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Modified Commission proposal following the adoption of COM(2017)539 of 20.9.2017.
Consolidated version to be read together with the explanatory memorandum contained in COM(2017)539.
The text should read as follows:

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

EXPLANATORY MEMORANDUM

CONTEXT OF THE PROPOSAL

1.1. Reasons for and objectives of the proposal

Derivatives contracts are a key tool for Europe's banks and businesses to manage their risks, whether they are related to changes in interest rates, currency fluctuations or the default of a business counterpart. However, opaque derivatives markets also acted as an unwelcome contagion channel. Derivatives markets must therefore be regulated and supervised effectively to safeguard financial stability.

Given the global nature of derivatives markets and in accordance with the 2009 G20 Pittsburgh agreement[1] to reduce the systemic risk linked to extensive use of derivatives, the EU adopted the European Market Infrastructure Regulation (EMIR) in 2012.[2] As a key pillar of EMIR standardised over-the-counter (OTC) derivatives contracts must be cleared through a Central Counterparty (CCP). A CCP is a market infrastructure that reduces systemic risk and enhances financial stability by standing between the two counterparties to a derivatives contract (i.e. acting as buyer to the seller and seller to the buyer of risk) and thereby reducing the risk for both. EMIR also introduced strict prudential, organisational and business conduct requirements for CCPs and established arrangements for their prudential supervision to minimise any risk to users of a CCP and underpin systemic stability.

Since 2012 when EMIR was adopted, central clearing has been significantly expanding and CCPs have become increasingly concentrated and integrated across the EU and with third countries.

The present proposal ensures that supervisory arrangements keep pace with these developments. It is proposed that the EU equips its Capital Markets Union with a more effective and consistent supervisory system for CCPs, in the interest of further market integration, financial stability and a level-playing field.

CCPs have grown in importance since the adoption of EMIR and will expand further in the coming years

In the five years since the adoption of EMIR, the volume of CCP activity – in the EU and globally - has grown rapidly both in scale and in scope. This is a sign that the legislation works and is fulfilling its purpose.

As of end of June 2016, around 62% of the global value of all OTC derivatives contracts and asset classes (interest rates, credit default, foreign exchange, etc.) were centrally cleared by CCPs[3], which is equivalent to $337 trillion. About 97% ($328 trillion) of all centrally-cleared derivatives contracts are interest-rate derivatives.

At the end of 2015, about 60% of all OTC interest-rate derivatives were centrally cleared, while the corresponding figure by the end of 2009 was 36%[4]. Central clearing has similarly gained in importance in the credit derivatives (so-called CDS) market, with the proportion of outstanding CDSs cleared through CCPs increasing steadily since these data were first

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1 http://www.g20.utoronto.ca/2009/2009communique0925.html

2 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. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012R0648-20170103&qid=1492599335405&from=EN

3 BIS, Statistical release, OTC derivatives statistics at end-June 2016, November 2016.

4 See http://europa.eu/rapid/press-release_MEMO-16-3990_en.htm, November 2016.

reported, i.e. 37% at the end of June 2016 while the corresponding figure was 10% at the end of June 2010[5].

The rapidly expanding role of CCPs in the global financial system not only reflects the introduction of central clearing obligations across different asset classes[6], but also increased voluntary use of central clearing amid growing awareness of the benefits of central clearing among market participants (clearing obligations have applied only since June 2016)[7]. EMIR requires certain interest-rate derivatives and CDSs to be centrally cleared in line with similar requirements in other G20 countries[8]. Bank capital rules have been changed to incentivise central clearing and make bilateral clearing a costlier option in relative terms[9], while bilateral transactions are subject to additional collateral requirements since March 2017[10].

The expansion in CCP activity is set to continue in the coming years. Mandatory clearing obligations are likely for additional asset classes[11] and the incentives to mitigate risks and costs are likely to lead to even more voluntary clearing. The May 2017 proposal to amend EMIR in a targeted manner, to improve its effectiveness and proportionality, will reinforce this trend, by creating further incentives for CCPs to offer central clearing of derivatives to counterparties.[12] Finally, deeper and more integrated capital markets as a result of the Capital Markets Union (CMU) will further increase the need for cross-border clearing in the EU, thus increasing the importance and the interconnectedness of CCPs within the financial system.

Expanding role of CCPs raises concerns about the need to upgrade supervisory arrangements under EMIR, also in light of the establishment of the Capital Markets Union

The growing importance of CCPs in the financial system and the associated concentration of credit risk in these infrastructures have drawn the attention of governments, regulators, supervisors, central banks and market participants.

While the scale and scope of centrally-cleared transactions has expanded, the number of CCPs has remained relatively limited. There are currently 17 CCPs established in the EU, all of

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5 BIS, Statistical release, OTC derivatives statistics at end-June 2016, November 2016.

6 FSB, OTC Derivatives Market Reforms, Eleventh progress report on implementation, August 2016. See in particular section 3.2.1 on central clearing of standardised transactions, as well as Appendixes C and I for further details.

7 https://www.kfw.de/KfW-Group/Newsroom/Aktuelles/Pressemitteilungen/Pressemitteilungen-Details_407936.html

8 In accordance with EMIR, the European Securities and Market Authority (ESMA) is tasked with developing technical standards specifying the class of OTC derivatives that should be subject to the clearing obligation. ESMA also maintains a public register on the clearing obligation. See p. 8-10 of the public register for further details on the clearing obligations: https://www.esma.europa.eu/sites/default/files/library/public_register_for_the_clearing_obligation_under_emir.pdf

9 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012.

10 Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016, OJ L 340, 15.12.2016, p. 9–46.

11 ESMA has analysed several classes of interest rate, credit, equity and foreign-exchange OTC derivatives and proposed some of them for the clearing obligation. As indicated in the following table, ESMA could consider further clearing obligations in the future, including for instance "Equity Lookalike/Flexible equity derivatives and CFD" and "ForEx Non-deliverable Forward (NDF)".

12 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.

which are authorised under EMIR to offer their services within the Union - although not all CCPs are authorised to clear all asset classes (e.g. only 2 CCPs clear credit derivatives, only 2 CCPs clear inflation derivatives[13]).[14] An additional 28 third-country CCPs have been recognised under EMIR's equivalence provisions, allowing them to offer their services in the EU.[15] Accordingly, clearing markets are integrated across the EU and are highly concentrated in certain asset classes. They are also highly interconnected.[16]

While increased clearing via properly regulated and supervised CCPs reinforces systemic stability overall, the concentration of risk makes the failure of a CCP a low-probability but potentially extremely high-impact event. Given the centrality of CCPs to the financial system, the increasing systemic importance of CCPs gives rise to concerns. CCPs have themselves become a source of macro-prudential risk, as their failure could cause significant disruption to the financial system and would have systemic effects. For instance, large scale, uncontrolled termination and close-out of contracts cleared by CCPs could lead to liquidity and collateral strains across the market, causing instability in the underlying asset market and the wider financial system. Like some other financial intermediaries, CCPs are also potentially susceptible to "runs" due to clearing members losing confidence in the solvency of a CCP. This could create a liquidity shock for the CCP as it attempts to meet its obligations to return the principal collateral (i.e. initial margin). The impact of a CCP failure due to increased concentration of risk would be amplified by a growing interconnectedness between CCPs both directly and indirectly via their members (usually large global banks) and clients.

In response, and in line with the G20 consensus[17], the Commission adopted a proposal for a Regulation on CCP Recovery and Resolution in November 2016[18]. The objective of the proposal is to ensure that authorities are appropriately prepared to address a failing CCP, safeguarding financial stability and limiting taxpayer costs. The CCP Recovery and Resolution proposal refocused attention on the supervisory arrangements for EU and third-country CCPs included in EMIR and the extent to which these arrangements can be made more effective five years after adoption of EMIR. This proposal is currently under negotiations in the European Parliament and the Council. That ongoing work-stream needs to be coordinated and consistent with the current proposal.

Supervisory arrangements for EU CCPs

Under EMIR, EU CCPs are 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 (e.g. supervisors of the largest clearing members, supervisors of certain trading venues and central securities depositories). These

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13 See ESMA, Report EU-wide CCP Stress test 2015, 29 April 2016, 2016/658 and related graph in section 3.1 of the impact assessment accompanying this proposal

14 See full list of CCPs established in the Union in Table 3 in section 2.3 of the impact assessment accompanying this proposal.

15 In accordance with EMIR, 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.

16 See section 2.3 of the impact assessment accompanying this proposal.

17 At the Cannes summit of November 2011; the G20 Heads of States and Government endorsed the FSB's"Key Attributes of Effective Resolution Regimes for Financial Institutions"(the 'Key Attributes' KA) as "a new international standard for resolution regimes". See Communiqué G20 Leaders Summit – Cannes – 3-4 November 2011, Section 13.

18 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.

colleges can include as many as 20 member authorities and they rely on coordination by the home-country authority. These arrangements raise certain concerns in light of the current state of integration in the market that needs to be reflected in the supervisory arrangements. This is also important in order to advance the Capital Markets Union.

First, the growing concentration of clearing services in a limited number of CCPs, and the consequential increase in cross-border activity, implies that CCPs in a small number of individual Member States are increasingly relevant for the EU financial system as a whole. Against this trend, the current supervisory arrangements relying mainly on the home-country authority (e.g. the home-country authority is ultimately responsible for important decisions such as the extension of the authorisation or the approval of outsourcing and interoperability arrangements) need to be reconsidered.

Second, diverging supervisory practices for CCPs (e.g. different conditions for authorisation or model validation processes) across the EU can create risks of regulatory and supervisory arbitrage for CCPs and indirectly for their clearing members or clients. The Commission has drawn attention to these emerging risks and the need for more supervisory convergence in its Communication on CMU of September 2016[19] and in the public consultation on the operations of the European Supervisory Authorities (ESAs)[20], both of which highlighted the challenges posed by heterogeneous supervisory practices.

Third, the role of central banks - as issuers of currency - is not adequately reflected in CCP colleges. While the mandates of central banks and supervisors may overlap (in particular in areas such as interoperability, liquidity-risk controls etc.), there is a potential for misalignment when supervisory actions impact on key responsibilities of central banks in areas such as price stability, monetary policy and the payment systems. In crisis situations, their misalignments can amplify the risks to financial stability if the assignment of responsibilities between authorities remains unclear.

Supervisory arrangements for third-country CCPs

Today, a significant amount of financial instruments denominated in the currencies of the Member States are cleared by recognised third-country CCPs. For example, the notional amount outstanding at Chicago Mercantile Exchange (CME) in the US is EUR 1.8 trillion for euro-denominated interest-rate derivatives, and SEK 348 billion for SEK denominated interest-rate derivatives. This also raises a series of concerns.

First, the implementation of EMIR's system of equivalence and recognition has shown certain shortcomings in particular regarding ongoing supervision. In particular, after a third-country CCP has been recognised, ESMA has encountered difficulties in accessing information from the CCP, in conducting on-site inspections of the CCP and in sharing information with the relevant EU regulators, supervisors and central banks. As a result, there is a risk that third-country CCP practices and/or adjustments to risk management models go undetected and/or unaddressed, which may have important financial-stability implications for the EU entities.

Second, the potential for misalignments between supervisory and central-bank objectives within colleges acquires an additional dimension in the context of third-country CCPs where non-EU authorities are involved.

Third, there is a risk that changes to the CCP rules and/or regulatory framework in a third-country could negatively affect regulatory or supervisory outcomes, leading to an un-level

[19] Communication on the "State of the Union 2016: Completing the Capital Market Union – Commission accelerates reform"; 14 September 2016; IP/16/3001.

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

playing field between EU and third-country CCPs and creating scope for regulatory or supervisory arbitrage. There is currently no mechanism to ensure that the EU is informed automatically of such changes and can take appropriate measures.

Such concerns are likely to become more significant in the coming years because the global nature of capital markets means that the role played by third-country CCPs is set to expand. In addition to the 28 third-country CCPs already recognised by ESMA, a further 12 CCPs from 10 jurisdictions have applied for recognition[21] and are awaiting a decision of the Commission for the equivalence of their regulatory and supervisory regimes.

Moreover, a substantial volume of euro-denominated derivatives transactions (and other transactions subject to the EU clearing obligation) is currently cleared in CCPs located in the United Kingdom. When the United Kingdom exits the EU, there will therefore be a distinct shift in the proportion of such transactions being cleared in CCPs outside the EU's jurisdiction, exacerbating the concerns outlined above. This implies significant challenges for safeguarding financial stability in the EU that need to be addressed.

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 Union[22]. The Communication indicated that "further changes [to EMIR] will be necessary to improve the current framework that ensures financial stability and supports the further development and deepening of the Capital Markets Union (CMU)".

Need to improve current supervisory arrangements

As the EU clearing landscape continues to evolve, the arrangements for crisis prevention and management of CCPs must be as effective as possible. EMIR and the Commission proposal for a Regulation on CCP Recovery and Resolution are important steps in this regard. However, five years after the adoption of EMIR, the growing size, complexity and cross-border dimension of clearing in the EU and globally have highlighted shortcomings in the supervisory arrangements for EU and third-country CCPs. The present proposal therefore sets out specific amendments to EMIR and the ESMA Regulation[23], in particular to establish clear and coherent supervisory arrangements both for EU and third-country CCPs.

The impact assessment report accompanying this proposal considers the costs and benefits of these amendments. It sets out a number of options in order to enhance supervision of CCPs at EU level, involve further the central banks of issue in the supervision of CCPs, and strengthen the ability of the EU to monitor, identify and mitigate third-country CCP risks.

The impact assessment provides comprehensive evidence that the proposed amendments contribute effectively to reinforce the overall stability of the EU financial system and to lower further the already low probability (but extremely high-impact) risk of a CCP failure, while keeping costs at a minimum for market participants. The proposed amendments also contribute to the further development and deepening of the CMU, in line with the political priorities of the Commission.

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21 In accordance with ESMA's indicative list of third-country CCPs that have applied for recognition under Article 25 of EMIR.

22 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.

23 Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84–119.

1.2. Consistency with existing policy provisions in the policy area

This proposal is related to, and consistent with, a number of other EU policies and ongoing initiatives that aim to: (i) address the systemic importance of CCPs; (ii) promote the use of central clearing, and (iii) enhance the efficiency and effectiveness of EU-level supervision, both within and outside the EU.

First, this proposal is consistent the Commission's proposal[24] for a Regulation on CCP Recovery and Resolution adopted in November 2016. That proposal seeks to ensure that EU and national authorities are appropriately prepared to address a failing CCP, maintain financial stability and avoid that costs associated with the restructuring and the resolution of failing CCPs fall on taxpayers. The Commission's proposal aims to ensure that, in the unlikely scenario where CCPs face severe distress or failure, the critical functions of CCPs are preserved while maintaining financial stability and helping to avoid that costs associated with the restructuring and the resolution of failing CCPs fall on taxpayers. The crisis-management arrangements for recovery and resolution of CCPs included in that proposal are based on the existence of the highest quality arrangements for crisis prevention (i.e. for CCP regulation and supervision) under EMIR. By further enhancing the supervision of CCPs under EMIR, the likelihood, however small, of needing to resort to recovery and resolution measures should be further diminished. The adjustments and enhancements of supervision brought by this proposal will also need to be appropriately reflected in the pending legislative proposal on CCP Recovery and Resolution. Targeted modifications may be necessary to take into account the new role of the CCP Executive Session in colleges under EMIR and subsequently in the resolution colleges.

Second, this proposal is related to the Commission's proposal[25] for an amendment to the Capital Requirements Regulation (CRR)[26] adopted in November 2016. The proposal seeks to exclude from the calculation of the leverage ratio thresholds the initial margins for centrally-cleared derivative transactions received by clearing members in cash from their clients that are passed on to CCPs. It will, therefore, ease access to clearing – as the capital requirements to offer client or indirect clearing services will diminish – again reinforcing the importance of CCPs within the financial system.

Third, this proposal complements the Commission's proposal for targeted amendments to EMIR[27], adopted in May 2017. The proposal seeks to simplify certain EMIR requirements and make them more proportionate in order to reduce excessive costs for market participants, without compromising financial stability. This proposal should therefore provide further incentives for market participants to use central clearing – again reinforcing the importance of CCPs within the financial system.

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[24] 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.

[25] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012.

[26] Regulation (EU) no 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms.

[27] 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.

Fourth, this proposal is consistent with the March 2017 consultation launched by the Commission on the operations of the European Supervisory Authorities (ESAs)[28], with a view to strengthening and improving the effectiveness and efficiency of the ESAs.

Fifth, it is consistent with experiences with the implementation and enforcement of third-country provisions in EU financial legislation, as set out in its Staff Working Document on equivalence[29]. The Staff Working Document provides a factual overview of the equivalence process with third countries in EU financial services legislation. It sets out the experience with the implementation and enforcement of third-country provisions in EU financial legislation. It also presents the key aspects of equivalence (e.g. exercise of empowerments, assessment, ex-post monitoring) and provides more clarity on how these tasks are approached in practice.

