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NOTE

From:	Presidency
To	Delegations
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories - General approach

Delegations will find attached the general approach on the above-mentioned proposal, subject to confirmation by the Council on 21 June 2013.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on markets in financial instruments and amending Regulation (EU) No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,
Having regard to the proposal from the European Commission,
After transmission of the draft legislative act to the national Parliaments,
Having regard to the opinion of the European Economic and Social Committee[1],
Having regard to the opinion of the European Data Protection Supervisor,
Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The financial crisis has exposed weaknesses in the transparency of financial markets. Strengthening transparency is therefore one of the shared principles to strengthen the financial system as confirmed by the G20 declaration in London on 2 April 2009. In order to strengthen the transparency and improve the functioning of the internal market for financial instruments, a new framework establishing uniform requirements for the transparency of transactions in markets for financial instruments should be put in place. The framework should establish comprehensive rules for a broad range of financial instruments. It should complement requirements for the transparency of orders and transactions in respect of shares established in Directive 2004/39/EC of the European Parliament and the Council of 21 April 2004.

[1] OJ C , , p. .

(2) The High Level Group on Financial Supervision in the EU chaired by Jacques de Larosière invited the Union to develop a more harmonised set of financial regulation. In the context of the future European supervision architecture, the European Council of 18 and 19 June 2009 also stressed the need to establish a European single rule book applicable to all financial institutions in the Single Market.

(3) The new legislation should, as a consequence, consist of two different legal instruments, a Directive and this Regulation. Together, both legal instruments should form the legal framework governing the requirements applicable to investment firms, regulated markets and data reporting services providers. This Regulation should therefore be read together with the Directive. The need to establish a single set of rules for all institutions in respect of certain requirements and to avoid potential regulatory arbitrage as well as to provide more legal certainty and less regulatory complexity for market participants warrants the use of a legal basis allowing for the creation of a Regulation. In order to remove the remaining obstacles to trade and significant distortions of competition resulting from divergences between national laws and to prevent any further likely obstacles to trade and significant distortions of competition from arising, it is therefore necessary to adopt a Regulation establishing uniform rules applicable in all Member States. This directly applicable legal act aims at contributing in a determining manner to the smooth functioning of the internal market and should, consequently, be based on the provisions of Article 114 TFEU, as interpreted in accordance with the consistent case-law of the Court of Justice of the European Union.

(4) Directive 2004/39/EC of the European Parliament and the Council of 21 April 2004 established rules for making the trading in shares admitted to trading on a regulated market pre- and post-trade transparent and for reporting transactions in financial instruments admitted to trading on a regulated market to competent authorities; the Directive needs to be recast in order to appropriately reflect developments in financial markets and to address weaknesses and to close loopholes that were inter alia exposed in the financial market crisis.

(5) Provisions in respect of trade and regulatory transparency requirements needs to take the form of directly applicable law applied to all investment firms that should follow uniform rules in all Union markets, in order to provide for a uniform application of a single regulatory framework, to strengthen confidence in the transparency of markets across the Union, reduce regulatory complexity and firms' compliance costs, especially for financial institutions operating on a cross-border basis, and contribute to the elimination of distortions of competition. The adoption of a Regulation ensuring direct applicability is best suited to accomplish these regulatory goals and ensure uniform conditions by preventing diverging national requirements as a result of the transposition of a directive.

(6) The definitions of regulated market and MTF should be clarified and remain closely aligned with each other to reflect the fact that they represent effectively the same organised trading functionality. The definitions should exclude bilateral systems where an investment firm enters into every trade on own account, even as a riskless counterparty interposed between the buyer and seller whose orders result in two or more matched transactions that are arranged simultaneously. Regulated markets and MTFs should not be allowed to execute client orders against proprietary capital. The term ‘system’ encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules. Regulated markets and MTFs are not obliged to operate a ‘technical’ system for matching orders. A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, transparency obligations is a regulated market or an MTF within the meaning of this Directive and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. The term ‘buying and selling interests’ is to be understood in a broad sense and includes orders, quotes and indications of interest.

The requirement that the interests be brought together in the system by means of non-discretionary rules set by the system operator means that they are brought together under the system's rules or by means of the system's protocols or internal operating procedures (including procedures embodied in computer software). The term ‘non-discretionary rules’ means that these rules leave the market operator or the investment firm with no discretion as to how interests may interact. The definitions require that interests be brought together in such a way as to result in a contract, meaning that execution takes place under the system's rules or by means of the system's protocols or internal operating procedures.

(7) In order to make European markets more transparent and to level the playing field between various venues offering trading services it is necessary to introduce a new trading venue category for, the organised trading facility (OTF). This new category is broadly defined so that now and in the future it should be able to capture all types of organised execution and arranging of trading in financial instruments which do not correspond to the functionalities or regulatory specifications of existing venues. Consequently appropriate organisational requirements and transparency rules which support efficient price discovery need to be applied. The new category includes broker crossing systems, which can be described as internal electronic matching systems operated by an investment firm which execute client orders against other client orders. The new category also encompasses systems eligible for trading clearing-eligible and sufficiently liquid derivatives. It shall not include facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests, other entities aggregating or pooling potential buying or selling interests, electronic post-trade confirmation services, or portfolio compression, which reduces non-market risks in existing derivatives portfolios without changing the market risk of the portfolios. However, portfolio compression, shall only be carried out by authorised investment firms to ensure that appropriate standards are maintained.

(8) This new category, OTF, will complement the existing types of trading venues. While regulated markets and MTFs have non-discretionary rules for the execution of transactions, the operator of an OTF should carry out order execution on a discretionary basis subject, where applicable, to the pre-transparency requirements and best execution obligations. Consequently, conduct of business rules, best execution and client order handling obligations should apply to the transactions concluded on an OTF operated by an investment firm or a market operator. In addition, it should be noted that any market operator authorised to operate an OTF shall ensure compliance with the provisions in Chapter 1 of [new MiFID] regarding Conditions and Procedures for Authorisation for Investment Firms. The investment firm or the market operator operating an OTF can exercise discretion at two different levels: (1) when deciding to place an order on the OTF or to retract it again and (2) when suggesting prices and quantities which would facilitate execution of orders and deciding not to match a specific order with the orders available in the system at a given point in time, provided that this complies with specific instructions received from clients and with best execution obligations. For the system that crosses clients' orders the operator may decide if, when and how much of two or more orders it wants to match within the system. In accordance with Article 20(1),(1a),(1b) and(1c) of MiFID and without prejudice to Article 20(1aa) of MiFID, for a system that arranges transactions in non-equities, the firm may facilitate negotiation between clients as to bring together two or more potentially compatible trading interest in a transaction. At both discretionary levels the OTF operator must have regard to its obligations under Articles 18 and 27 of Directive [new MiFID]. The market operator or investment firm operating an OTF shall make clear to users of the venue how they will exercise discretion. Because an OTF constitutes a genuine trading platform, the platform operator should be neutral. Therefore, the investment firm or market operator operating the OTF cannot execute client orders against its proprietary capital. For the purpose of facilitating the execution of one or more client orders in bonds, structured finance products, emission allowances and derivatives that have not been declared subject to the clearing obligation in accordance with Article 5 of Regulation (EU) No 648/2012, an OTF operator will be allowed to use 'matched principal' trading provided the client is informed of this process. This should not be considered proprietary trading. Matched principal trading shall not be permitted for orders in shares, depositary receipts, ETFs, certificates and other similar financial instruments.

When matched principal trading is used all pre-trade and post-trade transparency requirements as well as best execution obligations must be complied with. The OTF operator shall not act as systematic internaliser in the OTF operated by it. Furthermore, the operator of an OTF should be subject to the same obligations as an MTF in relation to the sound management of potential conflicts of interest.

(9) All organised trading should be conducted on regulated venues and be fully transparent, both pre and post trade. Transparency requirements therefore need to apply to all types of trading venues, and to all financial instruments traded thereon.

(9a) In order to ensure more trading moves to regulated trading venues and systematic internalisers, a trading obligation for shares admitted to trading on a regulated market or traded on a trading venue has been introduced for investment firms in this Regulation. This requires investment firms to undertake all trades (i.e. trades dealt on own account and also trades dealt when executing client orders) on a regulated market, MTF, OTF, systematic internaliser unless there is a legitimate reason for them to be concluded outside one of these. Examples of such trades include those that are non-systematic, ad-hoc, irregular and infrequent, and also technical trades such as give-up trades which do not contribute to the price discovery process. This trading obligation is without prejudice to the best execution provisions set out in [new MiFID].

With reference to the option for trades to be done on a systematic internaliser, this is without prejudice to the systematic internaliser regime set out in this Regulation. The intention is that if the investment firm itself meets the relevant criteria specified in this Regulation to be deemed a systematic internaliser in that particular share, the trade may be dealt in that way; however, if it is not deemed a systematic internaliser in that particular share, the investment firm may still undertake the trade on another systematic internaliser once it is in conformity with its best execution obligations and the option is available to it.

(10) Trading in depositary receipts, exchange-traded funds, certificates, similar financial instruments and shares other than those admitted to trading on a regulated market, takes place in largely the same fashion and fulfils a nearly-identical economic purpose, as trading in shares admitted to trading on a regulated market. Transparency provisions applicable to shares admitted to trading on regulated markets should thus be extended to these instruments.

(11) While, in principle, acknowledging the need for a regime of waivers from pre-trade transparency to support the efficient functioning of markets, the actual waiver provisions for shares currently applicable on the basis of Directive 2004/39/EC and Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive[1], need to be scrutinised as to their continued appropriateness in terms of scope and conditions applicable.
In order to ensure a uniform application of the waivers from pre-trade transparency in shares and eventually other similar instruments and non-equity products for specific market models and types and sizes of orders, the European Securities and Markets Authority (ESMA) should assess the compatibility of individual requests for applying a waiver with this Regulation and future delegated acts.
ESMA's assessment should take the form of an opinion in accordance with Article 29 of Regulation (EU) No 1095/2010. In addition, the already existing waivers for shares should be reviewed by ESMA within an appropriate timeframe and an assessment be made, following the same procedure, whether they are still in compliance with the rules in this Regulation and future delegated acts.

(12) All trading venues, namely regulated markets, MTFs, and OTFs, should lay down transparent and non-discriminatory rules governing access to the facility, and the operator of an OTF shall lay down transparent and non-discriminating rules regarding which clients have access to the OTF.

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

(13) It is necessary to introduce an appropriate level of trade transparency in markets for bonds, structured finance products and derivatives in order to help the valuation of products as well as the efficiency of price formation. Structured finance products should notably include asset backed securities as defined in Article 2(5) of Regulation (EC) No 809/2004, comprising among others collateralised debt obligations.

(14) In order to ensure uniform applicable conditions between trading venues, the same pre- and post-trade transparency requirements should apply to the different types of venues. The transparency requirements should be calibrated for different types of instruments, including equity, bonds, and derivatives, and for different types of trading, including order-book and quote-driven systems as well as hybrid and voice broking systems, and take account of issuance and transaction size.

(14a) (new) In order to avoid any negative impact on the price formation process, it is necessary to introduce an appropriate volume cap mechanism for orders placed in systems which are based on a trading methodology by which the price is determined in accordance with a reference price and for certain negotiated transactions. This mechanism shall have a double cap, whereby a volume cap is applied to each trading venue that uses these waivers so only a certain percentage of trading can be done on each trading venue, and in addition there is also an overall volume cap which if exceeded would result in the suspension of the use of these waivers across the Union.

In relation to the negotiated transactions, it shall only apply to those transactions that are made within the current volume weighted spread reflected on the order book or the quotes of the market makers of the trading venue operating that system. It shall exclude negotiated transactions that are dealt in illiquid stocks, and those transactions that are subject to conditions other than the current market price as they do not contribute to the price formation process.

(15) In order to ensure that trading carried out OTC does not jeopardise efficient price discovery or a transparent level-playing field between means of trading, appropriate pre-trade transparency requirements should apply to investment firms dealing on own account in financial instruments OTC insofar as it is carried out in their capacity as systematic internalisers in relation to shares, depositary receipts, ETFs, certificates or other similar financial instruments, bonds, structured finance products, emission allowances and derivatives which are traded on a trading venue and for which there is a liquid market.

(16) An investment firm executing client orders against its own proprietary capital should be deemed a systematic internaliser, unless the transactions are carried out outside a trading venue on an occasional, ad hoc and irregular basis. Thus, systematic internalisers should be defined as investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account by executing client orders outside a trading venue. The requirements for systematic internalisers in this Regulation should apply to an investment firm only in relation to each single financial instrument, (e.g. on ISIN-code level) in which it is a systematic internaliser. In order to ensure an objective and effective application of the definition of systematic internaliser to investment firms, there should be a pre-determined threshold for systematic internalisation containing an exact specification of what is meant by frequent, systematic and substantial basis.

(16a) [new] While an OTF is any system or facility in which multiple third-party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third party buying and selling interests. For instance, a so-called single-dealer platform, where trading always takes place against a single investment firm should be considered a systematic internaliser, were it to comply with the requirements included in this Directive. However, a so-called multi-dealer platform, with multiple dealers interacting for the same financial instrument, should not be considered a systematic internaliser.

(17) Systematic internalisers may decide on the basis of their commercial policy and in an objective non-discriminatory way the clients to whom they give access to their quotes, distinguishing between categories of clients. Systematic internalisers should not be obliged to publish firm quotes, execute clients' orders and give access to their quotes in relation to equity transactions above standard market size and non-equity transactions above the size specific to the instrument. Systematic internalisers must be checked by their competent authorities whether they comply with the systematic internalisers' obligations.

(18) It is not the intention of this Regulation to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, the characteristics of which include that they are non-systematic, ad-hoc, irregular and infrequent, are carried out between eligible or professional counterparties, and are part of a business relationship which is itself characterised by dealings above standard market size, and where the deals are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser.

