adaptation period determined according to point (b) of the third subparagraph of Article 25(2c).

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

7. By [42 months after the entry into force of this Regulation], the Commission shall review the functioning of the CCP Supervisory Committee and shall submit a report thereon to the European Parliament and to the Council together with any appropriate proposals. The Commission shall assess in particular, in the light of experience, the effectiveness of the CCP Supervisory Committee in fostering the convergence and coherence of the application of this Regulation among the competent authorities referred to in Article 22 and the colleges referred to in Article 18, in ensuring the effectiveness of the recognition and supervision of third-

country CCPs and in guaranteeing a level-playing field among authorised EU CCPs and between authorised EU CCPs and recognised third-country CCPs.

14. In Article 89, the following paragraphs are added:

“3a. ESMA shall not exercise its powers pursuant to paragraph 2a, 2b and 2c of Article 25 until the entry into force of the delegated act referred to in the second subparagraph of paragraph 2a of Article 25 and in paragraph 3 of Article 25a and, in relation to CCPs for which ESMA has not adopted a decision pursuant to paragraph 1 of Article 25 before [PO, please insert the date of entry into force of this Regulation], until the entry into force of the relevant implementing act referred to in paragraph 6 of Article 25.

3b. ESMA shall establish and manage a college pursuant to Article 25ba for all CCPs recognised according to Article 25 before [entry into force of this Regulation] within 4 months from the entry into force of the delegated act referred to in the second subparagraph of Article 25(2a).

3c. ESMA shall review the recognition decisions adopted pursuant to Article 25(1) before [entry into force of this Regulation] within 18 months from the entry into force of the delegated act referred to in the second subparagraph of Article 25(2a), in accordance with Article 25(5).

Where, following the review referred to in the first subparagraph, ESMA determines that a CCP recognised before [entry into force of this Regulation] qualifies as a Tier 2 CCP in accordance with Article 25(2a), ESMA shall set an appropriate adaptation period which shall not exceed 18 months within which the CCP must comply with the requirements referred to in Article 25(2b). ESMA may extend the adaptation period up to additional 6 months upon the reasoned request of the CCP or competent authority responsible for the supervision of the clearing members, where such extension is justified by exceptional circumstances and implications to the clearing members established in the Union."

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

Article 2

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

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

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President

ANNEX

to the Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU)

No 648/2012 as regards the procedures and authorities involved for the authorisation of
CCPs and requirements for the recognition of third-country CCPs

ANNEX

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

“ANNEX III

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

I. Infringements relating to capital requirements:

(a) a Tier 2 CCP infringes Article 16(1) by not having a permanent and available initial capital of at least EUR 7.5 million;

(b) a Tier 2 CCP infringes Article 16(2) by not having capital, including retained earnings and reserves, which is proportionate to the risk stemming from its activities and at all times sufficient to ensure an orderly winding-down or restructuring of that activities over an appropriate time span and an adequate protection of the CCP against credit, counterparty, market, operational, legal and business risks which are not already covered by specific financial resources as referred to in Articles 41, 42, 43 and 44.

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

- (a) a Tier 2 CCP infringes Article 26(1) by not having robust governance arrangements which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks to which it is or might be exposed and adequate internal control mechanisms, including sound administrative and accounting procedures;
- (b) a Tier 2 CCP infringes Article 26(2) by not adopting adequate policies and procedures which are sufficiently effective to ensure compliance, including that of its managers and employees, with all the provisions of this Regulation;
- (c) a Tier 2 CCP infringes Article 26(3) by not maintaining or operating an organisational structure that ensures continuity and orderly functioning in the performance of its services and activities or by not employing appropriate and proportionate systems, resources or procedures;
- (d) a Tier 2 CCP infringes Article 26(4) by not maintaining a clear separation between the reporting lines for risk management and those for other operations of the CCP;
- (e) a Tier 2 CCP infringes Article 26(5) by not adopting, implementing or maintaining a remuneration policy which promotes sound and effective risk management and which does not create incentives to relax risk standards;
- (f) a Tier 2 CCP infringes Article 26(6) by not maintaining information technology systems adequate to deal with the complexity, variety and type of services and activities performed to ensure high standards of security and the integrity and confidentiality of the information maintained;
- (g) a Tier 2 CCP infringes Article 26(7) by not making its governance arrangements, the rules governing the CCP, and its admission criteria for clearing membership available publicly free of charge;