Sixth, this proposal is consistent with work ongoing at an international level in the framework of the Financial Stability Board (FSB) aiming to, among others: (i) promote the use of central clearing and cross-border arrangements between jurisdictions to enhance the stability of the OTC derivatives market; (ii) achieve a consistent application of the Principles for Financial Markets Infrastructure (PFMIs) developed by the Committee on Payments and Markets Infrastructure (CPMI) and the International Organisation of Securities Commissions (IOSCO); (iii) monitor the implementation of the G20 derivatives markets reforms (through the FSB OTC Derivatives Working Group); and (iv) develop further guidelines on CCPs resolution (FSB Resolution Group).

1.3. Consistency with other Union policies

This proposal also relates to, and is consistent with, the Commission's ongoing efforts to further develop the CMU. The need to develop and integrate further EU capital markets was stressed in the Communication on the CMU of September 2016.[30] Further supervisory convergence of CCPs at EU level can support the development of deeper and better integrated capital markets, as more efficient and resilient CCPs are essential elements for the well-functioning of CMU. In order to do so, the Communication on the mid-term review of the CMU[31], which the Commission adopted on 8 June 2017, calls for strengthening the powers of ESMA to promote the effectiveness of consistent supervision across the EU and beyond. Conversely, as a result, the emergence of larger and more liquid financial markets implied by the CMU will result in even more transactions being cleared via CCPs, and increase their systemic relevance. Given the potential for increased volumes as well as the current opportunities for regulatory and supervisory arbitrage, further enhancements of the supervisory framework are required in order to ensure a strong and stable CMU.

In addition, the proposal is consistent with the Commission's Reflection paper on the deepening of the Economic and Monetary Union, adopted on 31 May 2017[32]. In particular,

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28 "Public consultation on the operations of the European Supervisory Authorities", 21.03.2017, available at https://ec.europa.eu/info/finance-consultations-2017-esas-operations_en

29 "EU equivalence decisions in financial services policy: an assessment", 27.02.2017, SWD(2017) 102 final, available at https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf

30 "Capital Markets Union - Accelerating Reform", 14.9.2016, COM(2016) 601 final, available at https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-601-EN-F1-1.PDF

31 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan, COM(2017) 292 final, 8 June 2017, available at: https://ec.europa.eu/info/sites/info/files/communication-cmu-mid-term-review-june2017_en.pdf

32 Reflection Paper on the Deepening of the Economic and Monetary Union, European Commission, 31 May 2017, available at: https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu_en_2.pdf

the reflection paper outlines that the completion of a genuine financial Union is essential for an effective and stable Economic and Monetary Union. According to the paper, this includes moving ahead with elements that are already on the table, including by delivering on the CMU. The proposal will help support the development of deeper integrated capital markets by ensuring further supervisory convergence of CCPs at EU level.

By tackling emerging threats to the smooth functioning of the financial system, the proposal also ensures that financial markets can continue to play their role in contributing to sustainable, long-term growth to further deepen the internal market in the interests of consumers and businesses, as part of the Commission's efforts to support Investments, Growth and Jobs.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

2.1. Legal basis

The legal basis for this proposal is Article 114 TFEU, which is the legal basis for EMIR and the ESMA Regulation. The analysis carried out as part of the impact assessment report identifies the elements of EMIR that need to be amended to reinforce the overall stability of the EU financial system and to lower further the already low probability (but extremely high-impact) risk of a CCP failure, while keeping costs at a minimum for market participants. Only the co-legislators have the competence to make the necessary amendments. Changes to the ESMA Regulation are necessary to create the CCP Executive Session which is entrusted with important tasks under EMIR.

2.2. Subsidiarity (for non-exclusive competence)

EMIR is a regulation that is binding in its entirety and directly applicable in all Member States. EMIR sets out the supervisory framework applying both to CCPs established in the EU and to third-country CCPs that provide clearing services to clearing members or trading venues established in the EU. Under EMIR, the Member State of establishment of the CCP plays a major role in the supervisory arrangements. However, Member States and national supervisors unilaterally cannot solve the systemic risks posed by highly integrated and interconnected CCPs, which operate on a cross-border basis beyond the scope of national jurisdictions. In addition, Member States cannot mitigate on their own risks arising from diverging national supervisory practices. Member States and national authorities cannot address on their own the systemic risks that third-country CCPs can pose to the financial stability of the EU as a whole.

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

2.3. Proportionality

The proposal aims to ensure that the supervisory arrangements of EMIR meet the objective of reducing systemic risk in derivatives markets in a more proportionate and effective manner, at a minimum cost for market participants. The proposal sets out a streamlined framework for the supervision of CCPs authorised at EU level, with clarified roles and responsibilities for all the various national and EU authorities and institutions involved. By recalibrating the supervisory arrangements, the proposal contributes to addressing the increasing cross-border

systemic nature of CCPs, while preserving the fiscal responsibilities of the authorities of the Member State of establishment. In addition, the proposal introduces an approach permitting third-country CCPs to comply with EMIR's requirements by complying with their own national comparable rules which allows for a proportionate approach focused on the systemic relevance of third-country CCPs for EU markets. At the same time, the proposal does not go beyond what is necessary to achieve the EMIR objective of reducing systemic risk, through the establishment of transparent and objective criteria to identify, monitor and mitigate third-country CCP risks to the EU's financial stability. The proposal therefore contributes directly to making the supervisory arrangements of EMIR more proportionate overall. Likewise, the proposal introduces only targeted amendments to the ESMA Regulation, that do not go beyond what is necessary to enable ESMA to carry out the tasks enshrined in EMIR.

2.4. Choice of the instrument

EMIR and the legal act establishing ESMA are both Regulations and therefore need to be amended by a legal instrument of the same nature.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

3.1. Ex-post evaluations/fitness checks of existing legislation

The impact assessment report accompanying this proposal provides an analysis of the extent to which the existing EMIR supervisory arrangements for CCPs established inside and outside the EU have met their objective of ensuring a level-playing field for the provision of CCP services in an effective and efficient way, while at the same time being coherent, relevant and providing EU added-value. The analysis also reflects the outcome of two peer reviews on the functioning of the supervisory colleges under EMIR conducted by ESMA in 2015[33] and 2016[34]. In addition, the analysis builds on input by ESMA assessing the current EMIR third-country equivalence and recognition regime as part of a report prepared for the Commission in the context of the review of EMIR[35].

Regarding the **effectiveness** of the EMIR supervisory arrangements applicable to CCPs established in the EU, practical experience shows that the cooperation between members of the colleges in their current structure has allowed the views of supervisors of different actors involved in central clearing to be represented, thereby contributing to the objectives of supervisory convergence and a level playing field amongst CCPs established in the EU. However, there are concerns about the consistency of CCP supervision across Member States, suggesting room for a more effective approach to cross-border CCP supervision. In particular the degree of cooperation between members of the colleges varies significantly depending on the role of the college in the decision-making process. While during the authorisation process, "*ESMA observed that in general the CCP colleges facilitated two-way cooperation: on the one hand, the chairing national competent authorities (NCAs) received good and constructive*

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33 ESMA review of CCP colleges under EMIR, January 2015 https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-20-_report_on_esma_review_of_ccp_colleges.pdf

34 ESMA, Peer Review under EMIR Art. 21 Supervisory activities on CCPs' Margin and Collateral requirements, 22 December 2016, ESMA/2016/1683 (ESMA peer review 2016) https://www.esma.europa.eu/sites/default/files/library/2016-1683_ccp_peer_review_report.pdf

35 ESMA, EMIR review report no. 4, ESMA input as part of the Commission consultation on the EMIR Review, 13 August 2015, ESMA/2015/1254 https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-1254_-_emir_review_report_no.4_on_other_issues.pdf

input from the college members which fed into their risk assessments; while on the other hand, college members received the information they required in order to vote on the adoption of the joint opinion."[36], a reduced level of cooperation occurs where there is no need for such an opinion. Thus, ESMA sees a "*risk that following authorisation CCP colleges may become simply a mechanism for the exchange of information, rather than an effective supervisory tool*." In addition, preliminary observations suggest that: (i) different college members participate to different degrees in college discussions; and (ii) the supervisory approaches of NCAs vary to a significant extent even in cases involving comparable CCPs. Common templates provided by ESMA to support supervisory convergence between NCAs have failed to solve that problem, because NCAs exercise their discretion differently. There is therefore room for improvement to help strengthen the consistency of CCP supervision at EU level, improve the level playing field in the EU and achieve more effective supervisory convergence.

On the effectiveness of supervision of third-country CCPs, the current arrangements have allowed ESMA to recognise 28 third-country CCPs to provide clearing services to EU counterparties. This is in line with the G20's objectives to promote cross-border arrangements. At the same time, most respondents to the EMIR consultation (mainly companies from the financial sector and industry associations) considered that the EMIR equivalence regime for third-country CCPs has *de facto* created a situation where the requirements for CCPs established in the EU are possibly stricter than for third-country CCPs, leading to an un-level playing field which is detrimental to the former. ESMA also highlighted that the EMIR approach vis-à-vis third-country CCPs is extremely flexible, with full reliance on third-country rules and supervisory arrangements, while the majority of third-country jurisdictions consider third-country CCPs as systemically relevant infrastructures and apply them to closer scrutiny. ESMA argued that, although the current EMIR approach could be a model in terms of mutual reliance, if the EU remains the only jurisdiction relying extensively on third-country rules and authorities, this might put it at risk and does not benefit CCPs established in the EU.

Regarding **efficiency**, a majority of respondents to the EMIR consultation supported the objective of ensuring a level playing field between CCPs established in the EU by promoting a homogeneous application of EMIR. At the same time, they pointed to the length of the approval processes, underlining that, in certain cases, the timeline for approval could be postponed indefinitely by the NCA, giving rise to legal uncertainty. Certain respondents also pointed to the need for greater transparency in the functioning of colleges, not only for CCPs for the authorisation and extension of services processes but also for users of CCPs in order to allow them to get more visibility of the authorisation process and its consequences. Moreover, several authorities and industry participants, and market infrastructure operators asked for more clarity in the process and timeframe for the authorisation and extension of services provided by CCPs. Respondents suggested that EMIR should clarify the modalities for the college process, in particular the roles and responsibilities of different college members. There is therefore room for improvement, in particular for a more streamlined supervision of CCPs established in the EU. This could contribute to a more efficient collaboration between national and EU supervisors, thereby avoiding the duplication of supervisory tasks and reducing the corresponding allocation of time and resources.

Regarding the current supervisory regime for third-country CCPs, industry associations that responded to the EMIR consultation indicated that the Commission takes too long to complete

[36] ESMA peer review 2015, p. 16, para. 30.

its equivalence assessments. ESMA also raised a series of concerns about the efficiency of the process of recognition of third-country CCPs. First, it argued that the process is rigid and burdensome, as demonstrated by the limited number of recognition decisions taken in 2015. Second, it pointed out that the recognition of third-country CCPs imposes a significant administrative burden on ESMA.

Regarding **relevance**, the supervisory arrangements of EMIR remain integral to international efforts to increase the stability of the global OTC derivatives market, while facilitating cross-border deference arrangements between jurisdictions. EMIR's supervisory arrangements also ensure that financial markets continue to play their role in contributing to sustainable, long-term growth to further deepen the internal market in the interests of consumers and businesses, as part of the Commission's efforts to support investments, growth and jobs.

As described in Section 2.4 of the impact assessment report accompanying this proposal, the supervisory arrangements of EMIR are **coherent** with other pieces of EU legislation that aim to: (i) address the systemic importance of CCPs; (ii) promote further the use of central clearing, and (iii) enhance the efficiency and effectiveness of EU-level supervision, both within and outside the EU.

Finally, in terms of the **EU added value**, the supervisory arrangements of EMIR covered a gap by introducing a new mechanism facilitating supervisory convergence at EU level in order to address the systemic risks of CCPs offering clearing services to EU counterparties.

3.2. Stakeholder consultations

This proposal builds on several public consultations.

First, it takes into account views from stakeholders and public authorities following the publication of the Commission's Communication on responding to challenges for critical financial market infrastructures and further developing the CMU of 4 May 2017[37]. The Communication considered that, in view of the challenges in the area of derivatives clearing, further changes would be necessary to ensure financial stability and the safety and soundness of CCPs that are of systemic relevance for financial markets across the EU and to support the further development of the CMU.

Second, the proposal relies on comments specific to EMIR and CCP supervision as part of the consultation on the operations of the ESAs that was open from 21 March to 17 May 2017. The consultation sought to build a clearer overview of areas where the effectiveness and efficiency of the ESAs can be strengthened and improved[38].

Third, the proposal considers comments focused on supervisory convergence as part of the consultation on the CMU mid-term review, which was open from 20 January 2017 to 17 March 2017[39]. The consultation sought the views of stakeholders on how the current CMU programme can be updated and completed so that it represents a strong policy framework for the development of capital markets. The consultation generated 178 responses.

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37 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.

38 The consultation and the related feedback statement can be found at: https://ec.europa.eu/info/finance-consultations-2017-esas-operations_en

39 The consultation can be found at: https://ec.europa.eu/info/finance-consultations-2017-cmu-mid-term-review_en

Fourth, the proposal takes into account contributions specific to EMIR's supervisory arrangements as part of the EMIR review consultation that was open between May and August 2015. The consultation generated more than 170 contributions from a broad range of stakeholders and public authorities[40].

Generally, respondents indicated that EMIR's current supervisory arrangements help increase the safety and soundness of CCPs established in the EU, with general support for the role performed by colleges of supervisors. Respondents also highlighted that most of the requirements of EMIR have started to apply only recently, and that it would therefore be premature to consider a complete overhaul of the existing supervisory architecture. Respondents, and in particular public authorities, underlined that, given the various types of CCPs currently operating (local vs. cross-border), national competent authorities should still be actively involved in supervision. However, many respondents also underlined that the operations of CCPs are of cross-border systemic relevance, highlighting the need to avoid supervision being conducted only at national level. The majority of respondents expressed support for increased supervisory convergence at EU level over the supervision of CCPs, indicating that the current regime is fragmented and inefficient. Increased cross-border activity, systemic importance of CCPs and access to liquidity in the Euro area were cited by respondents as factors why supervisory powers at EU level should be extended. Nevertheless, when considering any extension of direct supervisory powers at EU level over EU and third-country CCPs, respondents warned that such an extension should be in line with the principles of subsidiarity and proportionality, particularly as no EU structure would have sufficient resources to cater for a failing CCP, no matter how limited the risk of such an event is. Finally, a number of respondents, including ESMA[41], underlined the need to improve the current framework as regards third-country CCPs.

3.3. Impact assessment

The Commission conducted an impact assessment of relevant policy alternatives. Policy options were assessed against the key objectives of safeguarding the safety and efficiency of CCPs that are of systemic relevance to EU markets and enhancing financial stability in the EU, without undue fragmentation of the global system.

The Impact Assessment (IA) report was approved by the Regulatory Scrutiny Board (RSB) on 2 June 2017. It was submitted to the RSB on 22 May, and the RSB made a number of recommendations for improvements via a written procedure. Thus, the IA was resubmitted on 30 May to the RSB. The changes introduced in the IA to take into consideration the recommendations by the RSB were the following:

1. Specific systemic risks linked to the United Kingdom's withdrawal from the EU: Further description of the changes relating to the withdrawal of the United Kingdom from the EU in the section on the baseline scenario as part of the chapter on policy options.

[40] The consultation and the summary of the responses can be found at http://ec.europa.eu/finance/consultations/2015/emir-revision/index_en.htm

[41] See EMIR Review Report no.4 of 13 August 2015, as part of the Commission consultation on the EMIR Review, pp. 19-21, available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-1254_-_emir_review_report_no.4_on_other_issues.pdf

2. Preferred policy option for mitigation of third-country CCP risks: More detailed description of how option 3 relating to supervision based on criteria or thresholds would work in practice for third-country CCPs, depending on the risks that they would pose to the EU.

3. Impact of the preferred policy options on systemic risks: More detailed description of the role of CBIs regarding EU and non-EU CCPs. Clarification that the trade-off between supervisory burden and financial stability would be proportionate to the EU's exposure to third-country CCP risks. Explanation that a targeted location policy would reduce costs to a minimum.

4. Other issues: (i) clarification of how the decision-making process in the Executive Session would work compared to that of the current colleges; (ii) definition of operational objectives in the chapter on monitoring and evaluation; and (iii) further explanation of why there is no formal evaluation of EU CCPs as an Annex to the impact assessment report.