(19) Market data should be easily and readily available to users in a format as disaggregated as possible to allow investors, and data service providers serving their needs, to customise data solutions to the furthest possible degree. Therefore, pre- and post-trade transparency data should be made available to the public in an "unbundled" fashion in order to reduce costs for market participants when purchasing data.

(20) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[1] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[2] should be fully applicable to the exchange, transmission and processing of personal data for the purposes of this Regulation, particularly Title IV, by Member States and ESMA.

(21) Considering the agreement reached by the parties to the G20 Pittsburgh summit on 25 September 2009 to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms where appropriate, a formal regulatory procedure should be defined for mandating trading between financial counterparties and large non-financial counterparties in all derivatives which have been considered to be clearing-eligible and which are sufficiently liquid to take place on a range of trading venues subject to comparable regulation and enabling participants to trade with multiple counterparties.

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

The assessment of sufficient liquidity should take account of market characteristics at national level including elements such as the number and type of market participants in a given market, and of transaction characteristics, such as the size and frequency of transactions in that market.

A liquid market in a product class will be characterised by a high number of active market participants, including a suitable mix of liquidity providers and liquidity takers, relative to the number of traded products, which execute trades frequently in those products in sizes below a size that is large in scale. Such market activity should be indicated by a high number of resting bids and offers in the relevant derivative leading to a narrow spread for a transaction of normal market size. The assessment of sufficient liquidity should recognize that the liquidity of a derivative can vary significantly according to market conditions and its life cycle.

(22) Considering the agreement reached by the parties to the G20 in Pittsburgh on 25 September 2009 to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms where appropriate on the one hand, and the relatively lower liquidity of various OTC derivatives on the other, it is appropriate to provide for a suitable range of eligible venues on which trading pursuant to this commitment can take place. All eligible venues should be subject to closely aligned regulatory requirements in terms of organisational and operational aspects, arrangements to mitigate conflicts of interest, surveillance of all trading activity, pre-and post-trade transparency calibrated by financial instrument, and for multiple third-party trading interests to be able to interact with one another. The possibility for operators of venues to arrange transactions pursuant to this commitment between multiple third parties in a discretionary fashion should however be foreseen in order to improve the conditions for execution and liquidity.

(22a) (new) The obligation to conclude transactions in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation on a regulated market, MTF, OTF or third country trading venue shall not apply to the components of non-price forming post-trade risk reduction services which reduce non-market risks in existing OTC derivatives portfolios in accordance with Regulation (EU) No 648/2012 without changing the market risk of the portfolios.

(23) The trading obligation established for these derivatives should allow for efficient competition between eligible trading venues. Therefore those trading venues should not be able to claim exclusive rights in relation to any derivatives subject to this trading obligation preventing other trading venues from offering trading in these instruments. For effective competition between trading venues for derivatives, it is essential that trading venues have non-discriminatory and transparent access to central counterparties (CCPs).
Non-discriminatory access to a CCP should mean that a trading venue has the right to non-discriminatory treatment in terms of how contracts traded on its platform are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP, and non-discriminatory clearing fees.

(23a) In certain areas commercial and intellectual property rights may exist. In order to ensure effective competition in clearing and trading markets, deepen the Single Market and ensure that benchmarks are better regulated, licences should be available on proportionate, fair, reasonable and non-discriminatory terms.

(24) Competent authorities' powers should be complemented with an explicit mechanism for prohibiting or restricting the marketing, distribution and sale of any financial instrument giving rise to serious concerns regarding investor protection, orderly functioning and integrity of financial markets, or commodities markets, or the stability of the whole or part of the financial system, together with appropriate coordination and contingency powers for ESMA. The exercise of such powers should be subject to the need to fulfil a number of specific conditions. It is relevant to include the orderly functioning and integrity of commodity markets as a criterion for intervention by competent authorities in order to enable action to be taken to counteract possible negative externalities on commodities markets from activities on financial markets. This is true, in particular, for agricultural commodity markets which are to ensure a secure supply of food for the population. In these cases, the measures should also be co-ordinated with the authorities competent for the commodity markets concerned.

(25) Competent authorities should notify ESMA of the details of any of their requests to reduce a position in relation to a derivative contract, of any one-off limits, as well as of any ex-ante position limits in order to improve coordination and convergence in how these powers are applied. The essential details of any ex-ante position limits applied by a competent authority should be published on ESMA's website.

(26) ESMA should be able to request information from any person regarding their position in relation to a derivative contract, to request that position to be reduced, as well as to limit the ability of persons to undertake individual transactions in relation to commodity derivatives. ESMA should then notify relevant competent authorities of measures it proposes to undertake and should also publish these measures.

(27) The details of transactions in financial instruments should be reported to competent authorities to enable them to detect and investigate potential cases of market abuse, to monitor the fair and orderly functioning of markets, as well as the activities of investment firms. The scope of this oversight includes all instruments which are traded on a trading venue and financial instruments where the underlying is a financial instrument traded on a trading venue or where the underlying is an index or basket composed of financial instruments traded on a trading venue. The obligation should apply whether or not such transactions in any of these instruments were carried out on a trading venue. In order to avoid an unnecessary administrative burden on investment firms, financial instruments that are not susceptible to market abuse should be excluded from the reporting obligation.

(27a) The operator of a trading venue should provide its competent authority with relevant instrument reference data. These notifications are to be transmitted by the competent authorities without delay to ESMA, which shall publish them immediately on its website to enable ESMA and competent authorities to use, analyse and exchange transaction reports.

(28) In order to serve their purpose as a tool for market monitoring, transaction reports should identify the person who has made the investment decision, as well as those responsible for its execution. In addition to the transparency regime provided for in Regulation 236/2012, the marking of short sales provides useful supplementary information to enable competent authorities to monitor levels of short selling. Competent authorities also need to have full access to records at all stages in the order execution process, from the initial decision to trade, through to its execution. Therefore, investment firms are required to keep records of all their orders and all their transactions in financial instruments, and operators of platforms are required to keep records of all orders submitted to their systems. ESMA should coordinate the exchange of information among competent authorities to ensure that they have access to all records of transactions and orders, including those entered on platforms that operate outside their territory, in financial instruments under their supervision.

(29) Double reporting of the same information should be avoided. Reports submitted to trade repositories registered or recognised in accordance with Regulation (EU) No 648/2012 for the relevant instruments which contain all the required information for transaction reporting purposes should not need to be reported to competent authorities, but should be transmitted to them by the trade repositories. Regulation (EU) No 648/2012 should be amended to this effect.

(30) Any exchange or transmission of information by competent authorities should be in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[1]. Any exchange or transmission of information by ESMA should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[2], which should be fully applicable to the processing of personal data for the purposes of this Regulation.

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

(31) Regulation (EU) No 648/2012 sets out the criteria according to which classes of OTC derivatives should be subject to the clearing obligation. It also prevents competitive distortions by requiring non-discriminatory access to central counterparties (CCPs) offering clearing of OTC derivatives to trading venues and non-discriminatory access to the trade feeds of trading venues to CCPs offering clearing of OTC derivatives. As OTC derivatives are defined as derivatives contracts whose execution does not take place on a regulated market, there is a need to introduce similar requirements for regulated markets under this Regulation. Provided that ESMA has declared them subject to it, derivatives traded on regulated markets should also be subject to a clearing obligation.

(32) In addition to requirements in Directive 2004/39/EC that prevent Member States from unduly restricting access to post-trade infrastructure such as CCP and settlement arrangements, it is necessary that this Regulation removes various other commercial barriers that can be used to prevent competition in the clearing of financial instruments. To avoid any discriminatory practices, CCPs should accept to clear transactions executed in different trading venues, to the extent that those venues comply with the operational and technical requirements established by the CCP, including the risk management requirements. Access should only be denied by a CCP if certain access criteria specified in regulatory technical standards are not met. In assessing the risks associated with an access request, the possibility of increasing exposure to contagion effect should be taken into account.

With regard to newly established CCPs that have been authorised or recognised for a period of less than three years at the point of entry into force of this Regulation, with respect to transferable securities and money market instruments, there should be the possibility for competent authorities to approve a transitional period of up to three years before they are exposed to full non-discriminatory access in relation to transferable securities and money market instruments. . However, if a CCP chooses to avail of the transitional arrangement it may not benefit from the access rights to a trading venue under this Regulation for the duration of the transitional arrangement. Furthermore, no trading venue with a close link to that CCP may benefit from the access rights to a CCP under this Regulation for the duration of the transitional arrangement.

(32a) (new) Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories sets out the conditions under which non-discriminatory access between Central Counterparties (CCPs) and trading venues should be granted for OTC derivatives. Regulation (EU) No 648/2012 defines OTC derivatives as derivatives whose execution does not take place on a regulated market or on a third-country market considered as equivalent to a regulated market in accordance with Article 19(6) of Directive 2004/39/EC. In order to avoid any gaps or overlaps and ensure consistency between Regulation (EU) No 648/2012 and this Regulation, the requirements set out in this Regulation on non-discriminatory access between CCPs and trading venues apply to derivatives traded on regulated markets or on a third-country market considered as equivalent to a regulated market in accordance with [new MiFID] and all non-derivative financial instruments.

(33) Trading venues should also be required to provide access including data feeds on a transparent and non-discriminatory basis to CCPs that wish to clear transactions executed on a trading venue. However, this should not necessitate the use of interoperability arrangements for clearing transactions in derivatives or create liquidity fragmentation in a way that would threaten the smooth and orderly functioning of markets. Access should only be denied by a trading venue if certain access criteria specified in regulatory technical standards are not met. With regard to exchange traded derivatives, it would be disproportionate to require smaller trading venues, particularly those closely linked to CCPs, to comply with non-discriminatory access requirements immediately if they have not yet acquired the technological capability to engage on a level playing field with the majority of the post-trade infrastructure market. Therefore trading venues below the relevant threshold should have the option of exempting themselves, and therefore their associated CCPs, from non-discriminatory access requirements in respect of exchange traded derivatives for a three year period with the possibility of subsequent renewals. However, if a trading venue chooses to exempt itself, it may not benefit from the access rights to a CCP under this Regulation for the duration of the exemption. Furthermore, no CCP with a close link to that trading venue may benefit from the access rights to a trading venue under this Regulation for the duration of the exemption.

Regulation EU 648/2012 identifies that where commercial and intellectual property rights relate to financial services related to derivatives contracts, licenses should be available on proportionate, fair, reasonable and non-discriminatory terms. Therefore, access to licenses of, and information relating to, benchmarks that are used to determine the value of financial instruments should be provided to CCPs and other trading venues on a proportionate, fair, reasonable and non-discriminatory basis and any license should be on reasonable commercial terms. For benchmarks that are existing at the entry into force of the Regulation, there shall be a three year transitional period where a request for a licence may be rejected. Where any new benchmark is developed following the entry into force of this Regulation and there are objective reasons for delaying access in terms of observing the market for this new benchmark and assessing reasonable commercial terms, a request for a licence may be rejected for up to three years after a financial instrument referencing that benchmark commenced trading or was admitted to trading. Access to licenses is critical to facilitate access between trading venues and CCPs under Article 28 and 29 as otherwise licensing arrangements could still prevent access between trading venues and CCPs that they have requested access to. The removal of barriers and discriminatory practices is intended to increase competition for clearing and trading of financial instruments in order to lower investment and borrowing costs, eliminate inefficiencies and foster innovation in Union markets. The Commission should continue to closely monitor the evolution of post-trade infrastructure and should, where necessary, intervene in order to prevent competitive distortions from occurring in the internal market.

(33a) (new) Regulation (EU) No 648/2012 sets out the importance of interoperability arrangements for the greater integration of the posting-trading market within the Union and regulates interoperability arrangements for transferable securities and money market instruments that meet the requirements of Title V Regulation (EU) No 648/2012. This Regulation shall be without prejudice to this and continue to allow interoperability arrangements for transferable securities and money market instruments which meet the requirements of Title V Regulation (EU) No 648/2012.

(33b) (new) Regulation (EU) No 648/2012 requires ESMA to submit a report to the Commission by 30 September 2014 on the extension of interoperability arrangements under Title V of Regulation (EU) No 648/2012 to transactions in classes of financial instruments other than transferable securities and money market instruments. This Regulation shall not prejudice the outcome of this report. Therefore, the interoperability provisions in –this Regulation and – in Regulation (EU) No 648/2012 should be reviewed by the Commission following ESMA's report.

(33c) (new) Taking into account the reasons for the previous failure of market-led initiatives such as the European Code of Conduct for Clearing and Settlement of 7 November 2006 and the importance of removing various commercial barriers that prevent the trading and clearing of financial instruments, it is important that the Commission produces a report before 2 years following the application of MiFIR reviewing the handling and implementation of access arrangements between trading venues and central counterparties for Articles 28 and 29.

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(35) Deleted

(36) Deleted

(37) A range of fraudulent practices have occurred in spot secondary markets in emission allowances (EUA) which could undermine trust in the emissions trading schemes, set up by Directive 2003/87/EC, and measures are being taken to strengthen the system of EUA registries and conditions for opening an account to trade EUAs. In order to reinforce the integrity and safeguard the efficient functioning of those markets, including comprehensive supervision of trading activity, it is appropriate to complement measures taken under Directive 2003/87/EC by bringing emission allowances fully into the scope of this Directive and of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), by classifying them as financial instruments.

(38) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty. In particular, the delegated acts should be adopted in respect of specific details concerning definitions;–;–;–;–, –, specific cost-related provisions related to the availability of market data; the criteria for granting or refusing access between trading venues and CCPs; and the further determination of conditions under which threats to investor protection, the orderly functioning and integrity of financial markets, or the stability of the whole or part of the financial system of the Union may warrant ESMA action.

(39) The implementing powers relating to the adoption of the equivalence decision concerning third country legal and supervisory frameworks for third country trading venues, for the sole purpose of eligibility as trading venues for derivatives subject to the trading obligation, should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers[1].

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

(40) Although national competent authorities are better placed to monitor market developments, the overall impact of the problems related to trade transparency, transaction reporting, derivatives trading, and bans of products and practices can only be fully perceived in a Union-wide context. For this reason, the objectives of this Regulation can be better achieved at the 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.