- (h) a Tier 2 CCP infringes Article 26(8) by not being subject to frequent and independent audits or by not communicating the results of those audits to the board or by not making those results available to ESMA;
- (i) a Tier 2 CCP infringes Article 27(1) or the second subparagraph of Article 27(2) by not ensuring that its senior management and the members of the board are of sufficiently good repute and experience to ensure the sound and prudent management of the CCP;
- (j) a Tier 2 CCP infringes Article 27(2) by not ensuring that at least one third, but no less than two, of the members of that board shall be independent or by not inviting the representatives of the clients of clearing members to board meetings for matters relevant to Articles 38 and 39 or by linking the compensation of the independent and other non-executive members of the board to the business performance of the CCP;
- (k) a Tier 2 CCP infringes Article 27(3) by not clearly determining the roles and responsibilities of the board or by not making the minutes of the board meeting available to ESMA or the auditors;
- (l) a Tier 2 CCP infringes Article 28(1) by not establishing a risk committee or by not composing that risk committee of representatives of its clearing members, independent members of the board and representatives of its clients, by composing the risk committee in a way that one of these groups of representatives has a majority in the risk committee, or by not duly informing ESMA of the activities and decisions of the risk committee where ESMA has requested to be duly informed;
- (m) a Tier 2 CCP infringes Article 28(2) by not clearly determining the mandate, the governance arrangements to ensure its independence, the operational procedures, the admission criteria or the election mechanism of risk committee members or by not making those governance arrangements publicly available or by not determining that the risk committee is chaired by an independent member of the board and reports directly to the board and holds regular meetings;
- (n) a Tier 2 CCP infringes Article 28(3) by not allowing the risk committee to advise the board on any arrangements that may impact the risk management of the CCP or by

not making reasonable efforts to consult the risk committee on developments impacting the risk management of the CCP in emergency situations;

(o) a Tier 2 CCP infringes Article 28(5) by not promptly informing ESMA of any decision in which the board decides not to follow the advice of the risk committee;

(p) a Tier 2 CCP infringes Article 29(1) by not maintaining all the records on the services and activity provided by that CCP for a period of at least ten years, which are required to enable ESMA to monitor the CCP's compliance with this Regulation;

(q) a Tier 2 CCP infringes Article 29(2) by not maintaining, for a period of at least ten years following the termination of a contract, all information on all contracts it has processed in a way that enables the identification of the original terms of a transaction before clearing by that CCP;

(r) a Tier 2 CCP infringes Article 29(3) by not making the records and information referred to in paragraphs 1 and 2 of Article 29, or all information on the positions of cleared contracts, irrespective of the venue where the transactions were executed, available upon request to ESMA and the relevant members of the ESCB;

(s) a Tier 2 CCP infringes Article 30(1) by not, or by falsely or incompletely, informing ESMA of the identities of its shareholders or members, whether direct or indirect, national or legal, persons that have qualifying holdings or of the amounts of those holdings;

(t) a Tier 2 CCP infringes Article 30(4) by allowing the persons referred to in Article 30(1) exercise an influence which is likely to be prejudicial to the sound and prudent management of the CCP;

(u) a Tier 2 CCP infringes Article 31(1) by not, or by falsely or by incompletely, notifying ESMA of any change to its management or not providing ESMA with all information necessary to assess compliance with Article 27(1) or the second subparagraph of Article 27(2);

(v) a Tier 2 CCP infringes Article 33(1) by not maintaining or operating effective written organisational and administrative arrangements to identify or manage any potential conflict of interest between itself, including its managers, employees or any

person with direct or indirect control or close links, and its clearing members or their clients known to the CCP or by not maintaining or implementing adequate procedures aiming at resolving possible conflicts of interest;

(w) a Tier 2 CCP infringes Article 33(2) by not clearly disclosing the general nature or sources of conflicts of interest, before accepting new transactions from the clearing member concerned, to the clearing member or to a concerned client of that clearing member who is known to the CCP where the organisational or administrative arrangements of that CCP to manage a conflict of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interest of a clearing member or client are prevented;

(x) a Tier 2 CCP infringes Article 33(3) by not taking into account in its written arrangements any circumstances, of which it is or should be aware, which may give rise to a conflict of interest arising as a result of the structure and business activities of other undertakings with which it has a parent undertaking or a subsidiary relationship;

(y) a Tier 2 CCP infringes Article 33(5) by not taking all reasonable steps to prevent any misuse of the information held in its systems or preventing the use of that information for other business activities, or by a natural person who has a close link to a CCP or a legal person that has a parent undertaking or a subsidiary relationship with the CCP using confidential information recorded in that CCP for any commercial purposes without the prior consent of the client to whom such confidential information belongs;