The options considered in the IA concern targeted amendments of the supervisory arrangements of EMIR applying both to CCPs established in the EU and to third-country CCPs offering or willing to offer their services to EU counterparties. To achieve the desired objectives, a number of preferred policy options were identified:

- In order to enhance the supervision of CCPs established in the EU, the current supervisory arrangements should be streamlined and further centralised through the establishment of a European supervisory mechanism, ensuring the proper involvement of national authorities, central banks of issue and ESMA within the scope of their responsibilities. This will help improve the coherence of supervisory arrangements for CCPs established in the EU, by promoting a level playing field amongst the European CCPs as well as homogeneity in the application of EMIR across the EU, while ensuring that specific areas of supervisory responsibility and related national fiscal responsibility remain adequately aligned. This will contribute to lower costs both at an institutional level, by avoiding supervisory overlaps between authorities, and for CCPs, by simplifying their supervisory framework simplified and by limiting the risk of supervisory duplication.
- In order to enhance supervisory arrangements within the EU designed to mitigate the risks related to third-country CCPs, the impact assessment report considers that third-country CCPs could be subject to a 'sliding scale' of additional supervisory requirements by ESMA and relevant CBIs based on objective criteria or thresholds. The degree and intensity of EU supervision would be proportionate and depend on the risks posed by third-country CCPs to the EU. Different criteria or thresholds could be set: low-impact CCPs (Tier 1 CCPs) would be subject to essentially a continued implementation of the EMIR equivalence and recognition regime, while medium to high-impact CCPs (Tier 2 CCPs) would be subject to a sliding scale of additional supervisory requirements, including at the end of the spectrum an EU authorisation and establishment requirement for any third-country CCPs that would pose substantial exposure risk to the EU and the stability of its financial system.
- This gradual sliding scale of supervisory requirements will allow for a proportionate and balanced supervision of third-country CCPs and adequate mitigation of any associated systemic risk, without undue fragmentation of the global system and excessive costs for market participants. This will help enhance the mechanisms for EU supervisors and CBIs to address third-country CCP risks while ensuring a level-playing field between CCPs established in the EU and third-country CCPs and

providing for better ongoing enforcement and compliance of third-country CCPs. While this option may trigger certain additional costs at institutional level and for third-country CCPs, and ultimately for market participants, such costs have to be weighed against the gains in systemic risk mitigation, although the exact monetary benefits of a reduction of systemic risk are difficult to quantify in advance.

The package of proposed options aims to establish clear and coherent supervisory arrangements for CCPs established in the EU and in third countries.

The impact assessment report also considers the overall costs and benefits of the preferred options, with a view to assessing compliance costs and the burden imposed on market participants. The next section presents the expected impact of the proposed measures.

3.4. Regulatory fitness and simplification

While EMIR pursues the general objective of reducing the systemic risk by increasing the safety and efficiency of CCPs, the present initiative aims to render the supervision of CCPs more effective and efficient and, by following a proportionate approach based on a thorough risk assessment, to reduce the regulatory and compliance burden for market participants. This is in line with the Commission's Better Regulation Agenda.

This initiative will strengthen supervisory arrangements for CCPs established in the EU (responding to their growing size, integration, concentration and interconnectedness) and enable EU authorities to better monitor and mitigate risk related to the EU's exposure to third-country CCPs. This will help to decrease even further the already low probability (but extremely high-impact) risk of a CCP failure and reinforce the overall stability of the EU financial system as a whole. The enhanced supervisory framework will improve legal and economic certainty as a whole. While there may be upfront economic costs associated with the framework, the 2007-8 financial crisis provides extensive empirical evidence of the benefit of crisis prevention via the most effective possible arrangements for supervision.

Estimating costs related to the preferred options presents limitations as both problems deal with the supervision of CCPs. While the additional costs or the restructuring of costs for EU and national authorities (e.g. additional resources and tasks) can be quantified, the impact for market participants is less straightforward and would be based on hypotheses rendering them questionable. Furthermore, since the preferred option for third-country CCPs is based on a sliding scale of supervisory requirements, the related costs would be CCP-specific and depend on the impact on the EU of the activities of the CCPs supervised or recognised. However it is possible to identify the source of potential costs or efficiencies for market participants.

Potential for regulatory simplification and cost reduction

The aim of this initiative is to streamline the supervision framework for CCPs established in the EU and to strengthen the supervision of third-country CCPs. By centralising at EU level the supervisory work inside a European supervisory mechanism, this initiative removes the duplication of tasks between national authorities. This should create economies of scale at EU level and diminish the need for dedicated resources at national level.

As far as market participants are concerned, CCPs should mainly benefit from a reduction in the administrative burden with a single point of entry for cross-border supervision at EU level.

Impact on market participants (including SMEs)

Concerning the supervision of CCPs established in the EU, under the preferred option, the changes proposed are not expected to have a significant impact on the cost of clearing, whether for clearing members or their clients and indirect clients. In order to fund the European mechanism, CCPs may be required to pay supervisory fees. These would however be proportionate to their activity and would only represent a negligible fraction of their turnover. While these costs may be passed on to the market, these would represent minimal adjustment costs.

Concerning the supervision of third-country CCPs, under the preferred option, the costs would mostly materialise in case EU authorisation and establishment is triggered as part of the sliding scale of supervisory requirements. With the exception of the location requirement, for Tier 1 CCPs and Tier 2 CCPs, the situation would be close to that of CCPs established in the EU, with limited supervisory fees to fund the European mechanism. This would trigger only limited additional costs to market participants.

A core number of staff will be required in order to set up and operationalise the European supervisory mechanism to conduct the daily business of supervision of the 17 CCPs currently established in the EU. Assuming all third-country CCPs requesting recognition are recognised eventually, that would mean around 40 third-country CCPs under the Executive Session's competence – either indirectly through monitoring and information exchange (i.e. Tier 1 CCPs) or, in addition to that, through more direct supervision of Tier 2 CCPs that present potentially more significant risks.

Thus, taking account of the number of third-country CCPs to be supervised either indirectly or directly, type and complexity of tasks to be fulfilled for Tier 1 and Tier 2 CCPs respectively, the number of full time equivalents needed is estimated at roughly 49. Overall the additional costs related to the preferred options for CCP supervision should amount to approximately €7 million per year.

Beyond supervision-related costs, most of the costs that clearing counterparties (clearing members and their clients) would face would relate to the introduction of an EU authorisation and establishment requirement for substantially systemic Tier 2 CCPs. These costs would be driven by legal and operational considerations as well as, if not properly calibrated, by market fragmentation and the related consequences for market liquidity and execution prices. Positive or negative adjustments in margin efficiencies would largely depend on the ability of market participants to substitute third-country CCPs with CCPs established in the EU. The drivers of these costs are detailed under Section 5.3 of the impact assessment report accompanying this proposal.

In addition, a location policy that would not be tailored to the systemic risk of the third-country CCP, defined according to objective criteria, could have an impact on the costs of clearing, the access to indirect clearing for clients of clearing members (including non-financial counterparties and small financial counterparties) and therefore generally in the ability to hedge risks for EU counterparties.

Nevertheless, this has to be weighed against the benefits associated with better crisis prevention. Overall, businesses, SMEs and micro-entreprises will benefit from the increased stability of CCPs and the continuity of their key critical functions should a crisis occur in the future which would lead to their distress or failure. The probability of such a crisis occurring should be further reduced through the enhanced ability of the relevant authorities in the EU to prevent the build-up of systemic risk within EU CCPs and to mitigate the transmission of

harmful financial distress through third-country CCPs. As a result, the potential for negative knock-on effects of a crisis affecting the financial sector – e.g. reduced readiness and/or capacity of the banking sector to provide financing to the real economy, recessions etc. – that tends to heavily impact SMEs and their ability to secure funding would also be reduced.

In addition, by clarifying supervisory arrangements both for EU and third-country CCPs, and in combination with the Commission's recent EMIR REFIT initiative on the reduction of excessive costs for smaller counterparties, the proposal should help to promote further the use of central clearing and facilitate the ability of SMEs to access financial instruments, either to hedge their transactions or to invest. The proposal will therefore facilitate further cross-border transactions within the EU and promote an efficient and competitive EU CCP market, thereby contributing to the objectives of the CMU.

Impact on the EU budget

Overall, the changes envisaged for the supervision of EU CCPs would have no impact on the budget of the EU, as any additional costs such as extra resources for the European mechanism would be covered by supervisory fees collected from CCPs. Such changes should, however, eventually benefit all market participants and member states as they should result in a safer clearing market within the EU. Further consideration on the financial impact of strengthening supervision for CCPs established inside the EU are discussed in the sections below.

Similarly, the changes envisaged to mitigate the risks posed by third-country CCPs would also have no impact on the budget of the EU, as any additional resources for the European mechanism would also be funded through the collection of supervisory fees from third-country CCPs. This would however be beneficial to the EU as it would reduce the probability of importing financial stability risks inside the EU and ensure that EU counterparties transacting with third-country CCPs operate in a safe environment, thereby promoting strong and stable global markets.

3.5. Fundamental rights

The EU is committed to high standards of protection of fundamental rights and is signatory to a broad set of conventions on human rights. In this context, the proposal is not likely to have a direct impact on these rights, as listed in the main UN conventions on human rights, the Charter of Fundamental Rights of the European Union which is an integral part of the EU Treaties, and the European Convention on Human Rights (ECHR).

4. BUDGETARY IMPLICATIONS

The changes envisaged to enhance the supervision of EU CCPs and to mitigate the risks posed by third-country CCPs are not expected to have an impact on the budget of the EU.

Possible additional tasks arising for ESMA, such as the processing of the registration of third-country CCPs and their ongoing supervision, could lead to a need for an increase of ESMA’s planned resources. However, any additional costs for the EU budget would be alleviated by mechanisms to increase the financing of the European mechanism, such as the collection of fees from the EU-based and third-country CCPs that it would directly supervise.

The financial and budgetary impact of the proposal is indicated in the legislative financial statement annexed to this proposal.

5. OTHER ELEMENTS

5.1. Implementation plans and monitoring, evaluation and reporting arrangements

The proposal includes a requirement stating that an evaluation of EMIR in its entirety should be carried out, with a particular focus on the effectiveness and efficiency of the proposed supervisory arrangements in meeting EMIR's original objective to increase financial stability. The evaluation should thus consider all aspects of EMIR, but in particular the following:

- Number of CCPs that have entered into recovery or resolution;
- Number of times the dispute resolution mechanism has been used by national competent authorities;
- Number of on-site inspections of third-country CCPs;
- Number of recognised third-country CCPs;
- Number of infringements of equivalence and/or recognition conditions by third-country CCPs;
- Estimated costs to EU counterparties.

In principle, this evaluation should take place at least 5 years after the application of these amendments.

The evaluation should seek to collect input from all relevant stakeholders, but in particular from CCPs, clearing members, non-financial counterparties, small financial counterparties and in general clients and indirect clients of clearing members. Input would also be required from ESMA as well as national authorities and central banks. Statistical data for the analysis should be sought from ESMA.

5.2. Detailed explanation of the specific provisions of the proposal

5.2.1. Creation of the CCP Executive Session within ESMA's Board of Supervisors

Amendments to specify the relation between the CCP Executive Session and the ESMA Board of Supervisors (ESMA Regulation, 4, 6, 40, 42, 43)

Article 1(1) introduces new paragraph (4) in Article 4 of the ESMA Regulation to provide a definition of a CCP aligned with that of EMIR.

Article 1(2) inserts new point (1a) in Article 6 of the ESMA Regulation to establish a Board of Supervisors in Executive Session (CCP Executive Session) within ESMA in the field of supervision of Union and third-country CCPs.

Article 1(4) inserts new point (f) in Article 40(1) of the ESMA Regulation so that to establish that the Head and the two Directors of the CCP Executive Session shall be non-voting members of the Board of Supervisors of ESMA.

Article 1(5) amends the first subparagraph of Article 42 of the ESMA Regulation to provide that the Chairperson, the voting members of the Board of Supervisors, the Head and the two Directors of the CCP Executive Session shall act independently and objectively in the interest of the Union.

Article 1(6) amends paragraph (1) of Article 43 of the ESMA Regulation to establish the distinction between the tasks of the Board of Supervisors and the tasks of the CCP Executive Session. Article 1(6) also replaces paragraph (8) of Article 43 of the ESMA Regulation to add that the Board of Supervisors shall exercise authority over the Executive Director in agreement with the CCP Executive Session**.**

Amendments with a view to establishing the organisation of the CCP Executive Session (ESMA Regulation, new Articles 44a to 44c)

In order to establish how the Board of Supervisors in Executive Session (CCP Executive Session) will be organised within ESMA, Article 1(7) inserts new Articles 44a, 44b, and 44c as part of new Section 1A in Chapter III of the ESMA Regulation. New Section 1A establishes the composition of the CCP Executive Session, its tasks and its decision-making powers to ensure a coherent supervisory approach across the EU, an appropriate level of expertise as well as a swift and effective decision-making process in relation to CCP supervision.

New Article 44a provides that the Board of Supervisors in its CCP Executive Session shall be composed of: (i) permanent members, including an independent Head and two Directors, who shall be voting, and a representative of the ECB and of the Commission, who shall be non-voting; and (ii) members specific to each CCP, including a representative of the competent authority of the Member State where the CCP is established, who shall be voting, and a representative of the relevant central bank(s) of issue, who shall be non-voting. The permanent members should participate in all meetings of the CCP Executive Session. CCP specific members should participate where necessary and appropriate for CCPs' under their supervision. The Head may also invite other members of the current college of supervisors under Article 18 of EMIR and representatives of authorities of third-country CCPs recognised by ESMA as observers to ensure that the views of the other relevant authorities are sufficiently taken into account by the CCP Executive Session. The presence of independent permanent members and CCP-specific members will ensure that decisions made in the CCP Executive Session are both consistent, appropriate and proportionate across the EU and that the relevant national competent authorities, central banks of issue and observers are involved in the decision-making on issues concerning a CCP established in a Member State. When deciding on a third-country CCP, only the permanent members of the CCP Executive Session and the relevant central banks of issue of Union currencies should participate in the decision-making process**.**

New Article 44b provides that the CCP Executive Session shall perform a list of specific tasks assigned to it pursuant to EMIR to ensure the proper functioning of the internal market as well as the financial stability of the Union and the Member States. References to ESMA in the amendments to EMIR in this proposal therefore refer to the CCP Executive Session unless otherwise stated. It also provides that the CCP Executive Session shall have dedicated staff and adequate resources in order to guarantee its autonomy, independence and adequate functioning.

New Article 44c establishes that, in order to guarantee a swift and effective decision-making process, the CCP Executive Session shall take its decisions by a simple majority of its members in accordance with the voting rights established under new Article 44a(1), and that the Head shall have a casting vote in case of a tie.

Amendments to establish the accountability and independence of the members of the CCP Executive Session (ESMA Regulation, new Article 48a, Articles 49 and 50)

Article 1(8) replaces the title of Section 3 of Chapter III of the ESMA Regulation to establish the requirements that apply to the Head and the two Directors of the CCP Executive Session.

Article 1(9) inserts new Article 48a to provide for the appointment and the tasks of the Head and Directors of the CCP Executive Session. Article 48a(2) establishes that the Head and the two Directors shall be appointed on the basis of merit, skills, knowledge of clearing, post-trading and financial matters, and of experience relevant to CCP supervision and regulation in

order to ensure an appropriate level of expertise, on the basis of an open selection procedure. Article 48a(4) specifies that the Commission will make a proposal for the appointment of candidates to the European Parliament for approval. Following the European Parliament's approval, the Council will adopt an implementing decision appointing Head and the two Directors. The involvement of the co-legislators in the appointment procedure will ensure transparency and democratic control. In addition, Article 48a(5) establishes that the Council may, on a proposal from the Commission approved by the European Parliament, adopt an implementing act to remove the Head or the Directors under certain conditions, in order to make them accountable to the European Parliament and the Council and to safeguard the rights of the Union institutions.

Article 1(10) amends Article 49 of the ESMA Regulation to establish that the Head and the Directors of the CCP Executive Session shall act independently and objectively in the Union interest.

Article 1(11) amends Article 50 of the ESMA Regulation to provide that, in order to ensure democratic accountability, the European Parliament and the Council may invite the Head of the CCP Executive Session to make a statement, whenever requested. In addition, the Head of the CCP Executive Session is required to report in writing on the main activities of the CCP Executive Session to the European Parliament where requested and to report any relevant information requested by the European Parliament on an ad hoc basis.

Amendments to specify the interactions between the CCP Executive Session and the tasks of the Executive Director of ESMA, the establishment of the budget and professional secrecy (ESMA Regulation, Articles 53, 63 and 70)

Article 1(12) amends Article 53 of the ESMA Regulation to establish the interaction between the CCP Executive Session and the tasks of the Executive Director of ESMA. Point (a) of Article 1(12) amends paragraph (2) of Article 53 to specify that the Executive Director shall take into account the guidance of the CCP Executive Session for implementing the annual work programme of ESMA, under the control of the Management Board. Point (b) of Article 1(12) amends paragraph (4) of Article 53 to establish that the Executive Director shall obtain the endorsement of the CCP Executive Session for the tasks under its responsibility when preparing the multi-annual work programme, prior to forwarding it to the Management Board. Point (c) of Article 1(12) amends paragraph (7) of Article 53 to require the Executive Director to obtain the endorsement of the CCP Executive Session for the tasks under its responsibility when preparing the draft report on the activities of ESMA, prior to forwarding it to the Management Board.

Article 1(13) inserts new paragraph (1a) in Article 63 of the ESMA Regulation to establish that the expenditure and the fees related to the tasks of the CCP Executive Session shall be separately identifiable within ESMA's statement of estimates. The CCP Executive Session shall approve the draft prepared by the Executive Director relating to such expenditure and fees prior to the adoption of the statement of estimates.

Article 1(14) amends paragraph (1) of Article 70 in the ESMA Regulation to provide that members of the CCP Executive Session shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased.