(40a) No action taken by any competent authority or ESMA in the performance of their duties should directly or indirectly discriminate against any member state or group of member states as a venue for the provision of investment services and activities in any currency.

(41) Technical standards in financial services should ensure adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA, with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.

(42) The Commission should adopt the draft regulatory technical standards developed by ESMA according to Articles 3 to 10 regarding the precise characteristics of trade transparency requirements, Article 4, 4a and 8 regarding the detailed conditions for waivers from pre-trade transparency, Articles 6 and 10 regarding deferred post-trade publication arrangements–, Article 13 regarding the criteria for the application of the pre-trade transparency obligations for systematic internalisers, Article 20c regarding transactions that do not contribute to the price discovery process, Article 22 regarding the order data to be retained, Article 23 regarding the content and specifications of transaction reports, Article [23 a] regarding the content and specification of instrument reference data, Article 26 regarding the liquidity criteria for derivatives to be considered subject to an obligation to trade on organised trading venues, , Article 28 regarding non-discriminatory access to a CCP, Article 29 regarding non-discriminatory access to a trading venue, Article 30 regarding non-discriminatory access to and obligation to licence benchmarks, and Article 36 concerning the information that the applicant third country firm shall provide to ESMA in its application for registration by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

(43) The Commission should also be empowered to adopt implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010 in relation to equivalence as referred to in Article 26a. ESMA should be entrusted with drafting implementing technical standards for submission to the Commission with regard to Article 26 specifying whether a class of derivatives declared subject to the clearing obligation under Regulation (EU) No 648/2012 or a relevant subset thereof should only be traded on organised trading venues.

(44) The application of the requirements in this Regulation should be deferred in order to align applicability with the application of the transposed rules of the recast Directive and to establish all essential implementing measures. The entire regulatory package should then be applied from the same point in time. Only the application of the empowerments for implementing measures should not be deferred so that the necessary steps to draft and adopt these implementing measures can start as early as possible.

(45) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the right to the protection of personal data (Article 8), the freedom to conduct a business (Article 16), the right to consumer protection (Article 38), the right to an effective remedy and to a fair trial (Article 47), and the right not to be tried or punished twice for the same offence (Article 50), and has to be applied in accordance with those rights and principles.

HAVE ADOPTED THIS REGULATION:

TITLE I
SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1
Subject matter and scope

1. This Regulation establishes uniform requirements in relation to the following:

(a) disclosure of trade data to the public;
(b) reporting of transactions to the competent authorities;
(c) trading of derivatives on organised venues;
(d) non-discriminatory access to clearing and non-discriminatory access to trading in benchmarks;
(e) product intervention powers of competent authorities and ESMA and powers of ESMA on position management controls and position limits;

2. This Regulation applies to investment firms authorised under Directive [new MiFID] and credit institutions authorised under Directive 2006/48/EC when providing investment services and/or performing investment activities and to regulated markets.

3. Title V of this Regulation also applies to all financial counterparties as defined in Article 2(8) and to all non-financial counterparties falling under Article 2 (9) of Regulation (EU) No 648/2012.

4. Title VI of this Regulation also applies to CCPs and persons with proprietary rights to benchmarks.

Article 2

Definitions

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

(1) ‘investment firm’ means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis;

Member States may include in the definition of investment firms undertakings which are not legal persons, provided that:

(a) their legal status ensures a level of protection for third parties' interests equivalent to that afforded by legal persons, and
(b) they are subject to equivalent prudential supervision appropriate to their legal form.

However, where a natural person provides services involving the holding of third parties' funds or transferable securities, that person may be considered as an investment firm for the purposes of this Regulation and Directive [new MiFID] only if, without prejudice to the other requirements imposed in Directive [new MiFID], in this Regulation and in Directive [new CRD], he complies with the following conditions:

(a) the ownership rights of third parties in instruments and funds must be safeguarded, especially in the event of the insolvency of the firm or of its proprietors, seizure, set-off or any other action by creditors of the firm or of its proprietors;

(b) the firm must be subject to rules designed to monitor the firm's solvency and that of its proprietors;

(c) the firm's annual accounts must be audited by one or more persons empowered, under national law, to audit accounts;

(d) where the firm has only one proprietor, he must make provision for the protection of investors in the event of the firm's cessation of business following his death, his incapacity or any other such event;

(2) Deleted.]

(3) 'systematic internaliser' means an investment firm which, on an organised, frequent, systematic and substantial basis, deals on own account by executing client orders outside a regulated market or an MTF or an OTF.

The frequent and systematic basis shall be measured by the number of OTC trades in the financial instrument carried out by the investment firm on own account by executing client orders. The substantial basis shall be measured either by the size of the OTC trading carried out by the investment firm in relation to the total trading of the investment firm in a specific financial instrument or by the size of the OTC trading carried out by the investment firm in relation to the total trading in the Union in a specific financial instrument. Both pre-set limits, the one for frequent and systematic basis and the other for substantial basis, should be crossed in order to be defined as a systematic internaliser; also an investment firm which chooses to opt-in under the systematic internaliser regime shall be defined as a systematic internaliser;

(4) 'market operator' means a person or persons who manages and/or operates the business of a regulated market. The market operator may be the regulated market itself;

(5) ‘regulated market’ means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments in the system, in accordance with its non-discretionary rules,in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III of Directive [new MiFID];

(6) ‘multilateral trading facility (MTF)’ means a multilateral system operated by an investment firm or market operator, which brings together multiple third-party buying and selling interests in financial instruments in the system, in accordance with non-discretionary rules, in a way that results in a contract in accordance with the provisions of Title II of Directive [new MiFID];

(6a) (new) ‘multilateral system’ means any system or facility operated and/or managed by an investment firm or a market operator in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system;

(7) ‘organised trading facility (OTF)’ means a multilateral system which is not a regulated market or MTF and in which multiple third-party buying and selling interests in financial instruments are able to interact in the system in a way that results in a contract in accordance with the provisions of Title II of Directive [new MiFID];

(7aa) ‘Matched principal trading’ means a transaction where the facilitator interposes between the buyer and seller to the transaction in such a way that it is never exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously or as soon as technically possible and –the transaction is concluded at a price where –the facilitator makes no profit or loss, other than –a previously disclosed commission, fee or charge for the transaction;

(7a) (new) ‘liquid market’ means:

(a) for the purposes of Articles 8(1)(d), 10(1)(b) of this Regulation and 17(1) and 20(1)(aa) of MiFID, a market for a financial instrument or a class of financial instruments, where there are ready and willing buyers and sellers on a continuous basis, assessed according to the following criteria and taking into consideration the specific market structures of the particular financial instrument or of the particular class of financial instruments:

(i) the average frequency and size of transactions over a range of market conditions, having regard to the nature and life-cycle of products within the class of financial instrument;
(ii) the number and type of market participants, including the ratio of market participants to traded instruments in a given product;
(iii) the average size of spreads, when available;

(b) for the purposes of Article 4, 13 of this [Regulation]–, a market of a financial instrument where this financial instrument is traded daily and the market is assessed according to the following criteria:

(i) the free float;
(ii) the average daily number of transactions in those financial instruments;
(iii) the average daily turnover for those financial instruments;

(8) Deleted

(9) ‘transferable securities’ means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;

(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;

(10) 'depositary receipts' means those securities which are negotiable on the capital market and which represent ownership of the securities of a non-domiciled issuer while being able to be admitted to trading on a regulated market and traded independently of the securities of the non-domiciled issuer;

(11) 'exchange-traded fund' means a fund of which at least one unit or share class is traded throughout the day on at least one trading venue and with at least one market maker which takes action to ensure that the price of its units or shares on the trading venue does not vary significantly from its net asset value and, where applicable, from its indicative net asset value.

(12) 'certificates' means those securities which are negotiable on the capital market and which, in case of a repayment of investment by the issuer, are ranked above shares but below unsecured bond instruments and other similar instruments;

(13) 'structured finance products' means those securities created to securitise and transfer credit risk associated with a pool of financial assets entitling the security holder to receive regular payments that depend on the cash flow from the underlying assets;

(14) 'derivatives' means those financial instruments defined in paragraph 9(c) and referred to in Annex I Section C (4) to (10) of Directive [new MiFID];

(15) ‘commodity derivatives’ means those financial instruments defined in paragraph 9(c) relating to a commodity or an underlying mentioned in Section C(10) of Annex I to Directive [new MiFID], or within points (5), (6), (7) and (10) of Section C of Annex I to Directive [new MiFID];

(15a)(new) ‘exchange traded derivative’ means a derivative that is traded on a regulated market as defined in Article 2(5) of MiFIR or on a third-country market considered as equivalent to a regulated market in accordance with Article 24 of MiFIR, and as such does not fall within the definition of OTC derivative under Regulation (EU) No 648/2012.

(16) ‘actionable indication of interest’ means a message from one member or participant to another one within a trading system in relation to available trading interest that contains all necessary information to agree on a trade;

(17) Deleted

(18) ‘approved publication arrangement (APA)’ means a person authorised under the provisions established in Directive [new MiFID] to provide the service of publishing trade reports on behalf of investment firms pursuant to Articles [11 and 12];

(19) Deleted.

(20) ‘approved reporting mechanism (ARM)’ means a person authorised under the provisions established in Directive [new MiFID] to provide the service of reporting details of transactions to competent authorities or ESMA on behalf of investment firms;

(21) Deleted

(22) ‘supervisory function’ means the management body acting in its supervisory function of overseeing and monitoring management decision-making;

(23) Deleted

(24) 'benchmark' means any commercial index or published figure calculated by the application of a formula to the value of one or more underlying assets or to prices by reference to which the amount payable under a financial instrument is determined;

(25) 'trading venue' means any regulated market, MTF or OTF;

(26) 'central counterparty' means a central counterparty as defined in Article 2(1) of Regulation (EU) No 648/2012;

(27) 'investment services and activities' means the services and activities defined in Article 4(1)(2) of Directive [new MiFID];

(28) 'third country financial institution' means an entity, the head office of which is established in a third country, that is authorised or licensed under the law of that third country to carry on any of the services or activities listed in Directive 2006/48/EC, Directive [new MiFID], Directive 2009/138/EC, Directive 2009/65/EC, Directive 2003/41/EC or Directive 2011/61/EU;

(29) 'wholesale energy product' means those contracts and derivatives defined in Article 2(4) of Regulation [REMIT];

(30) ‘Agricultural commodity derivatives’ means those derivative contracts relating to products listed in Article 1 and Annex I of Regulation 1234/2007;

(31) (new) ‘Interoperability arrangement’ means an interoperability arrangement within the meaning of point (12) of Article 2 of Regulation (EU) No 648/2012.

(33) (new) ‘Home Member State’ means:

(a) in the case of investment firms:

(i) if the investment firm is a natural person, the Member State in which its head office is situated;

(ii) if the investment firm is a legal person, the Member State in which its registered office is situated;

(iii) if the investment firm has, under its national law, no registered office, the Member State in which its head office is situated;

(b) in the case of a regulated market, the Member State in which the regulated market is registered or, if under the law of that Member State it has no registered office, the Member State in which the head office of the regulated market is situated;

(c) in the case of an APA, an ARM or a CTP:

(i) if the APA, ARM or CTP is a natural person, the Member State in which its head office is situated;

(ii) if the APA, ARM or CTP is a legal person, the Member State in which its registered office is situated;

(iii) if the APA, ARM or CTP has, under its national law, no registered office, the Member State in which its head office is situated;

(34) (new) ‘Host Member State’ means the Member State, other than the Home Member State, in which an investment firm has a branch or provides investment services and/or activities, or the Member State in which a regulated market provides appropriate arrangements so as to facilitate access to trading on its system by remote members or participants established in that same Member State;

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

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

(b) 'control' which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1(1) and (2) of Directive 83/349/EEC, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered a subsidiary of the parent undertaking which is at the head of those undertakings;

(c) a situation in which they are permanently linked to one and the same person by a control relationship.

(36)(new) The notion of ‘liquidity fragmentation’ means when one of the following situations occur:

a. when the participants in a trading venue are unable to conclude a transaction with one or more other participants in that venue because of the absence of clearing arrangements to which all participants have access;
b. when a clearing member or its clients would be forced to hold their positions in a financial instrument in more than one CCP which would limit the potential for the netting of financial exposures.

(37)(new) ‘sovereign issuer’ means any of the following that issues debt instruments:

(i) the Union;

(ii) a Member State, including a government department, an agency, or a special purpose vehicle of the Member State;

(iii) in the case of a federal Member State, a member of the federation;

(iv) a special purpose vehicle for several Member States;

(v) an international financial institution established by two or more Member States which has the purpose of mobilising funding and provide financial assistance to the benefit of its members that are experiencing or threatened by severe financing problems; or

(vi) the European Investment Bank;

(38) (new) ‘sovereign debt’ means a debt instrument issued by a sovereign issuer;

2. The definitions provided in paragraph 1 also apply to Directive [new MiFID].

3. The Commission may adopt, by means of delegated acts in accordance with Article 41, measures specifying some technical elements of the definitions laid down in paragraph 1 to adjust them to market development and ensure the uniform application of this Regulation.

TITLE II

TRANSPARENCY FOR TRADING VENUES

Chapter 1

Transparency for equity instruments

Article 3

Pre-trade transparency requirements for trading venues in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments

1. Market operators and investment firms operating a trading venue shall make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue. This requirement shall also apply to actionable indication of interests. Market operators and investment firms operating a trading venue shall make this information available to the public on a continuous basis during normal trading hours.

1a. The above transparency requirements should be calibrated for different types of trading systems including order-book, quote-driven, hybrid and periodic auction trading systems.

2. Market operators and investment firms operating a trading venue shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information referred to in the first paragraph to investment firms which are obliged to publish their quotes in shares, depositary receipts, ETFs, certificates and other similar financial instruments pursuant to Article 13.