(z) a Tier 2 CCP infringes Article 36(1) by not acting fairly and professionally in accordance with the best interests of its clearing members and their clients;

(aa) a Tier 2 CCP infringes Article 36(2) by not having accessible, transparent and fair rules for the prompt handling of complaints;

(bb) a Tier 2 CCP infringes Article 37(1) or (2) by using, on an ongoing basis, discriminatory, opaque or subjective admission criteria, or by otherwise failing to ensure fair and open access to that CCP on an ongoing basis or by failing to ensure on an ongoing basis that its clearing members have sufficient financial resources and operational capacity to meet the obligations arising from the participation in that CCP,

or by failing to conduct a comprehensive review of compliance by its clearing members on an annual basis;

(cc) a Tier 2 CCP infringes Article 37(4) by failing to have objective and transparent procedures for the suspension and the orderly exit of clearing members that no longer meet the criteria referred to in Article 37(1);

(dd) a Tier 2 CCP infringes Article 37(5) by denying access to a clearing member meeting the criteria referred to in Article 37(1) where such denial of access is not duly justified in writing and based on a comprehensive risk analysis;

(ee) a Tier 2 CCP infringes Article 38(1) by not allowing the clients of its clearing members separate access to the specific services provided;

(ff) a Tier 2 CCP infringes Article 39(7) by not offering the different levels of segregation referred to in that paragraph on reasonable commercial terms;

III. Infringements relating to operational requirements:

(a) a Tier 2 CCP infringes Article 34(1) by not establishing, implementing or maintaining an adequate business continuity policy and disaster recovery plan aimed at ensuring the preservation of its functions, the timely recovery of operations and the fulfilment of the CCP's obligations, which at least allows for the recovery of all transactions at the time of disruption to allow the CCP to continue to operate with certainty and to complete settlement on the scheduled date;

(b) a Tier 2 CCP infringes Article 34(2) by not establishing, implementing or maintaining an adequate procedure aimed at ensuring the timely and orderly settlement or transfer of the assets and positions of clients and clearing members in the event of withdrawal of recognition pursuant to a decision under Article 25;

(c) a Tier 2 CCP infringes the second subparagraph of Article 35(1) by outsourcing major activities linked to the risk management of that CCP;

(d) a Tier 2 CCP infringes Article 39(1) by not keeping separate records and accounts that enable it, at any time and without delay, to distinguish in accounts with the CCP the

assets and positions held for the account of one clearing member from the assets and positions held for the account of any other clearing member and from its own assets;

(e) a Tier 2 CCP infringes Article 39(2) by not offering to keep and not keeping where so requested separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions of that clearing member from those held for the account of its clearing members;

(f) a Tier 2 CCP infringes Article 39(3) by not offering to keep and not keeping where so requested separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from those held for the account of other clients, or by not offering its clearing members the possibility to open more accounts in their own name for the account of their clients where so requested;

(g) a Tier 2 CCP infringes Article 40 by not measuring and assessing its liquidity and credit exposures to each clearing member and, where relevant, to another CCP with which it has concluded an interoperability arrangement on a near to real-time basis or by not having access to the relevant pricing sources to effectively measure its exposures on a reasonable cost basis;

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

(i) a Tier 2 CCP infringes Article 41(2) by failing to adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared taking into account the interval between margin collections, market liquidity and the possibility of changes over the duration of the transaction;

(j) a Tier 2 CCP infringes Article 41(3) by not calling and collecting margins on an intraday basis, at least when predefined thresholds are exceeded;

(k) a Tier 2 CCP infringes Article 42(3) by not maintaining a default fund which at least enables it to withstand, under extreme but plausible market conditions, the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members if the sum of their exposures are larger, or by developing scenarios that do not include the most volatile periods that have been experienced by the markets for which the CCP provides its services and a range of potential future scenarios, which take into account sudden sales of financial resources and rapid reductions in market liquidity;

(l) a Tier 2 CCP infringes Article 43(2) where its default fund referred to in Article 42 and its other financial resources referred to in Article 43(1) do not enable it to withstand the default of the two clearing members to which it has the largest exposures under extreme but plausible market conditions;

(m) a Tier 2 CCP infringes Article 44(1) by not having access at all times to adequate liquidity to perform its services and activities or by not measuring on a daily basis its potential liquidity needs;

(o) a Tier 2 CCP infringes Article 45(1), (2) and (3) by not using the margins posted by a defaulting clearing member prior to other financial resources in covering losses;

(p) a Tier 2 CCP infringes Article 45(4) by not using dedicated own resources before using the default fund contributions of non-defaulting clearing members;