Amendments with a view to enhancing ESMA's ability to collect information (ESMA Regulation, Article 35)

Article 1(3) replaces the sixth paragraph of Article 35 of the ESMA Regulation to provide that, where complete information is not available from the competent authorities or other

entities in the Member State, ESMA may request information directly from an authorised or recognised CCP, an authorised central securities depository and an authorised trading venue. ESMA shall inform the competent authorities of such requests.

5.2.2. Supervision of CCPs established in the Union

Amendments to the conditions and procedures for the authorisation of a CCP established in the EU (EMIR Articles 17, 18, 19, 20 and 21)

Procedure for granting and refusing authorisation

Article 2(2) amends paragraph (3) of Article 17 of EMIR so that the assessment by a competent authority of the completeness of a CCP's application is undertaken in consultation with ESMA and that ESMA and the college are informed of any additional information the competent authority has received regarding an application.

Chair and composition of the college

Article 2(3) amends Article 18 of EMIR to clarify the assignment of responsibilities between authorities within the college. New Article 18(1) provides that the college shall be chaired and managed by the Head of the CCP Executive Session. New point (a) in Article 18(2) of EMIR establishes that the college the permanent members of the CCP Executive Session shall attend the college instead of ESMA. New point (c) in Article 18(2) of EMIR adds, where relevant, the ECB in accordance with Council Regulation (EU) No 1024/2013, to the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States with the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period.

Opinion of the college

Article 2(4) amends Article 19(3) of EMIR regarding the voting rights of members of the college to establish that the permanent members of the CCP Executive Session shall have one vote each, with the exception of the representative of the Commission, who shall be non-voting.

Withdrawal of authorisation

Article 2(5) amends Article 20(6) of EMIR to provide that a CCP's competent authority shall send ESMA and the members of the college its fully reasoned draft decision of the withdrawal of authorisation.

Review and evaluation

Points (a) and (b) of Article 2(6) replace paragraphs (1) and (3) of Article 21 of EMIR relating to the review and evaluation of authorised CCPs. New Article 21(1) provides that the review and evaluation by a competent authority of a CCP's compliance with EMIR is undertaken in cooperation with ESMA. New Article 21(3) establishes that ESMA will establish the frequency and depth of such a review and evaluation, and provides that ESMA staff should be invited to participate in any on-site inspections. It also requires the competent authority to forward to ESMA any information that it receives from a CCP and that the competent authority requests any information sought by ESMA which it cannot provide from the relevant CCP.

Amendments relating to the authorisation and supervision of CCPs established in the EU (EMIR, new Articles 21a, 21b and 21c)

Article 2(7) inserts new Articles 21a, 21b and 21c in EMIR to establish the role of the CCP Executive Session in relation to the authorisation and supervision of CCPs and to clarify the assignment of responsibilities between authorities.

While national competent authorities continue to exercise their current supervisory responsibilities under EMIR, the prior consent of ESMA, and where appropriate, of the relevant central bank(s) of issue, is required for certain decisions in order to promote CCP supervisory convergence throughout the Union. New Article 21a provides that competent authorities will prepare final draft decisions and submit them to the prior consent of ESMA for decisions relating to access to a CCP, access to a trading venue, authorisation of a CCP, extension of activities and services of a CCP, capital requirements, withdrawal of authorisation, review and evaluation, shareholders and members with qualifying holdings, information to competent authorities, review of models, stress testing and back testing, and approval of interoperability arrangements. Any other decision relating to the application of Article 22 in connection with the requirements set out for CCPs and interoperability arrangements in Titles IV and V of EMIR will also be subject to ESMA's prior consent. If ESMA proposes amendments to certain final draft decisions of a competent authority, such decisions shall be adopted only once they have been amended as requested by ESMA. If ESMA objects to certain final draft decisions of a competent authority, those decisions shall not be adopted. New Article 21a also introduces a dispute-resolution mechanism in case of disagreement between ESMA and the national competent authorities. If a competent authority disagrees with the amendments or the objections by ESMA against certain of the competent authority's final draft decisions, the matter shall be referred for a final decision to the Board of Supervisors of ESMA. Finally, new Article 21a provides that ESMA may adopt an individual decision on financial market participant where national competent authorities deny the opinion or requests from ESMA.

Similarly, the prior consent of the relevant central banks of issue is required for certain decisions envisaged by national competent authorities, due to the potential risks that the malfunctioning of a CCP could pose to the definition and implementation of the monetary policy of the Union and the promotion of the smooth operation of payment systems. While the mandates of central banks and supervisors may overlap, there is potential for misalignment when supervisory actions impact on key responsibilities of central banks in areas such as price stability, monetary policy and the payment systems. New Article 21b provides for the tasks of the relevant central bank of issue in order to establish the assignment of responsibilities between authorities, in particular when it relates to a CCP's payment and settlement arrangements and related liquidity risk. Management procedures for the transactions denominated in that central bank of issue's currency. New Article 21b provides that competent authorities shall obtain the consent of the relevant central banks of issue for decisions relating to authorisation of a CCP, extension of activities and services of a CCP, withdrawal of authorisation, margin requirements, liquidity risk controls, collateral requirements, settlement and approval of interoperability arrangements.

In case the relevant central bank of issue objects to the draft decisions of a competent authority in these areas, those decisions shall not be adopted. In case the relevant central bank of issue proposes amendments to the draft decisions of a competent authority in these areas, those decisions shall be adopted only as amended.

New Article 21c provides that both CCPs established in the Member States and third-country CCPs shall pay fees for ESMA's supervisory and administrative tasks for (i) applications for authorisation referred to in Article 17, (ii) applications for recognition under Article 25, and (iii) annual fees associated with the tasks under ESMA's responsibility. The Commission will 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 authorised and applicant Union CCPs, recognised third-country CCPs that are not systemically important (Tier 1 CCPs) and recognised CCPs that are, or are likely to become, systemically important for the financial stability of the Union or for one or more of its Member States (Tier 2 CCPs). These supervisory fees will enable to finance the tasks of the CCP Executive Session and enable ESMA to fulfil its responsibilities.

Amendments relating to cooperation between authorities (EMIR, Article 24)

Article 2(8) amends Article 24 of EMIR to add potential adverse effects to the transmission of monetary policy and the smooth operation of payment systems to situations of emergency for which the CCP's competent authority or any other authority shall inform ESMA, the college, the relevant members of the ESCB and other relevant authorities without undue delay.

5.2.3. Third-country CCPs

In the five years since the adoption of EMIR, the volume of CCP activity – in the EU and globally - has grown rapidly in scale and in scope. Central clearing has gained in importance for interest rate and credit derivatives The rapidly expanding role of CCPs in the global financial system reflects not only the introduction of central clearing obligations across different asset classes, but also increased voluntary use of central clearing amid growing awareness of the benefits of central clearing among market participants. EMIR already requires certain interest-rate derivatives and credit default swaps to be centrally cleared in line with similar requirements in other G20 countries. Bank capital rules have also been changed to incentivise central clearing and make bilateral clearing a costlier option in relative terms, while bilateral transactions are subject to additional collateral requirements since March 2017. As a result, clearing has increased, but is now concentrated in a relatively limited number of global CCPs.

Currently, 28 third-country CCPs have been recognised under EMIR's equivalence provisions. A further 12 CCPs from 10 jurisdictions have applied for recognition and are awaiting a decision of the Commission as regards the equivalence of their regulatory and supervisory regimes.

Amendments with a view to enhancing the implementation of the equivalence of third-country CCP regimes (EMIR, Article 25(6))

The Commission will continue to determine by way of equivalence decisions that the legal and supervisory frameworks of third countries fulfil the requirements under EMIR for the purpose of enabling the recognition of CCPs based in those third countries. This proposal confirms that the Commission may subject an equivalence determination to further conditions. Point (e) of Article 2(9) inserts new paragraphs (6a) and (6b) so that the Commission may, if necessary, specify by way of a Delegated Act the criteria to be used in its assessment for granting equivalence to third-country CCP regimes. New paragraph (6b) in Article 25(6) of EMIR tasks ESMA with the monitoring of regulatory and supervisory developments in third-country CCP regimes that have been deemed equivalent by the Commission.

Amendments regarding the recognition of third-country CCPs (EMIR, Article 6, paragraphs (2), new (2a), new (2b) and new (2c) in Article 25, and new Article 25a)

Increased transparency

To improve transparency to stakeholders and the public as a whole, EMIR is amended to clarify the registration of CCPs by providing more details in ESMA's public register (Article 2(1) amends point (b) in Article 6(2)).

No additional requirements have been introduced in the proposal for recognised third-country CCPs.

Classification of non-systemically important third-country CCPs (Tier 1) and systemically important third-country CCPs (Tier 2)

In view of the global increase in clearing and concentration of risk in a limited number of global CCPs, a differentiation needs to be introduced according to the type of third-country CCP recognised under EMIR.This proposal therefore requires that, when considering an application for recognition, ESMA will need to consider the degree of systemic risk presented by a third-country CCP. In order to achieve this, and to introduce a proportionate application of the requirements, a distinction needs to be made between lower risk CCPs and those that are, or will be, systemically important for the Union or one or more of its Member States. This reflects the fact that not all third-country CCPs are of equal systemic importance. This will depend on their scope and type of transactions cleared as well as the volume of their clearing activity. For example, a relatively small third-country CCP that clears only a limited number of contracts that are, for example, denominated in local currency will objectively pose fewer concerns and less risk to the Union's financial system than a third-country CCP that clears significant volumes of contracts that are denominated in a Union currency.

It is therefore proposed that ESMA has the power to distinguish between CCPs that are, or are likely to become systemically important and those that are not. Third-country CCPs that ESMA has determined as non-systemically important or not likely to become systematically important for the Union and the Member States are referred to as 'Tier 1' (Point (a) of Article 2(9) inserts point (e) in Article 25(2) of EMIR). These Tier 1 CCPs will continue to be subject to the current arrangements and conditions for third-country equivalence decisions adopted by the Commission, and which allow ESMA to recognise individual third-country CCPs. ESMA will also be tasked with new responsibilities in relation to the supervision over these recognised Tier 1 CCPs.

In contrast to Tier 1 CCPs, ESMA will also be able to determine a different category of third-country CCPs which are deemed to be systemically important or likely to become systemically important in the near future for the financial and economic stability of the Union and of the Member States (so called 'Tier 2 CCPs').This is provided for in point (c) of Article 2(9) which inserts a new paragraph (2a) in Article 25 of EMIR.

In order for ESMA to determine whether a third-country CCP is a 'Tier 2' CCP, four objective criteria are provided for (new Article 25(2a)):

(i) the nature, size and complexity of the third-country CCP's business;

(ii) the effect that the failure of, or a disruption to, the third-country CCP would have on critical markets, financial institutions, or the broader financial system and on the financial stability of the EU;

(iii) the third-country CCP's clearing membership structure, and

(iv) the third-country CCP's relationship, interdependencies, or other interactions with other financial market infrastructures.

These criteria will need to be further specified by the Commission in a delegated act (second subparagraph of Article 25(2a)) within six months of the adoption of the Regulation.

The consequence of ESMA determining a third-country CCP to be a Tier 2 CCP is that that CCP can only be recognised and permitted to provide clearing services or activities in the Union if it meets further conditions. These conditions are necessary to reflect the additional concerns that arise for the financial stability to the Union and one or more of the Member

States. CCPs that have already been recognised under the current EMIR regime will continue to be recognised as 'Tier 1' CCPs until ESMA has determined whether such third-country CCPs are 'Tier 2' CCPs.

Proportionate requirements for systemically important Tier 2 third-country CCPs

The additional requirements that systemically important third-country CCPs must fulfil are fourfold (See point (b) of Article 2(9)):

(i) ongoing compliance with the relevant and necessary prudential requirements for EU-CCPs. These requirements concern capital requirements, requirements for the internal organisation management, conduct of business, margins, default fund, financial resources, liquidity, investments, stress tests, settlement and interoperability. They are currently set out in Article 16 and in Titles IV and V of EMIR;

(ii) written confirmation – within 180 days – from the relevant EU central banks of issue that the third-country CCP complies with any requirements imposed by those central banks. Those additional requirements would be imposed by the central banks in the exercise of their monetary policy tasks. By way of example, they could include additional requirements to address risks for liquidity, payment or settlement arrangements in the Union or Member States. In more particularity they could concern the availability and specific type of collateral held within a CCP, the level of any 'haircuts' applied to collateral, investment policy or collateral segregation, the availability of liquidity arrangements between central banks involved, the potential impact of the CCP's operations and the implications of their possible disruption or failure for the financial system and stability of the Union.

(iii) to enable ESMA to exercise its new supervisory responsibilities there must also be written consent by the third-country CCP that ESMA may access any information held by the CCP and may access any of its business premises upon request. Naturally, this needs to be able to be enforced in the third country, and a legal opinion should be available confirming that this is the case;

(iv) the third-country CCP should have all the necessary procedures and measures to be able to comply with the first and third condition above.

As the requirements above need to be applied in a proportionate manner, the proposal introduces a system according to which a third-country CCP may continue to rely on the rules and requirements in its own country. This new system of comparable compliance – which complies with FSB standards and reflects a similar system applied by the US authorities – relies on a simple procedure under which the third-country CCP can request ESMA to compare EMIR's requirements and EU supervisory standards for CCPs with those of the third country. Where comparable, ESMA may determine that the application of some or all of the requirements in place as well as the corresponding supervisory enforcement in that third country provides a comparable outcome to the application of EMIR and waive the application of corresponding EMIR provision. This approach will significantly reduce any burdens resulting from dual application of rules and requirements. The Commission will be required to adopt a delegated act to specify the details of assessment that ESMA carries out (new Article 25a).

However, in view of the growing concentration of clearing services in a limited number of global CCPs, and the increased risk which that concentration entails, some CCPs may be of specifically substantial systemic significance for the EU financial system. Therefore, when making its determination whether a third-country CCP is, or is likely to become, systemically important, ESMA may also determine, in agreement with the relevant EU central bank(s), that the risks posed by that entity to the Union's financial stability or to one or more of the

Member States are of such magnitude that even a system of full application of EMIR to this third-country CCP is not enough to sufficiently mitigate such risks and that it should therefore not be recognised. Where such determination that the challenges for safeguarding financial stability in the EU that cannot be addressed through the recognition process of third-country CCPs is made, it is proposed that ESMA, in agreement with the relevant EU central banks, has the power to recommend to the Commission, that that CCP should not be recognised. On that basis, the Commission is empowered to take a decision that that CCP should not be recognised and if it wishes to provide clearing services in the Union, it should be authorised and established in one of the Member States (new paragraph (2c) of Article 25).

Amendments to enhance the ongoing supervision of third-country CCPs post-recognition (EMIR Articles 25(5), 25(6), 25(7), new Articles 25b to 25m)

ESMA supervision over third-country CCPs

In order to respond to the shortcomings in the implementation of EMIR's system of equivalence and recognition for the supervision of third-country CCPs, the powers of ESMA are proposed to be enhanced. This will ensure that difficulties for ESMA in accessing information from a CCP, conducting on-site inspections of the CCP and sharing information with the relevant EU regulators, supervisors and central banks will be addressed. This will minimise the risk that CCP practices and/or adjustments to risk management models go undetected, with important financial-stability implications for the EU entities. Second, this will respond to potential for misalignments between supervisory and central-bank objectives within colleges in the context of third-country CCPs where non-EU authorities are involved. Finally, the risk that changes to the CCP rules and/or regulatory framework in a third-country which could negatively affect the regulatory or supervisory outcomes is addressed. This means that level-playing fields will be ensured between EU and third-country CCPs, and scope for regulatory or supervisory arbitrage will be removed. ESMA's new responsibilities to exercise supervision over recognised Tier 1 and Tier 2 CCPs are provided for in the new Article 25b (see below).

Enhanced implementation of the current recognition regime

Point (c) of Article 2(9) replaces Article 25(5) of EMIR to specify that ESMA must review at least once every two years the recognition of a third-country CCP that has extended its activities and services in the Union. Provisions relating to the withdrawal of the recognition of a third-country CCP have been moved to new Articles 25m and 25n (see below).

Point (f) of Article 2(9) replaces the first sentence of Article 25(7) of EMIR to provide that the cooperation arrangements between ESMA and the relevant competent authorities of equivalent CCP third-country regimes must be effective in practice.

Point (g) of Article 2(9) amends point (d) in Article 25(7) to specify that the procedures concerning the coordination of supervisory activities should include the agreement of third-country authorities to allow investigations and on-site inspections in accordance with Article 25d and 25e of this proposal. Point (g) also inserts a new point (e) in Article 25(7) establishing that the cooperation arrangements between ESMA and the relevant competent authorities of equivalent CCP third-country regimes must specify the procedures necessary for the effective monitoring of regulatory and supervisory developments in a third country.[42]

New role for ESMA and the relevant central bank(s) of issue in the supervision of recognised third-country CCPs

[42] See also the Commission staff working document "EU equivalence decisions in financial services policy: an assessment", SWD(2017) 102 final of 27 February 2017.