Article 4

Granting of waivers

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 3(1) for:

(a) systems matching orders based on a trading methodology by which the price of the financial instrument referred to in Article 3(1) is derived from the trading venue where the average daily trading volume is a sufficient proportion of the average overall daily trading volume of that financial instrument, where that reference price is widely published and is regarded by market participants as a reliable reference price. The continued use of this waiver shall be subject to the conditions outlined in Article 4a.

(b) systems that formalise negotiated transactions which:

(i) are made within the current volume weighted spread reflected on the order book or the quotes of the market makers of the –trading venue operating that system. These are subject to the conditions outlined in Article 4a; or

(i*) are in an illiquid share, depositary receipt, ETF, certificate or other similar financial instrument that does not fall within the meaning of a liquid market as defined in Article 2(7a)(b) of this Regulation, and are dealt within a percentage of a suitable reference price, being a percentage and a reference price set in advance by the system operator; or

(ii) are subject to conditions other than the current market price of that financial instrument;

(c) orders that are large in scale compared with normal market size;

(d) orders held in an order management facility of the trading venue pending disclosure.

1a. [new] The reference price referred to in paragraph 1(a) shall be established by obtaining any of the following prices:

(a) the midpoint within the current bid and offer prices;

(b) the open and/or closing price of the relevant trading session. Orders may only reference these prices outside the continuous trading phase of the relevant trading session.

2. Before granting a waiver in accordance with paragraph 1, competent authorities shall notify ESMA and other competent authorities of the intended use of each individual waiver and provide an explanation regarding their functioning, including the details of the trading venue where the reference price is established as referred to in paragraph 1(a). Notification of the intention to grant a waiver shall be made not less than 3 months before the waiver is intended to take effect. Within 2 months following receipt of the notification, ESMA shall issue an opinion to the competent authority in question assessing the compatibility of the waiver with the requirements established in paragraph 1 and specified in the – regulatory technical standards adopted pursuant to paragraph 3. Where that competent authority grants a waiver and a competent authority of another Member State disagrees with this, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010. ESMA shall monitor the application of the waivers and submit an annual report to the Commission on how they are applied in practice.

2a. Competent authorities, may, either on their own initiative or upon request by other competent authorities, withdraw a waiver granted under paragraph 1 if they observe that the waiver is being used in a way that deviates from its original purpose or if they consider that the waiver is being used to circumvent the requirements established in this Article.

Competent authorities shall notify ESMA and other competent authorities of such withdrawal providing full reasons for their decision.

3. ESMA shall develop draft regulatory technical standards specifying the following:

(a) the range of bid and offer prices or designated market-maker quotes, and the depth of trading interest at those prices, to be made public for each class of financial instrument concerned in accordance with Article 3(1), taking into account the necessary calibration for different types of trading systems as referred to in Article 3(1a);

(b) Deleted

(c) what constitutes sufficient proportion of the daily trading volume in relation to the overall trading volume of a financial instrument;

(ca) the specific characteristics of a negotiated transaction in relation to the different ways the member or participant of a trading venue can execute such a transaction;

(cb) the negotiated transactions that do not contribute to price formation which avail of the waiver provided for under paragraph 1(b)(ii);

(d) the size of orders that are large in scale and the type and the minimum size of orders held in an order management facility of a trading venue pending disclosure for which pre-trade disclosure may be waived under paragraph 1 for each class of financial instrument concerned;

ESMA shall submit those draft regulatory technical standards to the Commission by [xxx].

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

4. Waivers granted by competent authorities in accordance with Articles 29 (2) and 44 (2) of Directive 2004/39/EC and Articles 18 to 20 of Commission Regulation (EC) No 1287/2006 before the date of application of this Regulation shall be reviewed by ESMA by [2 years following the date of application of this Regulation]. ESMA shall issue an opinion to the competent authority in question assessing the continued compatibility of each of those waivers with the requirements established in this Regulation and any regulatory technical standards –based on this Regulation.

Article 4a (new)

Volume Cap Mechanism

1. In order to ensure that the use of the waivers provided for in Article 4(1)(a) and 4(1)(b)(i) does not unduly harm price formation, trading under these waivers is restricted as follows:

   i) the percentage of trading in a financial instrument carried out on a trading venue under these waivers shall be limited to 4% of the total volume of trading in that financial instrument on all trading venues across the Union over the previous 12-month period.

   ii) overall EU trading in a financial instrument carried out under these waivers shall be limited to 8% of the total volume of trading in that financial instrument on all trading venues across the Union over the previous 12-month period.

This volume cap mechanism shall not apply to negotiated transactions which are in an illiquid share, depositary receipt, ETF, certificate or other similar financial instrument and are dealt within a percentage of a suitable reference price as referred to in Art 4(1)(b)(i*), or to negotiated transactions that are subject to conditions other than the current market price of that financial instrument as referred to in Art 4(1)(b)(ii).

2. When the percentage of trading in a financial instrument carried out on a trading venue under the waivers has exceeded the limit referred to in paragraph 1(i), the competent authority that authorised the use of these waivers by that venue shall within 2 working days suspend their use on that venue in that financial instrument based on the data published by ESMA referred to in paragraph 4, for a period of 6 months.

3. When the percentage of trading in a financial instrument carried out on all trading venues across the Union under these waivers has exceeded the limit referred to in paragraph 1(ii), all competent authorities shall within 2 working dayssuspend the use of these waivers across the Union for a period of 6 months.

4. ESMA shall publish within 5 working days of the end of each calendar month, , the total volume of EU trading per financial instrument in the previous 12 months, the percentage of trading in a financial instrument carried out across the EU under these waivers and also on each trading venue in the previous 12 months, and the methodology that is used to derive these percentages.

5. In order that there is a reliable basis for monitoring the trading taking place under these waivers and for determining whether the limits referred to in paragraph 1 have been exceeded, operators of trading venues shall be obligated to have in place systems and procedures to:

   (i) enable the identification of all trades which have taken place on its venue under these waivers; and

   (ii) ensure it does not exceed the permitted percentage of trading allowed under these waivers as referred to in paragraph 1(i) under any circumstances.

6. The commencement period for the publication of trading data by ESMA, and for which trading in a financial instrument under these waivers is to be monitored shall start 6 months after the entry into force of this Regulation. Without prejudice to article 4(2a), competent authorities shall be empowered to suspend the use of these waivers from the date of application of this Regulation and thereafter on a monthly basis.

7. ESMA shall develop draft regulatory technical standards to specify the method, including the flagging of transactions, by which it collates, calculates and publishes the transaction data, as outlined in paragraph 4, in order to provide an accurate measurement of the total volume of trading per financial instrument and the percentages of trading that use these waivers across the EU and per trading venue.

   ESMA shall submit those draft regulatory technical standards to the Commission by [xxx].

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

Article 5

Post-trade transparency requirements for trading venues in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments

1. Market operators and investment firms operating a trading venue shall make public the price, volume and time of the transactions executed in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue. Market operators and investment firms operating a trading venue shall make details of all such transactions public as close to real-time as is technically possible.

2. Market operators and investment firms operating a trading venue shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under paragraph 1 to investment firms which are obliged to publish the details of their transactions in shares, depositary receipts, ETFs, certificates and other similar financial instruments pursuant to Article 19.

Article 6

Authorisation of deferred publication

1. Competent authorities shall be able to authorise market operators and investment firms operating a trading venue to provide for deferred publication of the details of transactions based on their type or size.

   In particular, the competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share, depositary receipt, ETF, certificate or other similar financial instrument or that class of share, depositary receipt, ETF, certificate or other similar financial instrument.

Market operators and investment firms operating a trading venue shall obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication, and shall clearly disclose these arrangements to market participants and the public. ESMA shall monitor the application of these arrangements for deferred trade-publication and shall submit an annual report to the Commission on how they are applied in practice.

2. ESMA shall develop draft regulatory technical standards specifying the following:

(a) the details of transactions that investment firms, including systematic internalisers and market operators and investment firms operating a trading venue shall make available to the public for each class of financial instrument concerned in accordance with Article 5(1), including identifiers for the different types of transactions published under Articles 5(1) and 19, distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;

(b) the conditions for authorising investment firms, including systematic internalisers and market operators and investment firms operating a trading venue to provide for deferred publication of the details of transactions for each class of financial instruments concerned in accordance with Articles 6(1) and 19(1);

(c) the criteria to be applied when deciding the transactions for which, due to their size or the type of share, depositary receipt, ETF, certificate or other similar financial instrument involved, deferred publication is allowed for each class of financial instrument concerned.

ESMA shall submit those draft regulatory technical standards to the Commission by [xxx].

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

Chapter 2

Transparency for non-equity instruments

Article 7

Pre-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives

1. Market operators and investment firms operating a trading venue shall make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for bonds, structured finance products, emission allowances and derivatives traded on a trading venue. This requirement shall also apply to actionable indication of interests. Market operators and investment firms operating a trading venue shall make this information available to the public on a continuous basis during normal trading hours.

1a. The above transparency requirements should be calibrated for different types of trading systems, including order-book, quote-driven, hybrid, periodic auction trading and voice broking systems.

2. Market operators and investment firms operating a trading venue shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information referred to in the first paragraph to investment firms which are obliged to publish their quotes in bonds, structured finance products, emission allowances and derivatives pursuant to Article 17.

3. Market operators and investment firms operating a trading venue shall, where a waiver is granted in accordance with Article 8(1)(b), make public at least an indicative pre-trade bid and offer prices which are close to the price of the trading interests advertised through their systems in bonds, structured finance products, emission allowances and derivatives traded on a trading venue. Market operators and investment firms operating a trading venue shall make this information available to the public through appropriate electronic means on a continuous basis during normal trading hours. These arrangements shall ensure that information is provided on reasonable commercial terms and on a non-discriminatory basis.

Article 8

Granting of waivers

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 7(1) for:

(a) orders that are large in scale compared with normal market size and orders held in an order management facility of the trading venue pending disclosure;

(b) indications of interest in request-for-quote and voice trading systems that are above a size specific to the instrument, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors;

(c) deleted;

(d) derivatives which are not subject to the trading obligation specified in Article 24 and other financial instruments for which there is not a liquid market.

2. Before granting a waiver in accordance with paragraph 1, competent authorities shall notify ESMA and other competent authorities of the intended use of each individual waiver and provide an explanation regarding their functioning. Notification of the intention to grant a waiver shall be made not less than 3 months before the waiver is intended to take effect. Within 2 months following receipt of the notification, ESMA shall issue an opinion to the competent authority in question assessing the compatibility of the waiver with the requirements established in paragraph 1 and specified in the – regulatory technical standards adopted pursuant to paragraph 5. Where that competent authority grants a waiver and a competent authority of another Member State disagrees with this, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010. ESMA shall monitor the application of the waivers and submit an annual report to the Commission on how they are applied in practice.

3. Competent authorities, may, either on their own initiative or upon request by other competent authorities, withdraw a waiver granted under paragraph 1 if they observe that the waiver is being used in a way that deviates from its original purpose or if they consider that the waiver is being used to circumvent the requirements established in this Article.

Competent authorities shall notify ESMA and other competent authorities of such withdrawal providing full reasons for their decision.

4. The competent authority responsible for supervising one or more trading venues on which a class of bond, structured finance product, emission allowance or derivative is traded may, where the liquidity of that class of financial instrument falls below a specified threshold, temporarily suspend the obligations referred to in Article 7. The specified threshold shall be defined based on objective criteria specific to the market for the financial instrument concerned. Such temporary suspension shall be published on the website of the relevant competent authority.

The temporary suspension shall be valid for an initial period not exceeding three months from the date of its publication on the website of the relevant competent authority. Such a suspension may be renewed for further periods not exceeding three months at a time if the grounds for the temporary suspension continue to be applicable. In case the temporary suspension is not renewed after that three-month period, it shall automatically lapse.

Before suspending or renewing the temporary suspension of the obligations referred to in Article 7, the relevant competent authority shall notify ESMA of its intention and provide an explanation. ESMA shall issue an opinion to the competent authority as soon as practicable on whether in its view the suspension or the renewal of the temporary suspension is justified in accordance with the previous subparagraphs.

5. ESMA shall develop draft regulatory technical standards specifying the following:

(a) the range of bid and offer prices or quotes and the depth of trading interests at those prices, or indicative pre-trade bid and offer prices which are close to the price of the trading interest, to be made public for each class of financial instrument concerned in accordance with of Articles 7(1) and 7(3), taking into account the necessary calibration for different types of trading systems as referred to in Article 7(1a);

(b) the size of orders that are large in scale and the type and the minimum size of orders held in an order management facility pending disclosure for which pre-trade disclosure may be waived under paragraph 1 for each class of financial instrument concerned;

(c) the size specific to the instrument referred to in Article 8(1)(b) and the definition of request-for-quote and voice trading systems for which pre-trade disclosure may be waived under paragraph 1;

When determining the size specific to the instrument that would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors, in accordance with Article 8(1)(b), ESMA shall take the following factors into account:

(i) whether, at such sizes, liquidity providers would be able to hedge their risks;

(ii) where a market in the instrument, or a class of instruments, consists in part of retail investors, the average value of transactions undertaken by those investors;

(d) the financial instruments or the classes of financial instruments for which there is not a liquid market where pre-trade disclosure may be waived under paragraph 1;

(e) the parameters and methods for calculating the threshold of liquidity referred to in paragraph 4 in relation to the financial instrument. The parameters and methods for Member States to calculate the threshold shall be set in such a way that when the threshold is reached, it represents a significant decline in liquidity across all venues within the Union for the financial instrument concerned based on the criteria used under Article 2(7a) of this Regulation.

ESMA shall submit those draft regulatory technical standards to the Commission by [xxx].

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

Article 9

Post-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives

1. Market operators and investment firms operating a trading venue shall make public the price, volume and time of the transactions executed in respect of bonds, structured finance products, emission allowances and derivatives traded on a trading venue. Market operators and investment firms operating a trading venue shall make details of all such transactions public as close to real-time as is technically possible.