(q) a Tier 2 CCP infringes Article 46(1) by accepting anything other than highly liquid collateral with minimal credit and market risk to cover its initial and ongoing exposure to its clearing members where other collateral is not allowed under the delegated act adopted by the Commission under Article 46(3);

(r) a Tier 2 CCP infringes Article 47(1) by investing its financial resources other than in cash or highly liquid financial instruments with minimum market and credit risk and capable of being liquidated rapidly with minimal adverse price effect;

(s) a Tier 2 CCP infringes Article 47(3) by not depositing financial instruments posted as margins or as default fund contributions with operators of securities settlement systems that ensure the full protection of those financial instruments where these are available or by not using other highly secure arrangements with authorised financial institutions;

(t) a Tier 2 CCP infringes Article 47(4) by performing cash deposits other than through highly secure arrangements with authorised financial institutions or through the use of standing deposit facilities of central banks or other comparable means provided by central banks;

(u) a Tier 2 CCP infringes Article 47(5) by depositing assets with a third party without ensuring that the assets belonging to the clearing members are identifiable separately from the assets belonging to the CCP and from assets belonging to that third party by means of differently titled accounts on the books of the third party or any other equivalent measures that achieve the same level of protection or by not having prompt access to the financial instruments when required;

(v) a Tier 2 CCP infringes Article 47(6) by investing its capital or the sums arising from the requirements laid down in Articles 41, 42, 43 or 44 in its own securities or those of its parent undertaking or its subsidiary;

(w) a Tier 2 CCP infringes Article 48(1) by not having detailed procedures in place to be followed where a clearing member does not comply with the participation requirements laid down in Article 37 within the time limit and in accordance with the procedures established by the CCP, or by not setting out in detail the procedures to be followed in the event the default of a clearing member is not declared by the CCP, or by not reviewing those procedures annually;

(x) a Tier 2 CCP infringes Article 48(2) by failing to take prompt action to contain losses and liquidity pressures resulting from clearing member defaults and to ensure that the closing out of any clearing member's positions does not disrupt its operations or expose the non-defaulting clearing members to losses they cannot anticipate or control;

(y) a Tier 2 CCP infringes Article 48(3) by failing to promptly inform ESMA before the default procedure is declared or triggered;

(z) a Tier 2 CCP infringes Article 48(4) by not verifying that its default procedures are enforceable and not taking all reasonable steps to ensure that it has the legal powers to liquidate the proprietary positions of the defaulting clearing member and to transfer or liquidate the clients' positions of the defaulting clearing member;

(aa) a Tier 2 CCP infringes Article 49(1) by not regularly reviewing its models and parameters adopted to calculate its margin requirements, default fund contributions, collateral requirements or other risk control mechanisms, and by not subjecting those models to rigorous and frequent stress tests to assess their resilience in extreme but plausible market conditions or performing back tests to assess the reliability of the methodology adopted, or by failing to obtain independent validation, or by failing to inform ESMA of the results of the tests performed or obtaining ESMA's validation before adopting any significant change to the models and parameters;

(bb) a Tier 2 CCP infringes Article 49(2) by not regularly testing the key aspects of its default procedures or by failing to take all reasonable steps to ensure that all clearing members understand them and have appropriate arrangements in place to respond to a default event;

(cc) a Tier 2 CCP infringes Article 49(1a) by adopting any significant change to the models and parameters referred to in Article 49(1) before obtaining ESMA's validation of that change;

(dd) a Tier 2 CCP infringes Article 50(1) by not using, where practical and available, central bank money to settle its transactions or by not taking steps to strictly limit cash settlement risks where central bank money is not used;

(ee) a Tier 2 CCP infringes Article 50(3) by not eliminating principal risks through the use of delivery-versus-payment mechanisms to the extent possible, where that CCP has an obligation to make or receive deliveries of financial instruments;

(ff) a Tier 2 CCP infringes Article 50a or Article 50b by not calculating K_{CCP} as specified in that Article or by not following the rules for the calculation of K_{CCP} set out in Articles 50a(2), 50b and 50d;

(gg) a Tier 2 CCP infringes Article 50a(3) by calculating K_{CCP} less than quarterly or less frequently than required by ESMA in accordance with Article 50a(3);

(hh) a Tier 2 CCP infringes Article 51(2) by not having non-discriminatory access both to the data that it needs for the performance of its functions from a trading venue to the extent that the CCP complies with the operational and technical requirements established by that trading venue and to the relevant settlement system;