Article 2(10) inserts new Articles 25b to 25n in EMIR to grant ESMA new powers to supervise recognised Tier 1 and Tier 2 third-country CCPs to strengthen the monitoring and enforcement of the ongoing compliance of third-country CCPs with EMIR requirements. It also provides for the involvement of the relevant central banks of issue in the recognition and supervision of third-country CCPs in relation to financial instruments denominated in Union currencies that are cleared to a significant extent in CCPs located outside the Union, in order to mitigate risks for the Union internal market and the financial stability of the Union or for one or more of its Member States.

New Article 25b provides ESMA with new powers to ensure the ongoing compliance of Tier 1 and Tier 2 third-country CCPs.

Paragraph (1) of new Article 25b provides that ESMA shall be responsible for the ongoing supervision of the continued compliance of Tier 2 CCPs with the prudential requirements set out in Article 16 and Titles IV and V of EMIR. In addition, ESMA will require confirmation from each Tier 2 CCP that it fulfils all the other additional supervisory requirements established in Article 25(2b) at least on a yearly basis, in accordance with the second subparagraph of Article 25b(1). The relevant central bank(s) of issue will also immediately notify ESMA if it deems that a Tier 2 CCP no longer fulfils the conditions established in Article 25(2b)(b).

Paragraph (2) of new Article 25b provides that ESMA shall obtain the consent of the relevant central bank(s) of issue prior to the adoption of decisions relating to margin requirements, liquidity risk controls, collateral requirements, settlement and approval of interoperability arrangements. In case the relevant central bank(s) of issue objects to the draft decision, ESMA shall not adopt it. In case the relevant central bank(s) of issue proposes amendments to the draft decision, ESMA may only adopt it as amended.

Paragraph (3) of new Article 25b provides that ESMA shall carry out its assessment of the resilience of recognised CCPs to adverse market conditions in accordance with the common methodologies established in Article 32(2) of the ESMA Regulation.

New Article 25c establishes that a request or a decision by ESMA may require a third-country CCP and related third parties to provide all necessary information to allow ESMA to carry out its duties under EMIR.

New Article 25d establishes that a decision by ESMA may require a Tier 2 third-country CCP to submit to general investigations.

New Article 25e establishes that a decision by ESMA may require a Tier 2 third-country CCP to submit to on-site inspections. ESMA should give notice of its intention to carry out an on-site inspection to the competent authorities of the third country. Those authorities may also participate in the inspection. The central bank(s) of issue shall be invited to participate in such on-site inspections.

New Articles 25f and 25i establish procedural rules, including respect of the rights of defence, in the event of serious indications of possible infringements by third-country CCPs to provide all necessary information or to submit to general investigations and on-site inspections. Paragraph (13) of Article 2 inserts a new Annex III in EMIR providing a list of possible infringements by a third-country CCP, including: (i) infringements relating to capital requirements; (ii) infringements relating to organisational requirements or conflicts of interest; (iii) infringements relating to operational requirements; (iv) infringements relating to transparency and the availability of information; and (v) infringements relating to obstacles to the supervisory activities.

New Article 25g provides for fines in case of established infringements by third-country CCPs. Paragraph (13) of Article 2 inserts a new Annex IV in EMIR providing a list of aggravating and mitigating factors of certain possible infringements by a third-country CCP.

New Article 25h provides for effective and proportionate periodic penalty payments to be imposed by a decision of ESMA on third-country CCPs in certain situations. Penalties can be imposed to end infringements, supply information or submit to investigations or inspections.

New Article 25j provides that ESMA shall disclose to the public, subject to certain conditions, each instance where fines or periodic penalty payments have been imposed on third-country CCPs.

New Article 25k provides for review by the Court of Justice of any ESMA decision imposing fines or periodic penalty payments on third-country CCPs.

New Article 25l empowers the Commission to adopt delegated acts in order to take account of developments in financial markets concerning measures to amend Annex IV of EMIR.

New Article 25m in EMIR establishes that ESMA shall withdraw partially or in its entirety a decision recognising a third-country CCP if certain conditions are met.

New Article 25n establishes that ESMA shall take one or more decisions when it finds that a Tier 2 third-country CCP has committed an infringement, including a requirement that the CCP brings the infringement to an end, fines, public notices, and the withdrawal of that CCP's recognition.

5.2.4. Prudential requirements applicable to CCPs

Amendments related to model and parameter validation (EMIR Article 49)

Up to now, Article 49 required, in addition to an independent validation to be obtained by the CCP, two separate validations by the NCA and ESMA of significant changes to the models and parameters adopted to calculate the CCP's margin requirements, default fund contributions, collateral requirements, and other risk-control mechanisms. Point (b) of Article 2(11) inserts new paragraphs (1a), (1b), (1c), (1d), (1e) and (1f) in Article 49 of EMIR to clarify the conditions under which a CCP may obtain the validation of significant changes to its adopted models and parameters. According to paragraph (1a) the NCA's validation is sufficient, because Article 2(7) introduces a new Article 21a in EMIR which requires ESMA's prior consent to the NCA's validation decision under Article 49 of EMIR. Thus, a separate validation by ESMA is not necessary anymore. When a CCP plans to adopt any significant change to the models and parameters, it shall apply to the competent authority for validation of that change. The competent authority, in consultation with ESMA, shall conduct a risk assessment of the CCP and submit a report to the college, which shall then adopt a majority opinion. After adoption of such an opinion, the competent authority shall inform the CCP whether validation has been granted or refused. In addition, the new paragraphs provide for a legal basis for the preliminary adoption of a significant change to models or parameters in case of need.

Point (a) of Article 2(11) amends Article 49(1) of EMIR accordingly and abolishes the requirement of two validations. The adopted models and parameters stay subject to an opinion of the college in accordance with a process defined in that Article. The last subparagraph of the amended Article 49(1) stipulates that ESMA shall relay the information on the results of the stress tests not only to the European Supervisory Authorities, but also to the ESCB and the Single Resolution Board, to enable them to assess the exposure of financial undertakings to the default of CCPs.

5.2.5. Transitional provisions

Amendments to establish transitional arrangements to enable the review of recognition decisions adopted before the entry into force (EMIR, Article 89)

Paragraph (12) of Article 2 inserts a new paragraph in Article 89 establishing certain transitional arrangements to provide that new Articles 25(2)(e) and 25(2a) will apply upon the entry into force of the delegated act establishing the criteria for determining a Tier 2 CCP, and referred to in the second subparagraph of Article 25(2a). Article 2(12) also provides for ESMA to review third-country CCPs recognition decisions adopted before this proposal enters into force. The new provision states that this review shall take place within 12 months from the entry into force of the delegated act spelling out the criteria for determining whether a third-country CCP is, or is likely to become, systemically important for the financial stability of the Union or for one or more of its Member States.

2017/0136 (COD)

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Central Bank[43],

Having regard to the opinion of the European Economic and Social Committee[44],

Acting in accordance with the ordinary legislative procedure[45],

Whereas:

(1) Regulation (EU) No 648/2012 of the European Parliament and of the Council[46] 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 2017[47] to amend Regulation (EU) No 648/2012 in a targeted manner, to improve its effectiveness and

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43 OJ C […], […], p. […].

44 OJ C , , p. .

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

46 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).

47 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.

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.

(3) The number of CCPs currently established in the Union and authorised under Regulation (EU) No 648/2012 remains relatively limited, standing at 17 in June 2017. 28 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 Union[48]. 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 Resolution[49] in November 2016 to ensure that authorities are appropriately prepared to address a failing CCP, safeguarding financial stability and limiting taxpayer costs.

(4) Notwithstanding that legislative proposal and in light of the growing size, complexity and cross-border dimension of clearing in the Union and globally, the supervisory arrangements for Union and third-country CCPs should be revisited. By addressing identified problems at an early stage and establishing clear and coherent supervisory arrangements both for Union and third-country CCPs, the overall stability of the Union financial system would be reinforced and the potential risk of a CCP failure should be lowered even further.

(5) In light of 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 Union[50], 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

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48 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.

49 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.

50 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.

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 2016[51] and in the public consultation on the operations of the European Supervisory Authorities (ESAs)[52].

(7) The basic tasks to be carried out through the ESCB include the definition and implementation of the monetary policy of the Union and the promotion of the smooth operation of payment systems. Safe and efficient financial market infrastructures, in particular clearing systems, are essential for the fulfilment of these basic tasks, and the pursuit of the ESCB's primary objective of maintaining price stability. The relevant members of the ESCB, as central banks of issue of the currencies of the financial instruments cleared by CCPs, should be involved in CCP supervision, due to the potential risks that the malfunctioning of a CCP could pose to the pursuit of those basic tasks and the primary objective, affecting the instruments and counterparties which are used to transmit monetary policy. As a result, the central banks of issue should be involved in the assessment of a CCP's risk management. In addition, while the mandates of central banks and supervisors may overlap, there is a potential for misalignment when supervisory actions impact on key responsibilities of central banks in areas such as price stability, monetary policy and the payment systems. In crisis situations, such misalignments can amplify the risks to financial stability if the assignment of responsibilities between authorities remains unclear.

(8) The Treaties have established an economic and monetary union whose currency is the euro, and the European Central Bank (ECB) as an Institution of the Union for this purpose. The Treaties also provide that the ESCB shall be governed by the decision-making bodies of the ECB, and the ECB alone may authorise the issue of the euro. The specific role of the ECB within the ESCB as the central bank of issue of the single currency of the Union should thus be acknowledged.

(9) 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. In order to confer new roles and responsibilities on ESMA, Regulation (EU) No 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (ESMA)[53] should be amended.

(10) A specific Executive Session ("CCP Executive Session") should be created within the Board of Supervisors of ESMA to handle tasks related to CCPs in general, and supervise Union and third-country CCPs in particular. In order to guarantee a smooth establishment of the CCP Executive Session, it is necessary to clarify its interactions with the Board of Supervisors of ESMA, its organisation and the tasks it should perform.

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

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

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

(11) In order to ensure a coherent supervisory approach and to reflect the mandates relevant authorities involved in the supervision of CCPs, the CCP Executive Session should be composed of permanent and CCP-specific members. Permanent members should include the Head of the CCP Executive Session and two independent Directors, who should act independently and objectively in the interest of the Union as a whole. The Commission and the ECB should also appoint permanent members. Members specific to each CCP should include a representative of the competent national authorities of the Member States where the CCP is established, designated in accordance with Regulation (EU) No 648/2012, and a representative of the relevant central bank(s) of issue. The Head of the CCP Executive Session should be able to invite members of the supervisory college, as well as representatives of authorities of third-country CCPs recognised by ESMA as observers to ensure that the views of the other relevant authorities are taken into account by the CCP Executive Session. While the permanent members should participate in all meetings of the CCP Executive Session, CCP specific members and observers should participate only where necessary and appropriate for CCPs under their supervision. The presence of independent permanent members and CCP-specific members should ensure that decisions made in the CCP Executive Session are consistent, appropriate and proportionate across the Union and that the relevant national competent authorities, central banks of issue and observers are involved in the decision-making on issues concerning a CCP established in a Member State.

(12) When deciding on issues concerning a CCP established within a Member State, the CCP Executive Session should convene and ensure that its permanent members and the relevant member(s) representing the competent national authorities designated by the Member State in accordance with Regulation (EU) No 648/2012 are involved in the decision-making process as well as observers appointed by the relevant central banks of issue. When deciding on a third-country CCP, only the permanent members, the relevant central bank(s) of issue and any relevant observers of the CCP Executive Session should participate in the decision-making process.

(13) In order to ensure an appropriate, effective and swift decision-making process, the Head, the two Directors of the CCP Executive Session, and the representative of the competent authority of the Member State where the CCP is established should have voting rights. The representatives of the ECB, of the Commission and of the relevant central bank(s), as well as observers, should have no voting rights. The CCP Executive Session should take its decisions by a simple majority of its members, and the Head should have a casting vote in case of a tie.

(14) The CCP Executive Session 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.

(15) In order to ensure effective supervision, the CCP Executive Session should have a dedicated staff and adequate resources to guarantee its autonomy, independence and adequate functioning in relation to its tasks. The budgetary impact needs to be considered in the statement made by ESMA in accordance with Regulation (EU) No 1095/2010.

(16) To provide for an appropriate level of expertise and accountability, the Head and the two Directors of the CCP Executive Session should be appointed on the basis of merit, skills, knowledge of clearing, post-trading and financial matters, as well as experience relevant to the supervision and regulation of CCPs. They should be chosen on the

basis of an open selection procedure. The Commission should submit a proposal for the appointment of candidates to the European Parliament for approval. Following the European Parliament's approval of that proposal, the Council should adopt an implementing decision.

(17) In order to ensure transparency and democratic control, as well as to safeguard the rights of the Union institutions, the Head and the two Directors of the CCP Executive Session should be accountable to the European Parliament and to the Council for any decisions taken on the basis of this Regulation.

(18) The Head and the two Directors of the CCP Executive Session should act independently and objectively in the interest of the Union. They should ensure that appropriate account is taken of the proper functioning of the internal market as well as financial stability in each Member State and in the Union.

(19) In order to promote consistency in the supervision of Union and third-country CCPs across the Union, the Head of the CCP Executive Session should chair and manage colleges, and the permanent members of the CCP Executive Session should attend them. The ECB should, where relevant and in accordance with Council Regulation (EU) No 1024/2013, also join the colleges to be able to exercise its mandate in accordance with Article 127 of the TFEU.

(20) In order to ensure an appropriate and effective decision-making process, the permanent members of the CCP Executive Session should have one vote each in the colleges, with the exception of the representative of the Commission, who should be non-voting. The current members of the colleges should continue to exercise their current voting rights.

(21) While national competent authorities continue to exercise their current supervisory responsibilities under Regulation (EU) No 648/2012, the prior consent of ESMA should be required for certain decisions in order to promote consistency in the supervision of CCPs throughout the Union. A specific mechanism is introduced for cases of disagreement between ESMA and the national competent authorities. Similarly, there is a need to better reflect the mandates of the central banks of issue concerning their monetary policy responsibilities, due to the potential risks that the malfunctioning of a CCP could pose to the implementation of the monetary policy of the Union and the promotion of the smooth operation of payment systems. Therefore, the prior consent of the relevant central banks of issue should be required on certain decisions envisaged by national competent authorities, in particular when it relates to a CCP's payment and settlement arrangements and related liquidity risk management procedures for the transactions denominated in that central bank of issue's currency.

(22) In order to enable ESMA to conduct its tasks with regards to CCPs effectively, both Union and third-country CCPs should pay supervisory fees for ESMA's supervisory and administrative tasks. These fees should cover for the applications for authorisation of Union CCPs, 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 authorised and applicant Union CCPs recognised third-country CCPs.

(23) 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 the possibility to share information on third-

country CCPs between relevant Union and Member State authorities needs to be improved to avoid important financial stability implications for Union entities. There is also a risk that changes to a 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.

(24) 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.

(25) 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 supervision 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 on a confidential basis.

(26) 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.

(27) 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 and supervision 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 to a significant extent in CCPs located outside the Union.

(28) 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 for the Member State.

(29) 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 on the basis of objective and transparent criteria set out in this Regulation. A Commission delegated act should further specify these criteria.

(30) 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. Where ESMA determines that a third-country CCP is not systemically important to the financial stability of the Union, 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 proportionate to the degree of risk presented by that CCP should be established. ESMA should only recognise such a CCP where that CCP complies with these requirements.

(31) 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 full and effective supervision of that CCP.

(32) In order to ensure the proper involvement of the central bank(s) of issue, the systemically important third-country CCP should also fulfil any additional requirements that the central bank(s) of issue consider necessary. 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 180 days from the CCP's application to ESMA.

(33) 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 and the relevant central bank(s) of issue conclude that a third-country CCP is of such systemic importance that additional requirements will not ensure the financial stability of the Union, ESMA should be able to recommend to the Commission that that CCP should not be recognised. The Commission should be able to adopt an implementing act declaring that the third-country CCP should be established in the Union and authorised as such to provide clearing services in the Union.

(34) 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.

(35) 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

(36) 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. In certain areas, ESMA's decisions should be subject to the prior consent of the relevant central bank(s) of issue.

(37) ESMA should be able to impose fines on third-country 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 systemically-important CCPs where it finds that they have committed, intentionally or negligently, an infringement of the additional requirements applicable to them in this Regulation.

(38) 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.

(39) 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.

(40) 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.

(41) 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.

(42) The decision to impose fines or periodic penalty payments should be based on an independent investigation.

(43) 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.

(44) 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.

(45) 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.

(46) 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.

(47) The validation of significant changes to models and parameters adopted to calculate a CCP's margin requirements, default fund contributions, collateral requirements, and other risk-control mechanisms should be aligned with the new requirement of a prior consent of ESMA with certain decisions of the national competent authority with regard to CCPs established in the Union. To simplify the model validation proceedings, one validation by the national competent authority that is subject to ESMA's prior consent should replace the two validations that national competent authority and ESMA were required to conduct independently. In addition, the interplay of that validation and the college decision should be clarified. The preliminary adoption of a significant change to that models or parameters should be possible where needed, especially where their swift change is necessary to ensure the soundness of the CCP's risk management.

(48) 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.

(49) 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.

(50) 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.

(51) 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.