2. Market operators and investment firms operating a trading venue shall give access, on reasonable commercial terms and on non-discriminatory basis, to the arrangements they employ for making public the information under the first paragraph to investment firms which are obliged to publish the details of their transactions in bonds, structured finance products, emission allowances and derivatives pursuant to Article 20.

Article 10

Authorisation of deferred publication

1. Competent authorities shall be able to authorise market operators and investment firms operating a trading venue to provide for deferred publication of the details of transactions based on the size or type of the transaction.

   In particular, the competent authorities may authorise the deferred publication in respect of transactions that:

(a) are large in scale compared with the normal market size for that bond, structured finance product, emission allowance or derivative traded on a trading venue, or for that class of bond, structured finance product, emission allowance or derivative traded on a trading venue; or

(b) are related to a bond, structured finance product, emission allowance or derivative traded on a trading venue, or for that class of bond, structured finance product, emission allowance or derivative traded on a trading venue for which there is not a liquid market.

(c) are above a size specific to that bond, structured finance product, emission allowance or derivative traded on a trading venue, or for that class of bond, structured finance product, emission allowance or derivative traded on a trading venue, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors.

Market operators and investment firms operating a trading venue shall obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication, and shall clearly disclose these arrangements to market participants and the public. ESMA shall monitor the application of these arrangements for deferred trade-publication and shall submit an annual report to the Commission on how they are used in practice.

2. The competent authority responsible for supervising one or more trading venues on which a class of bond, structured finance product, emission allowance or derivative is traded may, where the liquidity of that class of financial instrument falls below the threshold determined in accordance with the methodology of Article 8(5)(e), temporarily suspend the obligations referred to in Article 9. This threshold shall be defined based on objective criteria specific to the market for the financial instrument concerned. Such temporary suspension shall be published on the website of the relevant competent authority.

The temporary suspension shall be valid for an initial period not exceeding three months from the date of its publication on the website of the relevant competent authority. Such a suspension may be renewed for further periods not exceeding three months at a time if the grounds for the temporary suspension continue to be applicable. In case the temporary suspension is not renewed after that three-month period, it shall automatically lapse.

Before suspending or renewing the temporary suspension of the obligations referred to in Article 9, the relevant competent authority shall notify ESMA of its intention and provide an explanation. ESMA shall issue an opinion to the competent authority as soon as practicable on whether in its view the suspension or the renewal of the temporary suspension is justified in accordance with the previous subparagraphs.

3. Competent authorities may, in conjunction with an authorisation of deferred publication–:

(a) request the publication of limited details of a transaction or details of several transactions in an aggregated form, or a combination thereof, during the time period of deferral;

(b) allow the omission of the publication of the volume of an individual transaction during an extended time period of deferral;

(ba) regarding non-equity instruments that are not sovereign debt, allow the publication of several transactions in an aggregated form during an extended time period of deferral;

(c) regarding sovereign debt instruments, allow the publication of several transactions in an aggregated form for an indefinite period of time.

In the case of sovereign debt instruments, points (b) and (c) may be used either separately or consecutively whereby once the volume omission extended period lapses, the volumes could then be published in aggregated form.

In the case of all other instruments, when the deferral time period lapses, the outstanding details of the transaction and all the details of the transactions on an individual basis shall be published.

4. ESMA shall develop draft regulatory technical standards specifying the following:

(a) the details of transactions that investment firms, including systematic internalisers, and market operators and investment firms operating a trading venue shall make available to the public for each class of financial instrument concerned in accordance with Article 9(1), including identifiers for the different types of transactions published under Articles 9(1) and 20(1), distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;

(b) the conditions for authorising investment firms, including systematic internalisers, and market operators and investment firms operating a trading venue, to provide for deferred publication of the details of transactions for each class of financial instrument concerned in accordance with paragraph (1) of this Article and Article 20(1);

(c) the criteria to be applied when determining the size or type of a transaction for which deferred publication and publication of limited details of a transaction, or publication of details of several transactions in an aggregated form, or omission of the publication of the volume of a transaction with particular reference to allowing an extended length of time of deferral for certain financial instruments depending on their liquidity, is allowed under paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by [xxx].

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

Chapter 3

Obligation to offer trade data on a separate and reasonable commercial basis

Article 11

Obligation to make pre- and post-trade data available separately

1. Market operators and investment firms operating a trading venue shall make the information published in accordance with Articles 3 to 10 available to the public by offering pre- and post-trade transparency data separately.

2. ESMA may develop draft regulatory technical standards specifying the offering of pre- and post-trade transparency data, including the level of disaggregation of the data, to be made available to the public as referred to in paragraph 1.

   ESMA shall submit those draft regulatory technical standards to the Commission by […].

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

Article 12

Obligation to make pre- and post-trade data available on a reasonable commercial basis

1. Market operators and investment firms operating a trading venue shall make the information published in accordance with Articles 3 to 10 available to the public on a reasonable commercial basis. The information shall be made available free of charge 15 minutes after the publication of the information in accordance with Articles 3 to 10.

2. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures clarifying what constitutes a reasonable commercial basis to make information public as referred to in paragraph 1.

TITLE III

TRANSPARENCY FOR INVESTMENT FIRMS TRADING OTC INCLUDING SYSTEMATIC INTERNALISERS

Article 13

Obligation for systematic internalisers to make public firm quotes in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments

1. Investment firms shall make public firm quotes in respect of those shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue for which they are systematic internalisers and for which there is a liquid market as defined in Article 2(7a)(b).

   In case there is not a liquid market for the financial instruments mentioned in the previous subparagraph, systematic internalisers shall disclose quotes to their clients upon request.

2. This Article and Articles 14, 15 and 16 shall apply to systematic internalisers when they deal in sizes up to standard market size. Systematic internalisers shall not be subject to the provisions of this Article and Articles 14, 15 and 16 when they deal in sizes above standard market size.

3. Systematic internalisers may decide the size or sizes at which they will quote. The minimum quote size shall be at least the equivalent of 10% of the standard market size of a share, depositary receipt, ETF, certificate or other similar financial instrument traded on a trading venue.

For a particular share, depositary receipt, ETF, certificate or other similar financial instrument traded on a trading venue, each quote shall include a firm bid and offer price or prices for a size or sizes which could be up to standard market size for the class of shares, depositary receipts, ETFs, certificates or other similar financial instruments to which the financial instrument belongs.

The price or prices shall also reflect the prevailing market conditions for that share, depositary receipt, ETF, certificate or other similar financial instrument.

4. Shares, depositary receipts, ETFs, certificates and other similar financial instruments shall be grouped in classes on the basis of the arithmetic average value of the orders executed in the market for that financial instrument. The standard market size for each class of shares, depositary receipts, ETFs, certificates and other similar financial instruments shall be a size representative of the arithmetic average value of the orders executed in the market for the financial instruments included in each class.

5. The market for each share, depositary receipt, ETF, certificate or other similar financial instrument shall be comprised of all orders executed in the Union in respect of that financial instrument, excluding those that are large in scale compared to normal market size.

6. The competent authority of the most relevant market in terms of liquidity as defined in Article 23 for each share, depositary receipt, ETF, certificate and other similar financial instrument shall determine at least annually, on the basis of the arithmetic average value of the orders executed in the market in respect of that financial instrument, the class to which it belongs. This information shall be made public to all market participants.

7. In order to ensure the efficient valuation of shares, depositary receipts, ETFs, certificates and other similar financial instruments and maximise the possibility of investment firms to obtain the best deal for their clients, ESMA shall develop draft regulatory technical standards specifying the criteria for application of paragraphs 1, 2, 3, 4.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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

Article 14

Execution of client orders

1. Systematic internalisers shall make public their quotes on a regular and continuous basis during normal trading hours. They shall be entitled to update their quotes at any time. They shall also be allowed, under exceptional market conditions, to withdraw their quotes.

   The quotes shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.

2. Systematic internalisers shall, while complying with the provisions set down in Article 27 of Directive [new MiFID], execute the orders they receive from their clients in relation to the shares, depositary receipts, ETFs, certificates and other similar financial instruments for which they are systematic internalisers at the quoted prices at the time of the reception of the order.
   However, in justified cases, they may execute those orders at a better price provided that this price falls within a public range close to market conditions.

3. Systematic internalisers may also execute orders they receive from their professional clients at prices different than their quoted ones without having to comply with the requirements established in paragraph 2, in respect of transactions where execution in several securities is part of one transaction or in respect of orders that are subject to conditions other than the current market price.

4. Where a systematic internaliser, quoting only one quote or whose highest quote is lower than the standard market size, receives an order from a client of a size bigger than its quotation size but lower than the standard market size, it may decide to execute that part of the order which exceeds its quotation size, provided that it is executed at the quoted price, except where otherwise permitted under the conditions of the previous two paragraphs. Where the systematic internaliser is quoting in different sizes and receives an order between those sizes, which it chooses to execute, it shall execute the order at one of the quoted prices in compliance with the provisions of Article 28 of Directive [new MiFID], except where otherwise permitted under the conditions of the previous two subparagraphs.

5. In order to ensure the efficient valuation of shares, depositary receipts, ETFs, certificates and other similar financial instruments and maximise the possibility of investment firms to obtain the best deal for their clients, the Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying the criteria specifying when prices fall within a public range close to market conditions as referred to in paragraph 2.

6. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures clarifying what constitutes a reasonable commercial basis to make quotes public as referred to in paragraph 1.

Article 15

Obligations of competent authorities

The competent authorities shall check the following:

(a) that investment firms regularly update bid and offer prices published in accordance with Article 13 and maintain prices which reflect the prevailing market conditions;
(b) that investment firms comply with the conditions for price improvement laid down in Article 14(2).

Article 16

Access to quotes

1. Systematic internalisers shall be allowed to decide, on the basis of their commercial policy and in an objective non-discriminatory way, the clients to whom they give access to their quotes. To that end there shall be clear standards for governing access to their quotes. Systematic internalisers may refuse to enter into or discontinue business relationships with clients on the basis of commercial considerations such as the client credit status, the counterparty risk and the final settlement of the transaction.

2. In order to limit the risk of being exposed to multiple transactions from the same client, systematic internalisers shall be allowed to limit in a non-discriminatory way the number of transactions from the same client which they undertake to enter at the published conditions. They shall also be allowed, in a non-discriminatory way and in accordance with the provisions of Article 28 of Directive [new MiFID], to limit the total number of transactions from different clients at the same time provided that this is allowable only where the number and/or volume of orders sought by clients considerably exceeds the norm.

3. In order to ensure the efficient valuation of shares, depositary receipts, ETFs, certificates and other similar financial instruments and maximise the possibility of investment firms to obtain the best deal for their clients, the Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:

   (a) the criteria specifying when a quote is published on a regular and continuous basis and is easily accessible as referred to in Article 14(1) as well as the means by which investment firms may comply with their obligation to make public their quotes, which shall include the following possibilities:
   (i) through the facilities of any regulated market which has admitted the instrument in question to trading;
   (ii) through an approved publication arrangement;
   (iii) through proprietary arrangements;

(b) the criteria specifying those transactions where execution in several securities is part of one transaction or those orders that are subject to conditions other than current market price as referred to in Article 14(3);

(c) the criteria specifying what can be considered as exceptional market conditions that allow for the withdrawal of quotes as well as the conditions for updating quotes as referred to in Article 14(1);

(d) the criteria specifying when the number and/or volume of orders sought by clients considerably exceeds the norm as referred to in paragraph 2;

(e) the criteria specifying when prices fall within a public range close to market conditions as referred to in Article 14(2).

Article 17

Obligation for systematic internalisers to make public firm quotes in respect of bonds, structured finance products, emission allowance and derivatives

1. Investment firms shall make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives traded on a trading venue for which they are systematic internalisers and for which there is a liquid market as defined in Article 2(7a)(a) when the following conditions are fulfilled:

(a) they are prompted for a quote by a client of the systematic internaliser;
(b) they agree to provide a quote.

In case of bonds, structured finance products, emission allowances and derivatives traded on a trading venue for which there is not a liquid market, systematic internalisers shall disclose quotes to their clients on request if they agree to provide a quote.

2. Systematic internalisers shall make the firm quotes published pursuant to paragraph 1 available to their other clients. Notwithstanding, they shall be allowed to decide, on the basis of their commercial policy and in an objective non-discriminatory way, the clients to whom they give access to their quotes. To that end, systematic internalisers shall have in place clear standards for governing access to their quotes. Systematic internalisers may refuse to enter into or discontinue business relationships with clients on the basis of commercial considerations such as the client credit status, the counterparty risk and the final settlement of the transaction.

3. Systematic internalisers shall undertake to enter into transactions with any other client to whom the quote is made available under the published conditions when the quoted size is at or below the size specific to the instrument determined in accordance with Article 8(5)(c).

   Systematic internalisers shall not be subject to the obligation to publish a firm quote pursuant to paragraph 2 for financial instruments that fall below the threshold of liquidity determined in accordance with Article 8(5)(e).

4. Systematic internalisers shall be allowed to establish non-discriminatory and transparent limits on the number of transactions they undertake to enter into with clients pursuant to any given quote.

5. The quotes published pursuant to paragraph 1 and those at or below the size mentioned in paragraph 3 shall be made –public in a manner which is easily accessible to other market participants on a reasonable commercial basis.

6. The quoted price or prices shall be such as to ensure that the systematic internaliser complies with its obligations under Article 27 of Directive [new MiFID], and shall reflect prevailing market conditions in relation to prices at which transactions are concluded for the same or similar instruments on a trading venue.

However, in justified cases, they may execute orders at a better price provided that this price falls within a public range close to market conditions.

7. Systematic internalisers shall not be subject to the provisions of this Article when they deal in sizes above the size specific to the instrument determined in accordance with Article 8(5)(c).