(ii) a Tier 2 CCP infringes Article 52(1) by entering into an interoperability arrangement without fulfilling any of the requirements set out in point (a), point (b), point (c) and point (d) of that paragraph;

(jj) a Tier 2 CCP infringes Article 53(1) by not distinguishing in accounts the assets and positions held for the account of another CCP with whom it has entered into an interoperability arrangement;

(kk) a Tier 2 CCP infringes Article 54(1) by entering an interoperability arrangement without the prior approval of ESMA;

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

(a) a Tier 2 CCP infringes Article 38(1) by not publicly disclosing the prices and fees of each service provided separately including discounts and rebates and the conditions to benefit from those reductions;

(b) a Tier 2 CCP infringes Article 38(1) by not disclosing the information on costs and revenues of its services to ESMA;

(c) a Tier 2 CCP infringes Article 38(2) by not disclosing to its clearing members and their clients the risks associated with the services provided;

(d) a Tier 2 CCP infringes Article 38(3) by not disclosing to its clearing members or ESMA the price information used to calculate its end-of-day exposures to its clearing members or by not publicly disclosing the volume of cleared transactions for each instrument cleared by the CCP on an aggregated basis;

(f) a Tier 2 CCP infringes Article 38(4) by not publicly disclosing the operational and technical requirements relating to the communication protocols covering content and message formats it uses to interact with third parties including the operational and technical requirements referred to in Article 7;

(g) a Tier 2 CCP infringes Article 38(5) by not publicly disclosing any breaches by clearing members of the criteria referred to in Article 37(1) or the requirements laid down in Article 38(5) except where ESMA considered that such a disclosure would constitute a threat to financial stability or to market confidence or would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved;

(h) a Tier 2 CCP infringes Article 39(7) by not publicly disclosing the levels of protection and the costs associated with the different levels of segregation that it provides;

(i) a Tier 2 CCP infringes Article 49(3) by not publicly disclosing key aspects on its risk management model or assumptions adopted to perform the stress test referred to in Article 49(1);

(j) a Tier 2 CCP infringes Article 50(2) by not clearly stating its obligations with respect to deliveries of financial instruments, including whether it has an obligation to make or receive delivery of a financial instrument or whether it indemnifies participants for losses incurred in the delivery process.

(k) a Tier 2 CCP infringes Article 50c(1) by not reporting the information referred in points (a), (b), (c), (d) and (e) of Article 50c(1) to those of its clearing members which are institutions or to their competent authorities;

(l) a Tier 2 CCP infringes Article 50c(2) by notifying those of its clearing members which are institutions less than quarterly or less frequently than required by ESMA in accordance with Article 50c(2).

V. Infringements relating to obstacles to the supervisory activities:

(a) a CCP infringes Article 25c by providing incorrect or misleading information in response to a simple request for information by ESMA in accordance with Article 25c or in response to a decision by ESMA requiring information in accordance with Article 25n;

(b) a CCP provides incorrect or misleading answers to questions asked pursuant to Article 25d(1)(d);

(c) a Tier 2 CCP does not comply in due time with a supervisory measure required by a decision adopted by ESMA pursuant to Article 25n;

(d) a Tier 2 CCP does not submit to an on-site inspection required by an investigation decision adopted by ESMA taken pursuant to Article 25e”.

1. The following Annex IV is inserted:

“ANNEX IV

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

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

I. Adjustment coefficients linked to aggravating factors:

(a) if the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1.1 shall apply;

(b) if the infringement has been committed for more than six months, a coefficient of 1.5 shall apply;

(c) if the infringement has revealed systemic weaknesses in the organisation of the CCP, in particular in its procedures, management systems or internal controls, a coefficient of 2.2 shall apply;

(d) if the infringement has a negative impact on the quality of the activities and services of the CCP, a coefficient of 1.5 shall apply;

(e) if the infringement has been committed intentionally, a coefficient of 2 shall apply;

(f) if no remedial action has been taken since the breach has been identified, a coefficient of 1.7 shall apply;

(g) if the CCP's senior management has not cooperated with ESMA in carrying out its investigations, a coefficient of 1.5 shall apply.

II. Adjustment coefficients linked to mitigating factors:

(a) if the infringement has been committed for less than 10 working days, a coefficient of 0.9 shall apply;

(b) if the CCP's senior management can demonstrate to have taken all the necessary measures to prevent the infringement, a coefficient of 0.7 shall apply;

(c) if the CCP has brought quickly, effectively and completely the infringement to ESMA's attention, a coefficient of 0.4 shall apply;

(d) if the CCP has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future, a coefficient of 0.6 shall apply."