(52) Regulation (EU) No 1095/2010 and Regulation (EU) No 648/2012 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) No 1095/2010

Regulation (EU) 1095/2010 is amended as follows:

1. In Article 4, the following point (4) is inserted:

"(4) "CCP" means a CCP as defined in point (1) of Article 2 of Regulation (EU) No 648/2012."

2. In Article 6, the following point (1a) is inserted:

"(1a) a Board of Supervisors in Executive Session for CCPs (CCP Executive Session), which shall exercise the tasks set out in Article 44b";

3. In Article 35 paragraph (6) is replaced by the following:

"6. Where complete or accurate information is not available or is not made available in a timely fashion under paragraph 1 or 5, the Authority may request information, by way of a duly justified and reasoned request, directly from:

(a) an authorised or recognised CCP in accordance with Articles 14 or 25 of Regulation (EU) No 648/2012;

(b) a central securities depository authorised in accordance with Regulation (EU) No 909/2014;

(c) a regulated market in accordance with point (14) of Article 4(1) of Directive 2004/39/EC;

(d) a multilateral trading facility in accordance with point (22) of Article 4(1) of Directive 2014/65/EU;

(e) an organised trading facility in accordance with point (23) of Article 4(1) of Directive 2014/65/EU.

The addressees of such a request shall provide the Authority promptly and without undue delay with clear, accurate and complete information.

The Authority shall inform the relevant competent authorities of requests in accordance with this paragraph and with paragraph 5.

At the request of the Authority, the competent authorities shall assist the Authority in collecting the information."

4. In Article 40(1), the following point (f) is added:

"(f) the permanent members of the CCP Executive Session, referred to in point (i) of Article 44a(1)(a), who shall be non-voting."

5. In Article 42, the first subparagraph is replaced by the following:

"When carrying out the tasks conferred upon it by this Regulation, the Chairperson, the voting permanent members and the voting members specific to each CCP of the CCP Executive Session referred to in point (i) of Article 44a(1)(a) and the voting members of the Board of Supervisors 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. Article 43 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. The Board of Supervisors shall give guidance to the work of the Authority. It shall be responsible for the tasks referred to in Chapter II, except for those tasks for which the CCP Executive Session is responsible pursuant to Article 44b(1)."

(b) paragraph 8 is replaced by the following:

"8. The Board of Supervisors shall exercise disciplinary authority over the Chairperson and may remove him or her from office in accordance with Article 48(5). The Board of Supervisors, in agreement with the CCP Executive Session, shall exercise disciplinary authority over the Executive Director and may remove him or her from office in accordance with Article 51(5)."

7. In Chapter III, the following section 1A is inserted:

"**Section 1A CCP Executive Session**

Article 44a

Composition

1. The CCP Executive Session shall be composed of:

(a) the following permanent members:

(i) the Head and two Directors, appointed in accordance with Article 48a, who shall be voting;

(ii) a representative of the ECB, who shall be non-voting:

(iii) a representative of the Commission, who shall be non-voting;

(b) the following non-permanent members specific to each CCP:

(i) a representative of the competent authority for each CCP established in the Union in relation to which the CCP Executive Session is convened, who shall be voting;

(ii) a representative of each of the relevant central banks of issue referred to in point (h) of Article 18(2) of Regulation (EU) No 648/2012 for each CCP established in the Union in relation to which the CCP Executive Session is convened, who shall be non-voting.

The Head may invite, where appropriate and necessary, as observers to the meetings of the CCP Executive Session:

(a) other members referred to in Article 18(2) of Regulation (EU) No 648/2012 of the college of the relevant CCP to the meetings of the CCP Executive Session;

(b) authorities of third-country CCPs recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012.

Meetings of the CCP Executive Session shall be convened by its Head at its own initiative or at the request of any of its members.

Where a task of the CCP Executive Session does not relate to a specific Union CCP, it shall be composed only of the permanent members referred in point (a) and, where relevant, the central banks of issue referred to in point (b)(ii).

Article 44b

Tasks and powers of the CCP Executive Session

1. The CCP Executive Session shall be responsible for:

"(-a) taking decisions and actions on CCP matters with respect to Articles 17, 19, 29, 29a and 30 of this Regulation;".

(a) providing the consent referred to in Article 21a(1) of Regulation (EU) No 648/2012;

(b) the recognition and supervision of third-country CCPs in accordance with Article 25 of Regulation (EU) No 648/2012, the monitoring of regulatory and supervisory developments in third countries under Chapter 2 of Title II of Regulation (EU) No 648/2012; and

(c) the tasks referred to in the first subparagraph of Article 5(1), the first subparagraph of Article 9(3), Article 9(4), Article 17(2), Article 17(3), Article 18(1), Article 20(2), Article 20(6), Article 21c, Article 23, Article 24, Article 29(3), Article 38(5), 48(3), 49(1) and 54(3) of Regulation (EU) No 648/2012.

2. The CCP Executive Session shall have a dedicated staff and adequate resources provided by ESMA to carry out its tasks.

3. The CCP Executive Session shall inform the Board of Supervisors of its decisions.

Article 44c

Decision-making

The CCP Executive Session shall take its decisions by a simple majority of its members. The Head shall have the casting vote."

8. The title of Section 3 of Chapter III is replaced by the following:

"Chairperson, Head and Directors"

9. a new Article 48a is inserted:

"Article 48a

Appointment and tasks of the Head of the CCP Executive Session and Directors

1. By way of derogation from Article 48(1) the Authority shall be represented by the Head of the CCP Executive Session for the tasks and powers referred to in Article 44b(1).

The Head of the CCP Executive Session shall be responsible for preparing the work of the CCP Executive Session and shall chair its meetings.

2. The Head of the CCP Executive Session and the Directors referred to in point (i) of Article 44a(1)(a) shall be full-time, independent professionals. They shall be appointed on the basis of merit, skills, knowledge of clearing, post-trading and financial matters, and of experience relevant to CCP supervision and regulation. They shall be chosen on the basis of an open selection procedure organised by the Commission, which shall respect the principles of gender balance, experience and qualification.

3. The term of office of the Head of the CCP Executive Session and the Directors referred to in point (i) of Article 44a(1)(a) shall be five years and may be extended once.

The Head of the CCP Executive Session and the Directors referred to in point (i) of Article 44a(1)(a) shall not hold any office at national, Union, or international level.

4. The Commission shall provide to the European Parliament a shortlist of candidates for the positions of Head and Directors referred to in point (i) of Article 44a(1)(a) and shall inform the Council of the shortlist.

The Commission shall submit a proposal for the appointment of the Head of the CCP Executive Session and Directors referred to in point (i) of Article 44a(1)(a) to the European Parliament for approval. Following the approval of that proposal, the Council shall adopt an implementing decision to appoint the Head of the CCP Executive Session and the Directors referred to in point (i) Article 44a(1)(a). The Council shall act by qualified majority.

5. Where the Head of the CCP Executive Session or the Directors referred to in point (i) of Article 44a(1)(a) no longer fulfil the conditions required for the performance of his or her duties as referred to in paragraph 2 or has been found guilty of serious misconduct, the Council may, on a proposal from the Commission which has been approved by the European Parliament, adopt an implementing decision to remove him or her from office. The Council shall act by qualified majority.

The European Parliament or the Council may inform the Commission that they consider the conditions for the removal of the Head of the CCP Executive Session or the Directors referred to in point (i) of Article 44a(1)(a) from office to be fulfilled, to which the Commission shall respond."

10. Article 49 is replaced by the following:

"Without prejudice to the role of the Board of Supervisors, in relation to the tasks of the Head of the CCP Executive Session and the Directors referred to in point (i) of Article 44a(1)(a) and Chairperson, shall neither seek or take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the Head of the CCP Executive Session and the Directors referred to in point (i) of Article 44a(1)(a) or the Chairperson in the performance of his or her tasks.

In accordance with the Staff Regulations referred to in Article 68, the Chairperson, the Head of the CCP Executive Session and the Directors referred to in point (i) of 44a(1)(a) shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits."

11. Article 50 is replaced by the following:

"1. The European Parliament or the Council may invite the Chairperson or his alternate, or the Head of the CCP Executive Session, to make a statement while fully respecting their independence. The Chairperson or the Head shall make a statement before the European Parliament and answer any questions put by its members, whenever so requested.

2. The Chairperson or the Head of the CCP Executive Session shall report in writing on the main activities of Board of Supervisors and of the CCP Executive Session, respectively, to the European Parliament where requested and at least 15 days before making the statement referred to in paragraph 1.

3. In addition to the information referred to in Articles 11 to 18 and Articles 20 and 33, the Chairperson shall report any relevant information requested by the European Parliament on an ad-hoc basis.

In addition to the information referred to in Article 33, the Head of the CCP Executive Session shall report any relevant information requested by the European Parliament on an ad-hoc basis."

12. Article 53 is amended as follows:

(a) Paragraph 2 is replaced by the following:

"2. The Executive Director shall be responsible for implementing the annual work programme of the Authority under the guidance of the Board of Supervisors and the CCP Executive Session and under the control of the Management Board."

(b) Paragraph 4 is replaced by the following:

"4. The Executive Director shall prepare a multi-annual work programme, as referred to in Article 47(2). For the tasks and powers referred to in Article 44b(1), the Executive Director shall obtain the consent of the CCP Executive Session prior to submitting it to the Management Board."

(c) Paragraph 7 is replaced by the following:

"7. Each year the Executive Director shall prepare a draft report with a section on the regulatory and supervisory activities of the Authority and a section on financial and administrative matters.

For the tasks and powers referred to in Article 44b(1), the Executive Director shall obtain the consent of the CCP Executive Session prior to submitting it to the Management Board".

13. In Article 63, the following paragraph 1a is inserted:

"1a. ESMA's expenditure and fees relating to the tasks and powers referred to in Article 44b (1) shall be separately identifiable within the statement of estimates referred to in paragraph 1. Prior to the adoption of that statement of estimates, the draft prepared by the Executive Director relating to such expenditure and fees shall be approved by the CCP Executive Session.

The annual accounts of ESMA drawn up and published in accordance with Article 64(6) shall include the income and expenses related to the tasks referred to in Article 44b(1)."

14. In Article 70, paragraph 1 is replaced by the following:

"1. Members of the Board of Supervisors, the CCP Executive Session and the Management Board, the Executive Director, and members of the staff of the Authority, including officials seconded by Member States on a temporary basis and all other persons carrying out tasks for the Authority on a contractual basis, shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased."

15. In Article 76, the following paragraph 2a is inserted:

"2a Until such time as the Head of the CCP Executive Session and the Directors of the CCP Executive Session referred to in Article 44a(1) take up their duties following their appointment in accordance with Article 48a, the functions of the CCP Executive Session shall be carried out by the Board of Supervisors".

Article 2

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 17, paragraph 3 is replaced by the following:

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

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, 49, 51 and 54.

The Head of the CCP Executive Session referred to in Article 48a of Regulation (EU) No 1095/2010 shall chair and manage the college."

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

"(a) the permanent members of the CCP Executive Session referred to in Article 44a of Regulation (EU) No 1095/2010;"

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

"(c) the competent authorities responsible for the supervision of the clearing members of the CCP which are established in the three Member States with the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period, including, where relevant, the ECB in accordance with Council Regulation (EU) No 1024/2013.[54]

4. In Article 19, 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 (a), (c) and (h) of Article 18(2), it shall have the following number of votes:

(i) a maximum of 2 votes in colleges up to and including 12 members;

(ii) a maximum of 3 votes for colleges with more than 12 members.

The representative of the Commission shall be non-voting member. The other permanent members of the CCP Executive Session shall have one vote each."

5. In Article 20, paragraph 6 is replaced by the following:

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

6. Article 21 is amended as follows:

(a) paragraph 1 is replaced by the following:

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

(b) paragraph 3 is replaced by the following:

"3. ESMA shall establish the frequency and depth of the review and evaluation referred to in paragraph 1 having regard to the size, systemic importance, nature,

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[54] 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."

scale and complexity of the activities of the CCPs concerned. The review and evaluation shall be updated at least on an annual basis.

The CCPs shall be subject to on-site inspections. ESMA staff shall be invited to participate in these on-site inspections.

The competent authority shall forward to ESMA any information received from the CCPs and shall request from the relevant CCP any information sought by ESMA which it cannot provide."

7. In Title III, Chapter 2, the following Articles 21a, 21b and 21c are inserted:

"Article 21a

Preparation of draft decisions

1. Competent authorities shall prepare and submit draft decisions to ESMA for consent prior to adoption of any of the following decisions:

(a) decisions adopted pursuant to Articles 7, 8, 14, 15, 16, 20, 21, 30, 31, 35, 49 and 54 of this Regulation and Articles 35 and 36 of Regulation (EU) No 600/2014;

(b) any decisions adopted in the carrying out of their duties resulting from the requirements set out in Article 16 and Titles IV and V.

2. Competent authorities shall prepare and submit draft decisions to the central banks of issue referred to in Article 18(2)(h) before adopting any decision pursuant to Articles 14, 15, 20, 44, 46, 50 and 54.

Competent authorities shall obtain, in accordance with Article 21(b) the consent of the central banks of issue referred to in the first subparagraph in respect of any aspect of those decisions relating to the carrying out of their monetary policy tasks.

3. ESMA shall transmit to competent authorities any relevant information which may result in the adoption of a decision referred to in paragraph 1 and may request specific supervisory action, including withdrawal of authorisation. Competent authorities shall keep ESMA informed of any subsequent action or inaction thereto.

4. For the purposes of paragraph 1, the consent of ESMA shall be deemed to be given unless it proposes amendments or objects to the draft decision within a maximum period of 15 calendar days after having been notified of that decision. Where ESMA proposes amendments or objects to a draft decision, it shall provide full and detailed reasons, in writing.

5. Where ESMA proposes amendments, the competent authority may only adopt the decision as amended by ESMA.

Where ESMA objects to a final draft decision, the competent authority shall not adopt that decision.

6. Where the competent authority disagrees with the proposed amendment or the objection of ESMA, it may submit within 5 days a reasoned request to the Board of Supervisors referred to in Article 6(1) of Regulation (EU) No 1095/2010 to assess that objection or amendment. The Board of Supervisors shall either endorse or reject ESMAs objections or amendments within 10 days of that request and paragraph 5 shall apply accordingly.

7. Without prejudice to the powers of the Commission under Article 258 TFEU, ESMA may adopt a decision addressed to a financial market participant requiring the

necessary action to comply with its obligations under Union law, including the cessation of any practice in the following cases:

(a) where a competent authority does not comply with paragraph 5 in case of ESMAs objection or amendments to a final draft decision;

(b) where a competent authority, following a request from ESMA in accordance with paragraph 3, fails to take the requested action within a reasonable time where that failure results in a financial market participant breaching the applicable requirements in Titles IV and V of this Regulation.

Decisions adopted pursuant to the first subparagraph shall prevail over any previous decision adopted by the competent authorities on the same matter.

Article 21b

Consent of the Central Bank of Issue

1. The consent referred to in Article 21a(2) shall be deemed to be given unless the central bank of issue proposes amendments or objects to the draft decision within a maximum period of 15 calendar days after its submission. Where the central bank of issue proposes amendments or objects to a draft decision, it shall provide full and detailed reasons, in writing.

Where ESMA has proposed amendments pursuant to Article 21a(4) to the draft decisions to be adopted pursuant to Articles 14, 15, 20 and 54, it shall also submit them also to the central bank of issue. In that case, the deadline referred to in the first subparagraph shall be extended by 5 days.

2. Where the central bank of issue proposes amendments, the competent authority may only adopt the decision as amended by that central bank of issue.

Where the central bank of issue objects to a draft decision, the competent authority shall not adopt that decision.

Article 21c

Fees

1. CCPs shall pay the following fees:

(a) fees associated with applications for authorisation referred to in Article 17;

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

(c) annual fees associated with ESMA's tasks in accordance with this Regulation.

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) CCPs established in the Union which are authorised or applying for authorisation;

(b) CCP established in a third country which are recognised in accordance with Article 25(2);

(c) CCP established in a third country which are recognised in accordance with Article 25(2b).”

8. 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."

9. Article 25 is amended as follows:

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

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

(b) the following paragraphs 2a, 2b and 2c are inserted:

"2a. ESMA shall determine whether a CPP is systemically important or likely to become systemically important for the financial stability of the Union or for 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 counterparties;

(b) the effect that the failure of or a disruption to the CCP would have on financial markets, financial institutions, or the broader financial system, or on the financial stability of the Union or for one or more of its Member States;

(c) the CCP's clearing membership structure;

(d) the CCP's relationship, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system.

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. ESMA shall take into account, in accordance with Article 25a(2), the extent to which an CCP's compliance with those requirements is satisfied by the CCP's compliance with the comparable requirements applicable in the third country;

(b) following the consultation referred to in point (f) of paragraph 3, the central banks of issue referred to therein have provided ESMA with written confirmation, within 180 days of the submission of an application, that the

CCP complies with any requirements imposed by those central banks of issue in the carrying out of their monetary policy tasks. Where the relevant central bank of issue has not provided a written response 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. ESMA, in agreement with the relevant central banks of issue and commensurate with the degree of systemic importance of the CCP in accordance with paragraph 2a, may conclude that a CCP is of such substantial systemic importance that compliance with the conditions set out in paragraph 2b does not sufficiently ensure the financial stability of the Union or of one or more of its Member States and should not therefore be recognised. In such a case, ESMA shall recommend that the Commission adopt an implementing act confirming that that CCP should not be recognised in accordance with paragraph 2b.