Article 18

Monitoring by ESMA

1. Competent authorities and ESMA shall monitor the application of Article 17 regarding the sizes at which quotes are made available to clients of the investment firm and to other market participants relative to other trading activity of the firm, and the degree to which the quotes reflect prevailing market conditions in relation to transactions in the same or similar instruments on a trading venue. Within 2 years from the date of entry into force, ESMA shall report to the Commission on the application of Article 17. In case of significant quoting and trading activity just beyond the threshold mentioned in Article 17(3) or outside prevailing market conditions, ESMA shall report to the Commission before this deadline.

2. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying the sizes mentioned in Article 17(3) at which a firm shall enter into transactions with any other client to whom the quote is made available. The size specific to the instrument shall be determined in accordance with the criteria set in Article 8(5)(c).

3. ESMA shall develop draft regulatory technical standards clarifying what constitutes a reasonable commercial basis to make quotes public as referred to in Article 17(5).

ESMA shall submit those draft regulatory technical standards to the Commission by [ ].

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

Article 19

Post-trade disclosure by investment firms, including systematic internalisers, in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments

1. Investment firms which, either on own account or on behalf of clients, conclude transactions in shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue, shall make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public through an APA.

2. The information which is made public in accordance with paragraph 1 and the time-limits within which it is published shall comply with the requirements adopted pursuant to Article 5, including the delegated acts adopted in accordance with Article 6(2)(a). Where the measures adopted pursuant to Article 6 provide for deferred publication for certain categories of transaction in shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue, this possibility shall also apply to those transactions when undertaken outside trading venues.

3. ESMA shall develop draft regulatory technical standards specifying the following:

   (a) identifiers for the different types of transactions published under this Article, distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;
   (b) elements of the obligation under paragraph 1 to transactions involving the use of those financial instruments for collateral, lending or other purposes where the exchange of financial instruments is determined by factors other than the current market valuation of the instrument.

   ESMA shall submit those draft regulatory technical standards to the Commission by [xxx].

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

Article 20

Post-trade disclosure by investment firms, including systematic internalisers, in respect of bonds, structured finance products, emission allowances and derivatives

1. Investment firms which, either on own account or on behalf of clients, conclude transactions in bonds, structured finance products, emission allowances and derivatives traded on a trading venue shall make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public through an APA.

2. The information which is made public in accordance with paragraph 1 and the time-limits within which it is published shall comply with the requirements adopted pursuant to Article 9, including the delegated acts adopted in accordance with Article 10 (4)(a).

3. Competent authorities shall be able to authorise investment firms to provide for deferred publication, or may request the publication of limited details of a transaction or details of several transactions in an aggregated form, or a combination thereof, during the time period of the deferral– or may allow the omission of the publication of the volume for individual transactions during an extended time period of deferral, or in the case of non-equity instruments that are not sovereign debt, may allow the publication of several transactions in an aggregated form during an extended time period of deferral, or in the case of sovereign debt instruments may allow the publication of several transactions in an aggregated form for an indefinite period of time, and may temporarily suspend the obligations referred to in paragraph 1 on the same conditions as set forth in Article 10.

Where the measures adopted pursuant to Article 10 provide for deferred publication and publication of limited details or details in an aggregated form, or a combination thereof, or for omission of the publication of the volume for certain categories of transactions in bonds, structured finance products, emission allowances and derivatives traded on a trading venue, this possibility shall also apply to those transactions when undertaken outside trading venues.

4. ESMA shall develop draft regulatory technical standards specifying the following:

(a) the identifiers for the different types of transactions published in accordance with this Article, distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;

(b) the criteria specifying the obligation under paragraph 1,involving the use of those financial instruments for collateral, lending or other purposes where the exchange of financial instruments is determined by factors other than the current market valuation of the instrument.

ESMA shall submit those draft regulatory technical standards to the Commission by [xxx].

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

Article 20b (new)

Providing information for the purposes of transparency and other calculations

1. In order to carry out calculations for determining the requirements for the pre-trade and post-trade transparency and the trading obligation regimes imposed by Articles 3 to 10, Articles 13 to 20 and Article 26, which are applicable to financial instruments and for determining whether an investment firm is a systematic internaliser as defined in Article 2(3), competent authorities may request information from:

   (a) trading venues;

   (b) APAs; and

   (c) CTPs.

2. Trading venues, APAs and CTPs shall store the necessary data for a sufficient period of time.

3. ESMA shall develop draft regulatory technical standards to specify the content and frequency of data requests and the formats and the timeframe in which trading venues, APAs and CTPs shall respond to such requests in accordance with paragraph 1 and the type of data that must be stored and the minimum period of time trading venues, APAs and CTPs shall store data in order to be able to respond to such requests in accordance with paragraph 2.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX]

Power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2012.

Article 20c (new)

Trading Obligation for Investment Firms

1. An investment firm shall ensure the trades it undertakes in shares admitted to trading on a regulated market or traded on a trading venue shall take place on a regulated market, MTF, OTF or systematic internaliser, as appropriate, unless their characteristics include that they:

   - are non-systematic, ad-hoc, irregular and infrequent, or

   - are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process.

2. An investment firm that operates an internal matching system which executes client orders in shares on a multilateral basis must ensure it is authorised as either an MTF or OTF under this Directive and comply with all relevant provisions pertaining to such authorisations.

3. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the particular characteristics of those transactions in shares that do not contribute to the price discovery process as referred to in paragraph 1, taking into consideration cases such as:

a) Non-addressable liquidity trades; or

b) Where the exchange of shares is determined by factors other than the current market valuation of the share.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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

TITLE IV

TRANSACTION REPORTING

Article 21

Obligation to uphold integrity of markets

Without prejudice to the allocation of responsibilities for enforcing the provisions of Regulation [new MAR], competent authorities coordinated by ESMA in accordance with Article 31 of Regulation (EU) No 1095/2010 shall monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.

Article 22

Obligation to maintain records

1. Investment firms shall keep at the disposal of the competent authority, for 5 years, the relevant data relating to all orders and all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Directive 2005/60/EC[1]. ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No 1095/2010.

[1] *Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance) (OJ L 309, 25.11.2005, p. 15).*

2. The operator of a trading venue shall keep at the disposal of the competent authority, for at least five years, the relevant data relating to all orders in financial instruments which are advertised through their systems. The records shall contain all the details required for the purposes of Article 23(1) and (3), as well as other relevant data that constitutes the characteristics of the order, including those that link an order with the executed transactions(s) that stems from that order. ESMA shall perform a facilitation and coordination role in relation to competent authorities' accessing information under the provisions of this paragraph.

3. ESMA shall develop draft regulatory technical standards to determine the details of the other relevant order data required to be maintained under paragraph 2 of this Article that is not referred to in Article 23.

These shall include the identification code of the member or participant which transmitted the order, the identification code of the order, the date and time the order was transmitted, the characteristics of the order, including the type of order, the limit price if applicable, the validity period, any specific order instructions, details of any modification, cancellation, partial or full execution of the order, the agency or principal capacity.

ESMA shall submit those draft regulatory technical standards to the Commission by […].

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

Article 23

Obligation to report transactions

1. Investment firms which execute transactions in financial instruments shall report complete and accurate details of such transactions to the competent authority as quickly as possible and no later than the close of the following working day. The competent authorities shall, in accordance with Article 89 of Directive [new MiFID], establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives this information.

2. The obligation laid down in paragraph 1 shall apply to:

   (a) financial instruments which are admitted to trading on a regulated market or MTF or traded on a MTF or OTF or for which a request for admission to trading on a regulated market or MTF has been made;
   (b) financial instruments where the underlying is a financial instrument traded on a trading venue; and
   (c) financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue

   The obligation shall apply to transactions in financial instruments referred to in points (a) and (c) irrespective of whether or not such transactions are carried out on the trading venue.

3. The reports shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, a designation to identify the applicable waiver under which the trade has taken place, means of identifying the investment firms concerned, and a designation to identify a short sale as defined in Article 2(1)(b) of Regulation (EU) 236/2012 in respect of any shares and sovereign debt within the scope of Articles 12, 13 and 17 of that Regulation. For transactions not carried out on a trading venue, the reports shall also include a designation identifying the types of transactions in accordance with the measures to be adopted pursuant to Article 19(3)(a) and Article 20(4)(a).

4. Investment firms which transmit orders shall include in the transmission of that order all the details as specified in paragraphs 1 and 3. Instead of including the mentioned details when transmitting orders, an investment firm may choose to report the transmitted order, if it is executed, as a transaction in accordance with the requirements under paragraph 1. In this case, the transaction report by the investment firm shall state that it pertains to a transmitted order.

5. The operator of a trading venue shall report details of transactions in instruments traded on its platform which are executed through its systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3.

6. The reports shall be made to the competent authority either by the investment firm itself, an ARM acting on its behalf or by the trading venue through whose system the transaction was completed, in accordance with paragraphs 1 and 3.

In cases where transactions are reported directly to the competent authority by a trading venue or an ARM, the obligation on the investment firm laid down in paragraph 1 may be waived, while the ultimate responsibility for transaction reporting still remains with the investment firm.

The Home Member State shall require the trading venue, when making reports on behalf of the investment firm, to have sound security mechanisms in place designed to guarantee the security and authentication of the means of transfer of information, to minimise the risk of data corruption and unauthorised access and to prevent information leakage maintaining the confidentiality of the data at all times. The Home Member State shall require the trading venue to maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

Trade-matching or reporting systems, including trade repositories registered or recognised in accordance with Title VI of Regulation (EU) No 648/2012 , may be approved by the competent authority as an ARM in order to transmit transaction reports to the competent authority in accordance with paragraphs 1 and 3. In cases where transactions have been reported to a trade repository in accordance with Article 9 of Regulation (EU) No 648/2012 and where these reports contain the details required under paragraphs 1, 3 and 8 and are transmitted to the competent authority by the trade repository, the obligation on the investment firm laid down in paragraph 1 shall be considered to have been complied with. Where there are errors or omissions in the transaction reports they shall be corrected and submitted to the competent authority.

7. When, in accordance with Article 37(8) of Directive [new MiFID], reports provided for under this Article are transmitted to the competent authority of the Host Member State, it shall transmit this information to the competent authorities of the Home Member State of the investment firm, unless the competent authorities of the Home Member State decide that they do not want to receive this information.

8. ESMA shall develop draft regulatory technical standards to determine:

(a) data standards and formats for the information to be reported in accordance with paragraphs 1 and 3, including the methods and arrangements for reporting financial transactions and the form and content of such reports;

(b) the criteria for defining a relevant market in accordance with paragraph 1;

(c) the references of the instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, the information and details of the identity of the client, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, a designation to identify the applicable waiver under which the trade has taken place, the means of identifying the investment firms concerned, the way in which the transaction was executed, data fields necessary for the processing and analysis of the transaction reports in accordance with paragraph 3, and

(d) the designation to identify short sales of shares and sovereign debt as defined in Articles 12 and 13 of Regulation 236/2012.

(e) the relevant financial instruments to be reported in accordance with paragraph 2;

(f) the application of transaction reporting obligations to branches of investment firms;

(g) what constitutes a reportable transaction for the purposes of this Article.

ESMA shall submit those draft regulatory technical standards to the Commission by […].

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

9. Two years after entry into force of this Regulation, ESMA shall report to the Commission on the functioning of this Article, including whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enable to monitor the activities of investment firms in accordance with Article 21. The Commission may take steps to propose any changes, including providing for transactions to be transmitted to a system appointed by ESMA instead of to competent authorities, which allows relevant competent authorities to access all the information reported pursuant to this Article.

Article [23 a]

Obligation for trading venues to provide instrument reference data

1. The operator of a trading venue and investment firm acting as a systematic internaliser shall provide its competent authority with identifying reference data on each financial instrument traded on that trading venue or systematic internaliser in an electronic and standardised format. Identifying reference data shall be made ready for submission to the competent authority before trading commences in the financial instrument that it refers to. The instrument reference data shall be updated whenever there are changes to the data with respect to an instrument. These notifications are to be transmitted by competent authorities without delay to ESMA, which shall publish them immediately on its website. ESMA shall give competent authorities access to these reference data.

2. ESMA shall develop draft regulatory technical standards to determine the data standards and formats of the instruments reference data to be provided by operators of trading venues and investment firms acting as systematic internaliser in accordance with paragraph 1, including the instrument identifier as well as technical arrangements for supplying the data.

ESMA shall submit those draft regulatory technical standards to the Commission by [...].

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

TITLE V

DERIVATIVES

Article 24

Obligation to trade on regulated markets, MTFs or OTFs

1. Financial counterparties as defined in Article 2(8) of Regulation (EU) No 648/2012 and non financial counterparties that meet the conditions referred to in Article10(1)(b) of Regulation (EU) No 648/2012 shall conclude transactions, which are not intragroup transactions as defined in Article 3 of Regulation (EU) No 648/2012, with other financial counterparties as defined in Article 2(8) or non-financial counterparties that meet the conditions referred to in Article 10(1)(b) of Regulation (EU) No 648/2012 in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 26 and listed in the register referred to in Article 27 only on:

   (a) regulated markets;
   (b) MTFs;
   (c) OTFs; or
   (d) third country trading venues, provided that the Commission has adopted a decision in accordance with paragraph 4 and provided that the third country provides for an effective equivalent system for the recognition of trading venues authorised under Directive [new MiFID] to admit to trading or trade derivatives declared subject to a trading obligation in that third country on a non-exclusive basis.

2. The trading obligation shall also apply to counterparties referred to in paragraph 1 which enter into derivatives transactions pertaining to a class of derivatives that has been declared subject to the trading obligation with third country financial institutions or other third country entities that would be subject to the clearing obligation if they were established in the Union. The trading obligation shall also apply to third country entities that would be subject to the clearing obligation if they were established in the Union, which enter into derivatives transactions pertaining to a class of derivatives that has been declared subject to the trading obligation, provided that the contract has a direct, substantial and foreseeable effect within the Union or where such obligation is necessary or appropriate to prevent the evasion of any provision of this Regulation.