After submission of the recommendation referred to in the first subparagraph, the Commission may adopt an implementing act declaring that that CCP shall not be recognised pursuant to paragraph 2b and that it may only provide clearing services in the Union after it has been granted authorisation in accordance with Article 14."

(c) paragraph 5 is replaced by the following:

"5. ESMA shall, after consulting the authorities and entities referred to in paragraph 3, review the recognition of the 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, 3 and 4."

(d) paragraph 6 is replaced by the following:

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

(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."

(e) the following paragraphs 6a and 6b are inserted:

"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 for one or more of its Member States, it shall inform the Commission confidentially and without delay.

ESMA shall submit a confidential report to the Commission on the regulatory and supervisory developments in the third countries referred to in the first subparagraph on an annual basis."

(f) the first sentence of paragraph 7 is replaced by the following:

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

(g) in paragraph 7, the following point (e) is added:

"(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."

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

"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.

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.

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).

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

Where a central bank of issue referred to in Article 18(2)(h) 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 prepare and submit draft decisions to the central bank of issue of the relevant currency referred to in Article 18(2)(h) before adopting any decision pursuant to Articles 41, 44, 46, 50, and 54.

ESMA shall obtain, in accordance with this paragraph, the consent of the relevant central bank of issue in respect of any aspect of those decisions relating to the carrying out of their monetary policy tasks. The consent of the central bank of issue referred to in the second subparagraph shall be deemed to be given unless it proposes amendments or objects to the draft decision within 15 calendar days after having been notified 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 the central bank of issue objects to a draft decision, ESMA shall not adopt that decision. Where the central bank of issue proposes amendments, ESMA may only adopt the decision as amended by that central bank of issue.

3. 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.

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. 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.

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. Investigations in accordance with this Article shall be conducted provided that the relevant third-country authority does not object to them.

5. If any of the requests referred to in paragraph 1 require authorisation from a judicial authority according to the applicable national law, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

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. The relevant central bank of issue shall be invited to participate in such on-site inspections.

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. Inspections in accordance with this Article shall be conducted provided that the relevant third-country authority has confirmed that it does not object to those inspections.

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.

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

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 has been committed by the persons who have been subject to the investigations and, in such a case, shall take a supervisory measure in accordance with Article 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 shall withdraw a recognition decision adopted in accordance with Article 25 where the CCP concerned:

(a) does not make use of the recognition within 6 months, expressly renounces the authorisation or has ceased to engage in business for more than six month;

(b) has obtained the recognition through false statements or by any other irregular means;

(c) no longer meets the conditions for recognition pursuant to Article 25(2b);

(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 endeavor to minimise market disruption

2. Where ESMA considers that the criterion referred to in point (c) of the first paragraph is fulfilled in relation to a CCP, ESMA shall inform that CCP and the relevant third-country authorities prior to withdrawing a recognition decision, and request that appropriate action is taken within a set timeframe of up to a maximum of 3 months to remedy the situation.

Where ESMA determines that remedial action within the set timeframe or that the action taken is not appropriate, it shall withdraw the recognition decision.

3. ESMA shall, without undue delay, notify the relevant third-country competent authority of a decision to withdraw the recognition of a recognised CCP.

4. Any of the authorities referred to in Article 25(3) which consider that one of the conditions referred to in paragraph 1 has been met may request ESMA to examine whether the conditions for the withdrawal of 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."

11. 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 paragraphs (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, 1e and 1f 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.

1b. Within 30 working days of the receipt of the application, the competent authority, in consultation with ESMA, shall conduct a risk assessment of the CCP and submit a report to the college established in accordance with Article 18.

1c. Within 15 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).

1d. Within 60 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 referred to in paragraph 5. The CCP's competent authority, in agreement with ESMA, may allow for a provisional adoption of a significant change those models or parameters prior to its validation where duly justified.

12. 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 [*insert date of entry into force of the delegated act referred to in the second subparagraph of paragraph 3 of that Article*]

3b. ESMA shall review the recognition decisions adopted pursuant to Article 25(1) before [*entry into force of this Regulation*] within 12 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)."

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

Article 3

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 Brussels,

For the European Parliament	*For the Council*
The President	*The President*

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

1.2. Policy area(s) concerned in the ABM/ABB structure

1.3. Nature of the proposal/initiative

1.4. Objective(s)

1.5. Grounds for the proposal/initiative

1.6. Duration and financial impact

1.7. Management mode(s) planned

2. MANAGEMENT MEASURES

2.1. Monitoring and reporting rules

2.2. Management and control system

2.3. Measures to prevent fraud and irregularities

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

3.2. Estimated impact on expenditure

3.2.1. Summary of estimated impact on expenditure

3.2.2. Estimated impact on operational appropriations

3.2.3. Estimated impact on appropriations of an administrative nature

3.2.4. Compatibility with the current multiannual financial framework

3.2.5. Third-party contributions

3.3. Estimated impact on revenue

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

1.2. Policy area(s) concerned

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1.4. Objective(s)

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3.2.5. Third-party contributions

3.3. Estimated impact on revenue

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

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.

1.2. Policy area(s) concerned

Internal Market - Financial markets

1.3. Nature of the proposal/initiative

X The proposal/initiative relates to **a new action**

☐ The proposal/initiative relates to **a new action following a pilot project/preparatory action**[55]

☐ The proposal/initiative relates to **the extension of an existing action**

☐ The proposal/initiative relates to **an action redirected towards a new action**

1.4. Objective(s)

1.4.1. The Commission's multiannual strategic objective(s) targeted by the proposal/initiative

Contribute to a deeper and fairer internal market.

1.4.2. Specific objective(s)

Specific objective No

2.5 The financial regulatory framework is evaluated, appropriately implemented and enforced across the EU.

2.6 Financial institutions can absorb losses and liquidity shocks, financial market infrastructures are stable and function effectively, and structural and cyclical macro-prudential risks are proactively addressed.

[55] As referred to in Article 54(2)(a) or (b) of the Financial Regulation.

1.4.3. Expected result(s) and impact

Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.

Enhanced supervision of CCPs at EU level.

More involvement of central banks of issue in the supervision of CCPs.

Better ability of the EU to monitor, identify and mitigate third-country CCP risks.

1.4.4. Indicators of results and impact

Specify the indicators for monitoring implementation of the proposal/initiative.

Possible indicators:

- Number of CCPs that have entered into recovery or resolution;
- Number of times the dispute resolution mechanism has been used by national competent authorities;
- Number of on-site inspections of third-country CCPs;
- Number of recognised third-country CCPs;
- Number of infringements of equivalence and/or recognition conditions by third-country CCPs;
- Estimated costs to EU counterparties.

1.5. Grounds for the proposal/initiative

1.5.1. Requirement(s) to be met in the short or long term

Since the adoption of EMIR, the volume of CCP activity – in the EU and globally – has grown rapidly not only in scale and but also scope. This expansion in CCP activity is likely to continue in the coming years as further clearing obligations are introduced and the incentives to mitigate risks and costs lead to additional voluntary clearing. However, the number of CCPs has remained relatively limited. Accordingly, clearing markets are integrated across the EU and are highly concentrated in certain asset classes. They are also highly interconnected.

Under EMIR, EU CCPS are supervised by colleges of national supervisors, ESMA, relevant members of the ESCB and other relevant authorities. These arrangements raise several concerns: CCPs in individual Member States are increasingly relevant for the EU financial system as a whole; divergent supervisory practices can create risks of regulatory and supervisory arbitrage; and the role of central banks is not adequately reflected in CCP colleges. Third-country CCPs however clear a significant volume of instruments denominated in EU currencies. This creates issues relating to: shortcomings in EMIR's system of equivalence and recognition as regards ongoing supervision; potential misalignments between supervisory and central bank objectives; and the mechanism for ongoing monitoring of third country rules.

The proposal should address these challenges.

1.5.2. Added value of Union involvement (it may result from different factors, e.g. coordination gains, legal certainty, greater effectiveness or complementarities). For the purposes of this point 'added value of Union involvement' is the value resulting from Union intervention which is additional to the value that would have been otherwise created by Member States alone.

Reasons for action at European level (ex-ante):

EMIR sets out the supervisory framework applying both to CCPs established in the EU and to third-country CCPs that provide clearing services to clearing members or trading venues established in the EU. Under EMIR, the Member State of establishment of the CCP plays a major role in the supervisory arrangements. However, Member States and national supervisors unilaterally cannot solve the systemic risks posed by highly integrated and interconnected CCPs, which operate on a cross-border basis beyond the scope of national jurisdictions. In addition, Member States cannot mitigate on their own risks arising from diverging national supervisory practices. Member States and national authorities cannot address on their own the systemic risks that third-country CCPs can pose to the financial stability of the EU as a whole.

Expected generated Union added value (ex-post):

The proposal should improve the coherence and further strengthen the supervisory arrangements for CCPs established in the EU and enable EU authorities to better monitor and mitigate risk related to the EU's exposure to third country CCPs. This will help to lower even further the already low probability (but extremely high impact) risk of a CCP failure and reinforce the overall stability of the EU financial system as a whole. The enhanced supervisory framework will also improve legal and economic certainty.

1.5.3. Lessons learned from similar experiences in the past

The proposal learns from the past experience with EMIR, notably in relation to the operation of the EU supervisory regime for CCPs and the current equivalence framework for third country CCPs, to establish requirements at the appropriate levels where necessary. See Section 1.5.1 for further information.

1.5.4. Compatibility and possible synergy with other appropriate instruments

The objectives of the initiative are consistent with a number of other EU policies and ongoing initiatives that aim to: (i) address the systemic importance of CCPs; (ii) develop the CMU; (iii) enhance the efficiency and effectiveness of EU-level supervision, both within and outside the EU; and (iv) promote further the use of central clearing.

First, this initiative is consistent with the Commission's proposal[56] for a Regulation on CCP Recovery and Resolution adopted in November 2016. That proposal seeks to ensure that EU and national authorities are appropriately prepared to address a failing CCP, maintain financial stability and avoid that costs associated with the restructuring and the resolution of failing CCPs fall on taxpayers. The Commission's proposal aims to ensure that, in the unlikely scenario where CCPs face severe distress or failure, the critical functions of CCPs are preserved while maintaining

[56] 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.

financial stability and helping to avoid that costs associated with the restructuring and the resolution of failing CCPs fall on taxpayers. The crisis-management arrangements for recovery and resolution of CCPs included in that proposal are based on the existence of the highest quality arrangements for crisis prevention (i.e. for CCP regulation and supervision) under EMIR. By further enhancing the supervision of CCPs under EMIR, the likelihood, however small, of needing to resort to recovery and resolution measures should be further diminished.

Second, it is consistent with the Commission's ongoing efforts to further develop the Capital Markets Union ('CMU'). Further supervisory convergence of CCPs at EU level can support the development of deeper and better integrated capital markets, as more efficient and resilient CCPs are essential elements for the well-functioning of CMU. The urgency of further developing and integrating EU capital markets was stressed in the Communication on CMU of September 2016[57]. Conversely, the emergence of larger and more liquid financial markets implied by CMU will result in even more transactions being cleared via CCPs, and will increase the systemic relevance of CCPs. Given the potential for increased volumes as well as the current opportunities for regulatory and supervisory arbitrage, further enhancements of the supervisory framework are required in order to ensure a strong and stable CMU.

Third, it is consistent with the March 2017 consultation launched by the Commission on the operations of the ESAs[58], with a view to strengthening and improving the effectiveness and efficiency of the ESAs.

Fourth, it is consistent with DG FISMA's experience with the implementation and enforcement of third-country provisions in EU financial legislation, as set out in its Staff Working Document on equivalence[59]. The Staff Working Document provides a factual overview of the equivalence process with third countries in EU financial services legislation. It sets out DG FISMA's experience with the implementation and enforcement of third-country provisions in EU financial legislation. It also presents the key aspects of equivalence (e.g. exercise of empowerments, assessment, ex-post monitoring) and provides more clarity on how DG FISMA approaches these tasks in practice.

Fifth, it is consistent with the Commission's proposal[60] for an amendment to the Capital Requirements Regulation (CRR)[61] adopted in November 2016. The proposal seeks to exclude from the calculation of the leverage ratio thresholds the initial margins on centrally-cleared derivative transactions received by clearing members in

57 "Capital Markets Union - Accelerating Reform", 14.9.2016, COM(2016) 601 final, available at https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-601-EN-F1-1.PDF

58 "Public consultation on the operations of the European Supervisory Authorities", 21.03.2017, available at https://ec.europa.eu/info/finance-consultations-2017-esas-operations_en

59 "EU equivalence decisions in financial services policy: an assessment", 27.02.2017, SWD(2017) 102 final, available at https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf

60 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012.

61 Regulation (EU) no 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms.

cash from their clients and passed on to CCPs. It will, therefore, ease access to clearing – as the capital requirements to offer client or indirect clearing services will diminish – again reinforcing the importance of CCPs within the financial system.

1.6. Duration and financial impact

☐ Proposal/initiative of **limited duration**

– ☐ Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY

– ☐ Financial impact from YYYY to YYYY

X Proposal/initiative of **unlimited duration**

– Implementation with a start-up period from entry into force of the Regulation to 2 years after the entry into force of the Regulation,

– followed by full-scale operation.

1.7. Management mode(s) planned[62]

☐ **Direct management** by the Commission

– ☐ by its departments, including by its staff in the Union delegations;

– ☐ by the executive agencies

☐ **Shared management** with the Member States

X **Indirect management** by entrusting budget implementation tasks to:

– ☐ third countries or the bodies they have designated;

– ☐ international organisations and their agencies (to be specified);

– ☐the EIB and the European Investment Fund;

– ☑ bodies referred to in Articles 208 and 209 of the Financial Regulation;

– ☐ public law bodies;

– ☐ bodies governed by private law with a public service mission to the extent that they provide adequate financial guarantees;

– ☐ bodies governed by the private law of a Member State that are entrusted with the implementation of a public-private partnership and that provide adequate financial guarantees;

– ☐ persons entrusted with the implementation of specific actions in the CFSP pursuant to Title V of the TEU, and identified in the relevant basic act.

– *If more than one management mode is indicated, please provide details in the 'Comments' section.*

Comments

N/A

[62] Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: https://myintracomm.ec.europa.eu/budgweb/EN/man/budgmanag/Pages/budgmanag.aspx

2. MANAGEMENT MEASURES

2.1. Monitoring and reporting rules

Specify frequency and conditions.

In line with already existing arrangements ESMA prepares regular reports on its activity (including internal reporting to Senior Management, MB reporting, six month activity reporting to BoS and the production of the annual report), and undergoes audits by the Court of Auditors and the Internal Audit Service on its use of resources. Monitoring and reporting of the present proposed actions will comply with the same already existing requirements.

2.2. Management and control system

2.2.1. Risk(s) identified

In relation to the legal, economic, efficient and effective use of appropriations resulting from the proposal, it is expected that the proposal would not bring about new risks that would not be currently covered by an existing internal control framework.

2.2.2. Information concerning the internal control system set up

Management and control systems as provided for in the ESMA Regulation are already implemented. ESMA works closely together with the Internal Audit Service of the Commission to ensure that the appropriate standards are met in all internal controls areas. These arrangements will apply also with regard to the role of ESMA according to the present proposal. Annual internal audit reports are sent to the Commission, Parliament and Council.

2.2.3. Estimate of the costs and benefits of the controls and assessment of the expected level of risk of error

N/A

2.3. Measures to prevent fraud and irregularities

Specify existing or envisaged prevention and protection measures.

For the purposes of combating fraud, corruption and any other illegal activity, the provisions of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) shall apply to ESMA without any restrictions. ESMA shall accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) and shall immediately adopt appropriate provisions for all ESMA staff. The funding decisions and the agreements and the implementing instruments resulting from them shall explicitely stipulate that the Court of Auditors and OLAF may, if need be, carry out on the spot checks on the beneficiaries of monies disbursed by ESMA as well as on the staff responsible for allocating these monies.

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

- Existing budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [. . .][Heading……..…… ……]	Diff./Non-diff.[63]	from EFTA countries [64]	from candidate countries[65]	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
1a	12.02 06 ESMA	Diff.	YES	NO	NO	NO

63 Diff. = Differentiated appropriations / Non-diff. = Non-differentiated appropriations.

64 EFTA: European Free Trade Association.

65 Candidate countries and, where applicable, potential candidates from the Western Balkans.

3.2. Estimated impact on expenditure

This legislative initiative will have the following impacts on expenditures:

1. The hiring of 47 new temporary agents at ESMA (as from August 2018). See Annex for more information on its role and the ways its cost was calculated.

2. The cost of these new temporary agents will be fully funded by fees raised from the industry (no impact on EU budget). However, assuming that the adoption and entry into force of the proposal would take place mid-2018, the fact that the Commission would have to prepare a delegated act specifying the type of fees, the matters to which the fees are due, the amount of the fees and the manner in which they are to be paid, there will be no fees collection before at best mid-2019. As ESMA would however incur costs under the Regulation from the entry into force of the Regulation, there is a need to obtain additional budget from the EU in 2018 and 2019 in order to cover for at least the 12 first months of operations following the entry into force of the Regulation.

The fees to be collected will also cover the costs incurred as from 2018, allowing ESMA to return the advance made by the EU at the lastest in 2020.

This additional budget should come from the general budget, as DG FISMA's budget cannot cover for such an amount.

3.2.1. Summary of estimated impact on expenditure

EUR million (to three decimal places)

Heading of multiannual financial framework	Number	Heading 1a Competitiveness for growth and jobs

DG: FISMA			Year **2018**	Year **2019**	Year **2020**	Enter as many years as necessary to show the duration of the impact (see point 1.6)			**TOTAL**
• Operational appropriations									
12.02 06	Commitments	(1)	4 310 555	7 788 789					
	Payments	(2)	4 310 555	7 788 789					
Number of budget line	Commitments	(1a)							
	Payments	(2a)							

Appropriations of an administrative nature financed from the envelope of specific programmes[66]									
Number of budget line		(3)							
TOTAL appropriations for DG FISMA	Commitments	=1+1a +3	4 310 555	7 788 789					
	Payments	=2+2a +3	4 310 555	7 788 789					

• TOTAL operational appropriations	Commitments	(4)								
	Payments	(5)								
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes		(6)								
TOTAL appropriations under HEADING <….> of the multiannual financial framework	Commitments	=4+ 6								
	Payments	=5+ 6								

[66] Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former 'BA' lines), indirect research, direct research.

Heading of multiannual financial framework	5	'Administrative expenditure'

EUR million (to three decimal places)

		Year N	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
DG: <…….>									
• Human resources									
• Other administrative expenditure									
TOTAL DG <…….>	Appropriations								

TOTAL appropriations under HEADING 5 of the multiannual financial framework	(Total commitments = Total payments)								

EUR million (to three decimal places)

		Year N[67]	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
TOTAL appropriations under HEADINGS 1 to 5 of the multiannual financial framework	Commitments								
	Payments								

[67] Year N is the year in which implementation of the proposal/initiative starts.

3.2.2. Estimated impact on operational appropriations

– ☐ The proposal/initiative does not require the use of operational appropriations

– ☐ The proposal/initiative requires the use of operational appropriations, as explained below:

Commitment appropriations in EUR million (to three decimal places)

Indicate objectives and outputs ⇩			Year **N**		Year **N+1**		Year **N+2**		Year **N+3**		Enter as many years as necessary to show the duration of the impact (see point 1.6)						**TOTAL**	
	OUTPUTS																	
	Type[68]	Average cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	Total No	Total cost
SPECIFIC OBJECTIVE No 1[69]…																		
- Output																		
- Output																		
- Output																		
Subtotal for specific objective No 1																		
SPECIFIC OBJECTIVE No 2 ...																		
- Output																		
Subtotal for specific objective No 2																		
TOTAL COST																		

[68] Outputs are products and services to be supplied (e.g.: number of student exchanges financed, number of km of roads built, etc.).

[69] As described in point 1.4.2. 'Specific objective(s)…'

3.2.3. Estimated impact on appropriations of an administrative nature

3.2.3.1. Summary

– ☑ The proposal/initiative does not require the use of appropriations of an administrative nature

– ☐ The proposal/initiative requires the use of appropriations of an administrative nature, as explained below:

EUR million (to three decimal places)

	Year **N** [70]	Year **N+1**	Year **N+2**	Year **N+3**	Enter as many years as necessary to show the duration of the impact (see point 1.6)			**TOTAL**
HEADING 5 of the multiannual financial framework								
Human resources								
Other administrative expenditure								
Subtotal HEADING 5 of the multiannual financial framework								
Outside HEADING 5[71] of the multiannual financial framework								
Human resources								
Other expenditure of an administrative nature								
Subtotal outside HEADING 5 of the multiannual financial framework								
TOTAL								

The appropriations required for human resources and other expenditure of an administrative nature will be met by appropriations from the DG that are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

[70] Year N is the year in which implementation of the proposal/initiative starts.

[71] Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former 'BA' lines), indirect research, direct research.

3.2.3.2. Estimated requirements of human resources

– ☐ The proposal/initiative does not require the use of human resources.

– X The proposal/initiative requires the use of human resources, as explained below:

Estimate to be expressed in full time equivalent units

		Year **2018**	Year **2019**	Year **2020**	Year **2021**	Enter as many years as necessary to show the duration of the impact (see point 1.6)		
• Establishment plan posts (officials and temporary staff)								
XX 01 01 01 (Headquarters and Commission's Representation Offices)								
XX 01 01 02 (Delegations)								
XX 01 05 01 (Indirect research)								
10 01 05 01 (Direct research)								
• External staff (in Full Time Equivalent unit: FTE)[72]								
XX 01 02 01 (AC, END, INT from the 'global envelope')								
XX 01 02 02 (AC, AL, END, INT and JED in the delegations)								
XX 01 04 **yy** [73]	- at Headquarters							
	- in Delegations							
XX 01 05 02 (AC, END, INT - Indirect research)								
10 01 05 02 (AC, END, INT - Direct research)								
Other budget lines (specify)								
TOTAL								

XX is the policy area or budget title concerned.

The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Description of tasks to be carried out:

Officials and temporary staff	NA
External staff	NA

[72] AC= Contract Staff; AL = Local Staff; END= Seconded National Expert; INT = agency staff; JED= Junior Experts in Delegations.

[73] Sub-ceiling for external staff covered by operational appropriations (former 'BA' lines).

3.2.4. Compatibility with the current multiannual financial framework

– ☐ The proposal/initiative is compatible the current multiannual financial framework.

– X The proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.

Explain what reprogramming is required, specifying the budget lines concerned and the corresponding amounts. A reprogramming of ESMA budget line 12.02.06 is required. Although the full amounts envisaged (see Annex for details) will be covered by fees from EU and third country CCPs, an advance will be required from the EU budget to cover the costs incurred during at least the first 6 months of operation (i.e. 2018 budget) and at a maximum the first 12 months of operation. After the adoption of the proposal, the Commission will be required to adopt a delegated act specifying in detail the methodology for calculating and collecting the fees from EU and third country CCPs. This will then require non-objection from the European Parliament and Council and publication in the official journal before fees can start being collected. Nevertheless, these costs should be recuperated over time.

– ☐ The proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework.

Explain what is required, specifying the headings and budget lines concerned and the corresponding amounts. […]

3.2.5. Third-party contributions

– The proposal/initiative does not provide for co-financing by third parties.

– The proposal/initiative provides for the co-financing estimated below:

Appropriations in EUR million (to three decimal places)

	Year **2018**	Year **2019**	Year **2020**	Year **2021**	Enter as many years as necessary to show the duration of the impact (see point 1.6)			Total
Specify the co-financing body*:*								
TOTAL appropriations co-financed								

Estimated impact on revenue

– ☑ The proposal/initiative has no financial impact on revenue.

– ☐ The proposal/initiative has the following financial impact:

  – ☐ on own resources

  – ☐ on miscellaneous revenue

EUR million (to three decimal places)

Budget revenue line:	Appropriations available for the current financial year	Impact of the proposal/initiative[74]						
		Year **N**	Year **N+1**	Year **N+2**	Year **N+3**	Enter as many years as necessary to show the duration of the impact (see point 1.6)		
Article …….								

For miscellaneous 'assigned' revenue, specify the budget expenditure line(s) affected.

[…]

Specify the method for calculating the impact on revenue.

[…]

[74] As regards traditional own resources (customs duties, sugar levies), the amounts indicated must be net amounts, i.e. gross amounts after deduction of 25 % for collection costs.

Annex to the legislative financial statement for a 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.

The costs related to the tasks to be carried out by ESMA have been estimated for staff expenditure in conformity with the cost classification in the ESMA draft budget for 2018. These estimates may nevertheless need to be revisited if the financing of the ESAs were to be changed in a proposal of the Commission on the review the ESAs.

Additional tasks

The proposal of the Commission includes provisions giving new or expanded tasks for ESMA. First, ESMA will be required to take on a broader range of supervisory tasks in relation to third-country CCPs. For 'tier 1' CCPs, this would mean a more intensive follow-up on the recognition process, potentially including onsite inspections and direct meetings with the CCPs. For 'tier 2' CCPs this would imply a de facto supervision of the third-country CCPs. As such, ESMA would have to have the necessary resources to engage in such supervisory activity. Second, the staff for the newly established CCP Executive Session will be financed from ESMA's budget, notably the permanent members of the CCP Executive Session. Third, ESMA will have its own additional tasks supporting the work of a newly established CCP Executive Session which will create more convergence in supervisory practices across the EU. Finally, the proposal contains provisions which would require ESMA to develop technical advice for the preparation of several Commission delegated acts that should ensure that provisions of a highly technical nature are consistently implemented across the EU. It can not be excluded that, under the existing empowerments in EMIR, amendments to existing Regulatory Technical Standards or Implementing Technical Standards could be proposed in order to reflect changes in this proposal (e.g. existing RTS on colleges). In addition, ESMA may have to renegotiate cooperation arrangements with relevant authorities of third countries.

The CCP Executive Session will have 5 permanent members. The main tasks of the CCP Executive Session will be to review and to endorse (or not as the case may be) supervisory decisions of NCAs in relation to certain requirements under EMIR, notably authorisation withdrawal of authorisation, prudential requirements of CCPs and interoperability arrangements. This will require an expert analysis and understanding of the decisions being presented to the CCP Executive Session for reflection, an assessment of the risks and benefits of the decision as well as the necessary coordination and dialogue with the Central Bank of Issue and national competent authorities, in particular those in the existing EMIR college.

Regarding the timing, it has been assumed that the Regulation will enter into force mid-2018. The additional ESMA resources are therefore required from mid-2018. As regards the nature of the positions, the successful and timely delivery of the establishment of the new CCP Executive Session and the implementation of the new supervisory framework for EU and third country CCPs will require additional resources to be allocated to tasks on CCP supervision, consisting of but not limited to: day-to-day contact (physical meetings, conference calls, etc) with CCP management, compliance, legal, IT, risk management, financial, business and operations teams; assessment of risk models, CCP rulebook and procedures, board and executive staff appointments, outsourced services, extension of activities and services, IT solutions, capital adequacy, CCP's shareholders / shareholding structure, and interoperability arrangements; review of internal audits; comprehensive risk assessment; issuance of recommendations and crisis management. Staff will be required to

carry out the following tasks: risk analysis and modelling; legal analysis and support; bilateral and multilateral meetings with stakeholders, in particular CCPs and trading venues as well as with other regulators or supervisors, both in a national and an international setting, therefore requiring frequent travels. For third-country CCPs, staff will also be required to carry out new tasks, including the monitoring of the ongoing compliance of recognised third-country CCPs with EMIR requirements, through requests for information, questionnaires and on-site inspections. ESMA will also need to determine whether applicant and recognised third-country CCPs are systemically important to the financial stability of the EU and of the Member States. For third-country CCPs deemed systemically important (Tier 2 CCPs), ESMA will need to monitor their compliance with additional requirements. Finally, ESMA will need to develop tools to assess comparable compliance. This will involve a substantial exchange of information both with the third-country authorities and CCPs, and the processing of a substantial amount of data, collected via questionnaires and analysed by the ESMA staff. Overall, the work also requires bilateral and multilateral meetings with stakeholders, in particular CCPs and other regulators/supervisors, setting-up and management of the CCP Executive Session composed of supervisors from Member States; negotiating international memorandums of understandings/cooperation agreements; providing technical analysis and drafting documents for the CCP Executive Session. (i.e. onsite inspections, analysis of risk models, etc.).

The required work is closely related and will build on existing work by ESMA under EMIR in terms of the recognition of third country CCPs and the current role of ESMA in the supervision of EU CCPs through colleges. So far, there have been 28 third country CCPs recognised and 17 EU CCPs have been authorised under EMIR. A further 12 third-country CCPs have requested recognition but not yet been granted it due to the fact that the Commission has not yet adopted an equivalence decision for their home jurisdictions.

Human resources

Assuming all third-country CCPs requesting recognition are recognised eventually, that would mean around 40 third-country CCPs under ESMA's competence – either indirectly through monitoring and information exchange (i.e. non systemically-important *Tier 1 CCPs)* or through more direct supervision of *Tier 2* CCPs that present potentially more significant risks. Given the potential negative impact that CCPs present for both financial stability and indirectly the real economy, it is essential that adequate resources are dedicated to the tasks in question.

Thus, taking account of the number of third-country CCPs to be supervised either indirectly or directly, type and complexity of tasks to be fulfilled by ESMA for tier 1 and tier 2 CCPs respectively, the number of full time equivalents needed is estimated at 45 full time equivalents. Given the specialist and expert nature of the work, and the potential challenges in recruiting experienced staff quickly, it is assumed that at the beginning, more national experts will be required to conduct the necessary tasks. As the number of staff increases and gains experience, the number of national experts required should correspondingly decline.

A core number of staff will be required in order to set up and operationalise the CCP Executive Session. Once up and running, and combined with existing ESMA staff dealing with the daily business of EMIR colleges, etc. the number of new staff required should decline.

Finally, for ESMA a number of ASTs will be required to help administer the CCP Executive Session as well as engage in the recruitment of the necessary staff.

ESMA Staff	**2018**	**2019**	**2020**

ADs	**20**	**27**	**36**
3rd country CCPs	25	35	35
EU CCPs	10	5	5
ENDs	**10**	**12**	**13**
3rd country CCPs	15	10	10
EU CCPs	0	0	0
ASTs	**0**	**1**	**2**
TOTAL STAFF	**30**	**40**	**49**

In addition to the additional staff required by ESMA, three permanent members (Chair, plus 2 additional permanent members) of the EU Executive Session are required. They will also be paid from ESMA's budget. Those members should be experienced and have a remuneration appropriate to their level.

There will be also inevitable costs related to the recruitment of these additional staff (travel, hotel, medical examinations, installation and other allowances, removal costs, etc) estimated at €12,700.

Assumptions in calculating staff costs:

- The additional posts are assumed to be a temporary agents of functional group and grade AD7.
- Average salary costs for different categories of personnel are based on DG BUDG guidance;
- Salary correction coefficient for Paris is 1.138.

Other required resources

The envisaged substantial increase in ESMA's staff will have inevitable consequences for ESMA's infrastructure arrangements.

First, they will have to acquire additional office space. This may be done by either expanding their existing office space or obtaining a new building. The cost for the additional office space is estimated at EUR 1.057 million per year for the rent and EUR 600 000 for fitting and security costs.

Second, a key new task originates from the supervision of third-country CCPs recognised in the EU. It is likely that there will therefore be a need for a number of missions both to third countries and in the EU, as well as a number of meetings. Mission costs are estimated at EUR 12 000 per month for 20 staff members, or EUR 240 000 per annum.

Third, a number of miscellaneous costs will also be incurred, for example, new staff will require a degree of training, and additional resources may be required to develop new IT tools or expand existing IT projects.

Revenues

The proposal also envisages that the additional costs incurred by ESMA will be largely covered by fees raised from CCPs. The costs related to the recognition and ongoing supervision of third-country CCPs will reflect whether they are considered as a tier 1 CCP or a tier 2 CCP and be proportionate to the actual costs ESMA incurs.

	Calculation	2018	2019	2020	TOTAL
ESMA staff expenditure		20 TAs + 10 ENDs	28 TAs + 12 ENDs	36 TAs + 13 ENDs	
Salaries and allowances					
TAs (ADs and ASTs)	= (30x138 000)x1.138 in 2018	1,570,440	4,397,232	5,653,584	11,621,256
ENDs	= (15x78 000)x1.139 in 2018	443,820	1,065,168	1,153,932	2,662,920
Expenditure related to recruitment	= 30x12 700	38,100	127,000	114,300	622,300
Mission expenses	= 20 x 12 x 1 000	120,000	240,000	240,000	600,000
CCP Executive Session					
Salaries and allowances	=(21 990x12)x1.138 + 2x(21 323x12)x1.138	441,335	882,669	882,669	2,206,673
Mission expenses	=3x12x2 500	45,000	90,000	90,000	225,000
Expenditure related to recruitment	=3x12 700	38,100			38,100
Rental costs	=1554m²x680	528,360	1,056,720	1,056,720	2,641,800
Fitting costs	estimated 600K€	600,000			600,000
Other costs (training, It tools, etc…)	estimated 2500€ 1st year - 1000€ after pp	142,500	57,000	57,000	256,500

TOTAL		**4,310,555**	**7,915,789**	**9,248,205**	**21,474,549**

REVENUE		**2018**	**2019**	**2020**	**TOTAL**
CCPs Fees	=25 ADs + 15 ENDs in 2018 and 35 ADs + 10 ENDs after + Supervisory Executive Session + related costs	**4,310,555**	**7,915,789**	**9,248,205**	**21,474,549**

TOTAL		**4,310,555**	**7,915,789**	**9,248,205**	**21,474,549**