3. Derivatives declared subject to the trading obligation shall be eligible to be admitted to trading or to trade on any trading venue as referred to in paragraph 1 on a non-exclusive and non-discriminatory basis.

4. The Commission may, in accordance with the procedure referred to in Article 42, adopt decisions determining that the legal and supervisory framework of a third country ensures that a trading venue authorised in that third country complies with legally binding requirements which have equivalent effect to the requirements for the trading venues referred to in subparagraphs (a) to (c) of paragraph 1 resulting from this Regulation, Directive [new MiFID], and Regulation [new MAR], and which are subject to effective supervision and enforcement in that third country.

These decisions shall be for the sole purpose of determining eligibility as a trading venue for derivatives subject to the trading obligation.

The legal and supervisory framework of a third country is considered to have equivalent effect where that framework fulfils all the following conditions:

(a) trading venues in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;

(b) trading venues have clear and transparent rules regarding admission of financial instruments to trading so that such financial instruments are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;

(c) issuers of financial instruments are subject to periodic and ongoing information requirements ensuring a high level of investor protection;

(d) it ensures market transparency and integrity via rules addressing market abuse in the form of insider dealing and market manipulation;

(e) it provides for an effective equivalent system for recognition of trading venues authorised under foreign regimes to request access to CCPs established in that third country.

A decision of the Commission under this paragraph may be limited to a category or categories of trading venues. In that case, a third country trading venue is only included in paragraph 1(d) if it falls within a category covered by the Commission's decision.

5. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the types of contracts referred to in paragraph 2 which have a direct, substantial and foreseeable effect within the Union and the cases where the trading obligation is necessary or appropriate to prevent the evasion of any provision of this Regulation.

ESMA shall submit those draft regulatory standards to the Commission by [XXX].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) 1095/2010.

Article 25

Clearing obligation for derivatives traded on regulated markets and timing of acceptance for clearing

1. The operator of a regulated market shall ensure that all transactions in derivatives that are concluded on that regulated market are cleared by a CCP.

2. CCPs, trading venues and investment firms which act as clearing members in accordance with Article 3 of Regulation (EU) No 648/2012 shall have in place effective systems, procedures and arrangements in relation to cleared derivatives to ensure that transactions in cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable using automated systems.

In this paragraph, "cleared derivatives" means:

(i) all derivatives which are to be cleared pursuant to the clearing obligation under paragraph 1 or pursuant to the clearing obligation under Article 5 of Regulation (EU) No 648/2012; or

(ii) all derivatives which are otherwise agreed by the relevant parties to be cleared.

ESMA shall develop draft regulatory technical standards to specify the minimum requirements for systems, procedures and arrangements (including the acceptance timeframes) under this paragraph taking into account the need to ensure proper management of operational or other risks, and shall have ongoing authority to update these requirements as industry standards evolve.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2012.

Article 25aa(new)

Indirect Clearing Arrangements

1. Indirect clearing arrangements with regard to exchange traded derivatives are permissible provided that those arrangements do not increase counterparty risk andensure that the assets and positions of the counterparty benefit from protection with equivalent effect to that referred to in Articles 39 and 48 of Regulation (EU) No 648/2012.

2. ESMA shall develop draft regulatory technical standards to specify the types of indirect clearing service arrangements where established that meet the conditions referred to above, ensuring consistency with provisions established for OTC derivatives under Chapter II of Regulation (EU) No 149/2013.

   ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

   Power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2012.

Article 25a (new)

Portfolio Compression

1. Portfolio compression is a risk reduction service in which two or more counterparties wholly or partially terminate some or all of the derivatives submitted by those counterparties for inclusion in the portfolio compression and replace the terminated derivatives with another derivative whose combined notional value is less than the combined notional value of the terminated derivatives.

2. Investment firms providing portfolio compression as defined in paragraph 1– shall not be subject to the best execution obligation in article 27 [Mifid], the transparency obligations in articles 17 and 20 [Mifir] and the obligation in Article 1(6) [Mifid]. The component transactions of a portfolio compression shall not be subject to Article 24 [Mifir].
3. Investment firms providing portfolio compression shall make public through an APA the volumes of transactions subject to portfolio compressions and the time they were concluded within the time limits specified in Article 9 [Mifir].

4. Investment firms providing portfolio compressions shall keep complete and accurate records of all portfolio compressions which it organises or participates in. These records shall be made available promptly to the relevant competent authority or ESMA upon request.

5. The Commission may adopt, by means of delegated acts in accordance with Article 41, measures specifying the following:

(a) the elements of portfolio compression.
(b) the information to be published pursuant to paragraph 3–.

Article 26

Trading obligation procedure

1. ESMA shall develop draft regulatory technical standards to determine the following:

   (a) which of the class of derivatives that has been declared subject to the clearing obligation in accordance with Article 5 paragraphs 2 and 4 of Regulation (EU) No 648/2012 or a relevant subset thereof shall be traded on the venues referred to in Article 24(1);

   (b) the date from which the trading obligation takes effect.

   ESMA shall submit those draft regulatory technical standards to the Commission within [xx] months after the regulatory technical standards in accordance with Article 5(2) of Regulation (EU) No 648/2012 are adopted by the Commission.

   Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation 1095/2010.

2. In order for the trading obligation to take effect:

   (a) the class of derivatives or a relevant subset thereof has to be admitted to trading or traded on at least one trading venue referred to in Article 24(1), and

   (b) there must be sufficient continuous third party buying and selling interest in the class of derivatives or a relevant subset thereof so that such a class of derivatives is considered sufficiently liquid to trade only on the venues referred to in Article 24(1).

3. In developing the draft regulatory technical standards, ESMA shall consider the class of derivatives or a relevant subset thereof as sufficiently liquid pursuant to the following criteria:

(a) the average frequency and size of trades over a range of market conditions, having regard to the nature and lifecycle of products within the class of derivatives;

(b) the number and type of active market participants including the ratio of market participants to products/contracts traded in a given product market;

(c) the average size of the spreads.

In preparing those draft regulatory technical standards, ESMA shall take into consideration the anticipated impact this trading obligation might have on the liquidity of a class of derivatives or a relevant subset thereof and the commercial activities of end users which are not financial entities.

Before submitting the draft regulatory technical standards to the Commission for adoption, ESMA shall conduct a public consultation and, where appropriate, may consult with the competent authorities of third countries.

4. ESMA shall, on its own initiative, in accordance with the criteria set out in paragraph 2 and after conducting a public consultation, identify and notify to the Commission the classes of derivatives or individual derivative contracts that should be subject to the obligation to trade on the venues referred to in Article 24(1), but for which no CCP has yet received authorisation under Article 14 or 15 of Regulation (EU) No 648/2012 or which is not admitted to trading or traded on a venue referred to in Article 24(1).

Following a notification by ESMA, the Commission may publish a call for development of proposals for the trading of those derivatives on the venues referred to in Article 24(1).

5. ESMA shall in accordance with paragraph 1, submit to the Commission new draft regulatory technical standards to amend, suspend or revoke existing regulatory technical standards whenever there is a material change in the criteria set out in paragraph 2. Before doing so, ESMA may consult, where appropriate, the competent authorities of third countries. Power is conferred to the Commission to amend, suspend and revoke the existing regulatory technical standards in accordance with Article 15 of Regulation (EU) No 1095/2010.

6. Powers are delegated to the Commission to adopt regulatory technical standards specifying the criteria referred to in paragraph 2(b), to be adopted in accordance with Articles 10 to 14 of Regulation EU 1095/2010. ESMA shall submit drafts for those regulatory technical standards to the Commission by --/--/--.

Article 26a

Mechanism to avoid duplicative or conflicting rules

1. The Commission shall be assisted by ESMA in monitoring and preparing reports, at least on an annual basis, to the European Parliament and to the Council on the international application of principles laid down in Articles 24 and 25, in particular with regard to potential duplicative or conflicting requirements on market participants, and recommend possible actions.
2. The Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of the relevant third country:

   (a) are equivalent to the requirements resulting from Articles 24 and 25;
   (b) ensure protection of professional secrecy that is equivalent to that set out in this Regulation;
   (c) are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 42.

3. An implementing act on equivalence as referred to in paragraph 2 shall have the effect that counterparties entering into a transaction subject to this Regulation shall be deemed to have fulfilled the obligation contained in Article 24 and 25 where at least one of the counterparties is established in that third country and the counterparties are in compliance with those legal, supervisory and enforcement arrangements of the relevant third country.

4. The Commission shall, in cooperation with ESMA, monitor the effective implementation by third countries, for which an implementing act on equivalence has been adopted, of the requirements equivalent to those contained in Articles 24 and 25 and regularly report, at least on an annual basis, to the European Parliament and the Council.

Within 30 calendar days of the presentation of the report where the report reveals a significant defect or inconsistency in the application of the equivalent requirements by third country authorities, the Commission may withdraw the recognition as equivalent of the third country legal framework in question. Where an implementing act on equivalence is withdrawn, transactions by counterparties shall automatically be subject again to all requirements contained in Articles 24 and 25 of this Regulation.

Article 27

Register of derivatives subject to the trading obligation

ESMA shall publish and maintain on its website a register specifying, in an exhaustive and unequivocal manner, the derivatives that are subject to the obligation to trade on the venues referred to in Article 24(1), the venues where they are admitted to trading or traded, and the dates from which the obligation takes effect.

TITLE VI

NON-DISCRIMINATORY CLEARING ACCESS FOR FINANCIAL INSTRUMENTS

Article 28

Non-discriminatory access to a CCP

1. Without prejudice to Article 7 of Regulation (EU) No 648/2012, a CCP shall accept to clear financial instruments on a non-discriminatory and transparent basis, including as regards collateral requirements and fees related to access, regardless of the trading venue on which a transaction is executed. This in particular should ensure that a trading venue has the right to non-discriminatory treatment in terms of how contracts traded on that trading venue are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP. A CCP may require that the trading venue comply with the operational and technical requirements established by the CCP, including the risk management requirements. The requirement in this paragraph does not apply to any derivative contract that is already subject to the access obligations under Article 7 of Regulation (EU) No 648/2012.

   A CCP is not bound by this Article if it is connected by close links to a trading venue which has given notification under Article 29(4a).

2. A request to access a CCP by a trading venue shall be formally submitted to a CCP, its relevant competent authority and the competent authority of the trading venue. The request shall specify to which types of financial instruments access is requested.

3. The CCP shall provide a written response to the trading venue within three months in the case of transferable securities and money market instruments, and within six months in the case of exchange traded derivatives, either permitting access, under the condition that a relevant competent authority has granted access pursuant to paragraph 4, or denying access. The CCP may only deny a request for access under the conditions specified in paragraph 7(a). If a CCP denies access it shall provide full reasons in its response and inform its competent authority in writing of the decision. Where the trading venue is established in a different Member State to the CCP, the CCP shall also provide such notification and reasoning to the competent authority of the trading venue. The CCP shall make access possible within three months of providing a positive response to the access request.

4. The competent authority of the CCP or that of the trading venue shall grant a trading venue access to a CCP only where such access:

(a) would not require an interoperability arrangement, in the case of derivatives that are not OTC derivatives pursuant to Article 2(7) of Regulation (EU) No 648/2012; or

(b) would not threaten the smooth and orderly functioning of the markets, in particular due to liquidity fragmentation as defined in Article 2(36), or would not adversely affect systemic risk.

Nothing in subparagraph (a) shall prevent access being granted where the request as it is mentioned in paragraph 1 requires interoperability and the trading venue and all CCPs party to the proposed interoperability arrangement have consented to the arrangement and the risks to which the incumbent CCP is exposed to arising from inter-CCP positions are collateralised at a third party.

Where the need for an interoperability arrangement is, or part of, the reason for denying a request, the trading venue will advise the CCP and inform ESMA which other CCPs have access to the trading venue and ESMA will publish this information so that investment firms may choose to exercise their rights under Article 39 of Directive (MiFID) in respect of those CCPs in order to facilitate alternative access arrangements.

If a competent authority refuses access it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons to the other competent authority, the CCP and the trading venue including the evidence on which the decision is based.

4a. (new) As regards transferable securities and money market instruments, a CCP that has been newly established and authorised as a CCP as defined in Article 2(1) of Regulation (EU) No 648/2012 to clear under Article 17 of Regulation (EU) No 648/2012 or recognised under Article 25 of Regulation (EU) No 648/2012 or authorised under a pre-existing national authorisation regime for a period of less than three years at the point of entry in force of this Regulation [MiFIR] may, before the entry into application of this Regulation [MiFIR], apply to its competent authority for permission to avail itself of transitional arrangements. The competent authority may decide that this Article would not apply to the CCP in respect of transferable securities and money market instruments, for a transitional period of up to three years from the application of this Regulation. Where such a transitional period is approved, the CCP cannot benefit from the access rights under Article 29 or this Article in respect of transferable securities and money market instruments for the duration of this transitional arrangement. The competent authority shall notify members of the college of competent authorities for the CCP and ESMA when a transitional period is approved. ESMA shall publish a list of all notifications that it receives.

Where a CCP which has been approved for the transitional arrangements under this paragraph is connected by close links to one or more trading venues, those trading venues shall not benefit from access rights under Article 29 or this Article in respect of transferable securities and money market instruments for the duration of the transitional arrangement.

A CCP which is authorised during the three year period prior to entry into force, but is formed by a merger or acquisition involving at least one CCP authorised prior to this period, shall not be permitted to apply for the transitional arrangements under this paragraph.

5. A trading venue established in a third country may request access to a CCP established in the Union only if the Commission has adopted a decision in accordance with Article 24(4) relating to that third country.

6.

7. ESMA shall develop draft regulatory technical standards specifying:

(a) the specific conditions under which an access request may be denied by a CCP, including the anticipated volume of transactions, the number and type of users, arrangements for managing operational risk and complexity or other factors creating significant undue risks

(b) the conditions under which access shall be permitted by a CCP, including confidentiality of information provided regarding financial instruments during the development phase, the non-discriminatory and transparent basis as regards clearing fees, collateral requirements and operational requirements regarding margining.

(c) the conditions under which granting access will threaten the smooth and orderly functioning of markets or would adversely affect systemic risk.

(d) (new) the procedure for making a notification under paragraph 4a.

(e) (new) the conditions for non-discriminatory treatment in terms of how contracts traded on that trading venue are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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

Article 29

Non-discriminatory access to a trading venue

1. Without prejudice to Article 8 of Regulation (EU) No 648/2012, a trading venue shall provide trade feeds on a non-discriminatory and transparent basis, including as regards fees related to access, upon request to any CCP authorised or recognised by Regulation (EU) No 648/2012 that wishes to clear transactions in financial instruments that are concluded on that trading venue.. This requirement does not apply to any derivative contract that is already subject to the access obligations under Article 8 of Regulation (EU) No 648/2012.

A trading venue is not bound by this Article if it is connected by close links to a CCP which has given notification that it is availing of the transitional arrangements under Article 28(4a).

2. A request to access a trading venue by a CCP shall be formally submitted to a trading venue, its relevant competent authority and the competent authority of the CCP.

3. The trading venue shall provide a written response to the CCP within three months in the case of transferable securities and money market instruments, and within six months in the case of exchange traded derivatives, either permitting access, under the condition that the relevant competent authority has granted access pursuant to paragraph 4, or denying access. The trading venue may only deny access under the conditions specified under paragraph 6(a). When access is denied the trading venue shall provide full reasons in its response and inform its competent authority in writing of the decision. Where the CCP is established in a different Member State to the trading venue, the trading venue shall also provide such notification and reasoning to the competent authority of the CCP. The trading venue shall make access possible within three months of providing a positive response to the access request.

4. The competent authority of the trading venue or that of the CCP shall grant a CCP access to a trading venue only where such access:

(a) would not require an interoperability arrangement, in the case of derivatives that are not OTC derivatives pursuant to Article 2(7) of Regulation (EU) No 648/2012; or

(b) would not threaten the smooth and orderly functioning of the markets, in particular due to liquidity fragmentation as specified in Article 2 (36) and the trading venue has put in place adequate mechanisms to prevent such fragmentation, or would not adversely affect systemic risk.

Nothing in subparagraph (a) shall prevent access being granted where the request as it is mentioned in paragraph 1 requires interoperability and the trading venue and all CCPs party to the proposed interoperability arrangement have consented to the arrangement and the risks to which the incumbent CCP is exposed to arising from inter-CCP positions are collateralised at a third party.

Where the need for an interoperability arrangement is, or is part of, the reason for denying a request, the trading venue will advise the CCP and inform ESMA which other CCPs have access to the trading venue and ESMA will publish this information so that investment firms may choose to exercise their rights under Article 39 of Directive 9 (MiFID) in respect of those CCPs in order to facilitate alternative access arrangements.

If a competent authority denies access it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons to the other competent authority, the trading venue and the CCP including the evidence on which its decision is based.

4a. (new) As regards exchange traded derivatives, a trading venue which falls below the relevant threshold in the calendar year preceding the entry into application of this Regulation, may, before the entry into application of this Regulation, notify ESMA and its competent authority that it does not wish to be bound by this Article for exchange traded derivatives included within that threshold, for a period of three years from the application of this Regulation. A trading venue which remains below the relevant threshold in every year of that, or any further, three year period may, at the end of the period, notify ESMA and its competent authority that it wishes to continue to not be bound by this Article for further three years. Where notification is given the trading venue cannot benefit from the access rights under Article 28 or this Article for exchange traded derivatives included within the relevant threshold, for the duration of the opt-out.

The relevant threshold for the opt-out is an annual notional amount traded of One Thousand Billion Euros. The notional amount shall be single-counted and shall include all transactions in exchange traded derivatives concluded under the rules of the trading venue.

Where a trading venue is part of a group which is connected by close links the threshold shall be calculated by adding the annual notional amount traded of all the trading venues in the group as a whole that are based in the Union.

Where a trading venue which has made a notification under this paragraph is connected by close links to one or more CCPs, those CCPs shall not benefit from access rights under Article 28 or this Article for exchange traded derivatives within the relevant threshold, for the duration of the opt-out.

5. A CCP established in a third country may request access to a trading venue in the Union subject to that CCP being recognised under Article 25 of Regulation (EU) No 648/2012.

5a.

6. ESMA shall develop draft regulatory technical standards specifying:

(a) the specific conditions under which an access request may be denied by a trading venue, including conditions based on the anticipated volume of transactions, the number of users, arrangements for managing operational risk and complexity or other factors creating significant undue risks,

(b) the conditions under which access is shall be granted, including confidentiality of information provided regarding financial instruments during the development phase and the non-discriminatory and transparent basis as regards fees related to access

(c) the conditions under which granting access will threaten the smooth and orderly functioning of the markets, or would adversely affect systemic risk;

(d)

(e) (new) the procedure for making a notification under paragraph 4a, including further specifications for calculation of the notional amount and the method by which ESMA may verify the calculation of the volumes and approve the opt-out.

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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

Article 30

Non-discriminatory access to and obligation to licence benchmarks

1. Where the value of any financial instrument is calculated by reference to a benchmark, a person with proprietary rights to the benchmark shall ensure that CCPs and trading venues are permitted, for the purposes of trading and clearing, non-discriminatory access to:

(a) relevant price and data feeds and information on the composition, methodology and pricing of that benchmark for the purposes of clearing and trading; and

(b) licences.

A licence including access to information shall be granted on a fair, reasonable and non-discriminatory basis within three months following the request by a CCP or a trading venue.

Access shall be given at a reasonable commercial price taking into account the price at which access to the benchmark is granted or the intellectual property rights are licensed on equivalent terms to another CCP, trading venues or any related persons for the purposes of clearing and trading . Different prices can be charged to different CCPs, trading venues or any related persons only where objectively justified having regard to reasonable commercial grounds such as the quantity, scope or field of use demanded.

1a (new) For benchmarks that are existing at the entry into force of the Regulation, there shall be a three year transitional period where a request for a licence may be rejected. This period shall start at the entry into force of this Regulation.

1b (new) Where a new benchmark is developed following the entry into force of this Regulation and there are objective reasons for delaying access, a request for a licence may be rejected for up to three years after a financial instrument referencing that benchmark commenced trading or was admitted to trading. Where a person with proprietary rights to a new benchmark owns an existing benchmark, it shall establish that compared to any such existing benchmark the new benchmark meets the cumulative criteria:

a) the new benchmark is not a mere copy or adaptation off any such existing benchmark and the methodology, including the underlying data, of the new benchmark is meaningfully different from any such existing benchmark;and

b) the new benchmark is not a substitute for any such existing benchmark.

2. No CCP, trading venue or related entity may enter into an agreement with any provider of a benchmark the effect of which would be either:

(a) to prevent any other CCP or trading venue from obtaining access to such information or rights as referred to in paragraph 1; or

(b) to prevent any other CCP or trading venue from obtaining access to such a licence, as referred to in paragraph 1.

3. ESMA shall develop draft regulatory technical standards specifying:

(a) the information through licensing to be made available under paragraph 1(a) for the sole use of the CCP or trading venue;

(b) other conditions under which access is granted, including confidentiality of information provided.

(d) the standards guiding how a benchmark may be proven to be new in accordance with paragraphs 1b(a) and (b). .

ESMA shall submit those draft regulatory technical standards to the Commission by [XXX].

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

TITLE VII

SUPERVISORY MEASURES ON PRODUCT INTERVENTION AND POSITIONS

Chapter 1

Product Intervention

Article 31

ESMA powers to temporarily intervene

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may where the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:
   (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or
   (b) a type of financial activity or practice.

   A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by ESMA.

2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled:
   (a) the proposed action addresses a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system in the Union;
   (b) regulatory requirements under Union legislation that are applicable to the relevant financial instrument or activity do not address the threat;
   (c) a competent authority or competent authorities have not taken actions to address the threat or the actions that have been taken do not adequately address the threat.

3. When taking action under this Article, ESMA shall ensure that the action:

(a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action;
(b) does not create a risk of regulatory arbitrage;
(c) has been taken after consultation with the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation 1234/2007/EC, in case the measure relates to agricultural commodities derivatives.

Where a competent authority or competent authorities have taken a measure under Article 32, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 33.

4. Before deciding to take any action under this Article, ESMA shall notify competent authorities of the action it proposes.

5. ESMA shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect.

6. ESMA shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three month period it shall expire.

7. Action adopted by ESMA under this Article shall prevail over any previous action taken by a competent authority.

8. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by ESMA in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a).

These criteria and factors shall include:

(a) the degree of complexity of a financial instrument and the relation to the type of client to whom it is marketed and sold;
(b) the size or the notional value of an issuance of financial instruments;
(c) the degree of innovation of a financial instrument, an activity or a practice;
(d) the leverage a product or practice provides.

Article 32

Product intervention by competent authorities

1. A competent authority may prohibit or restrict in or from that Member State:

(a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or
(b) a type of financial activity or practice.

2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that:

(a) a financial instrument or activity or practice gives rise to significant investor protection concerns, or poses a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of whole or part of the financial system;

(b) existing regulatory requirements under Union legislation applicable to the financial instrument or activity or practice do not sufficiently address the risks referred to in subparagraph (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements;

(c) the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument or activity;

(d) it has properly consulted with competent authorities in other Member States that may be significantly affected by the action;

(e) the action does not have a discriminatory effect on services or activities provided from another Member State;

(f) it has properly consulted with public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation 1234/2007/EC, in case a financial instrument or activity or practice poses a serious threat to the orderly functioning and integrity of the physical agricultural market.

A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by the competent authority.

3. The competent authority shall not take action under this Article unless, not less than one month before the measure is intended to take effect, it has notified all other competent authorities and ESMA in writing the details of:

(a) the financial instrument or activity or practice to which the proposed action relates;

(b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and

(c) the evidence upon which it has based its decision and upon which is satisfied that each of the conditions in paragraph 2 are met.

In exceptional cases where the competent authority deems it necessary to take urgent action under this Article in order to prevent detriment arising from the instruments, practices or activities mentioned in paragraph (a), the competent authority can act with no less than [24 hours] written notice, before the measure is intended to take effect, to all other competent authorities and ESMA provided that all of the criteria in this Article are met and that, in addition, it is clearly established that a one month notification period would not adequately address the specific concern or threat.

4. The competent authority shall publish on its website notice of any decision to impose any prohibition or restriction referred to in paragraph 1. The notice shall specify details of the prohibition or restriction, a time after the publication of the notice from which the measures will take effect and the evidence upon which it is satisfied each of the conditions in paragraph 2 are met. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice.

5. The competent authority shall revoke a prohibition or restriction if the conditions in paragraph 2 no longer apply.

6. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a).

These criteria and factors shall include:

(a) the degree of complexity of a financial instrument and the relation to the type of client to whom it is marketed and sold;

(b) the size or the notional value of an issuance of financial instruments;

(c) the degree of innovation of a financial instrument, an activity or a practice;

(d) the leverage a product or practice provides.

Article 33

Coordination by ESMA

1. ESMA shall perform a facilitation and coordination role in relation to action taken by competent authorities under Article 32. In particular ESMA shall ensure that action taken by a competent authority is justified and proportionate and that, where appropriate, a consistent approach is taken by competent authorities.

2. After receiving notification under Article 32 of any action that is to be imposed under that Article, ESMA shall adopt an opinion on whether the prohibition or restriction is justified and proportionate. If ESMA considers that the taking of a measure by other competent authorities is necessary to address the risk, it shall also state this in the opinion. The opinion shall be published on ESMA's website.

3. Where a competent authority proposes to take, or takes, action contrary to an ESMA opinion under paragraph 2 or declines to take action contrary to an ESMA opinion under that paragraph, it shall immediately publish on its website a notice fully explaining its reasons for doing so.

Chapter 2

Positions

Article 34

Coordination of national position management measures and position limits by ESMA

1. ESMA shall perform a facilitation and coordination role in relation to measures taken by competent authorities pursuant to Article 71(1)(o) or (p) of Directive [new MiFID]. In particular ESMA shall ensure that a consistent approach is taken by competent authorities with regard to when these powers are exercised, the nature and scope of the measures imposed, and the duration and follow-up of any measures.

2. After receiving notification of any measure under Article 83(5) of Directive [new MiFID], ESMA shall record the measure and the reasons thereof. In relation to measures taken pursuant to Article 71(1)(o) or (p) of Directive [new MiFID], it shall maintain and publish on its website a database with summaries of the measures in force including details of the person or class of persons concerned, the applicable financial instruments, any quantitative measures or thresholds such as the maximum size of a position persons can enter into before a limit is reached, any exemptions thereto, and the reasons thereof.

Article 35

Position management powers of ESMA

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA shall, where all conditions in paragraph 2 are satisfied, adopt a decision containing one of the following measures:

   (a) request from any person information regarding the size and purpose of a position or exposure entered into via a derivative;
   (b) after analysing the information obtained in accordance with subparagraph (a), require any such person to reduce the size of the position or exposure in accordance with the delegated act mentioned in paragraph 10(b);
   (c) as a last resort, limit the ability of a person from entering into a commodity derivative.

2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled:

   (a) the measures listed in paragraph 1 address a threat to the stability of the whole or part of the financial system in the Union or to the orderly functioning and integrity of financial markets or commodities markets;

(b) a competent authority or competent authorities have not taken measures to address the threat or the measures taken do not sufficiently address the threat;

ESMA shall perform its assessment of the fulfilment of the conditions mentioned in subparagraphs (a) and (b) in accordance with the criteria and factors specified by the delegated act mentioned in paragraph 10(a).

3. When taking measures referred to in paragraph 1 ESMA shall ensure that the measure:

(a) does significantly address the threat to the orderly functioning and integrity of financial markets or of delivery arrangements for physical commodities, or to the stability of the whole or part of the financial system in the Union or significantly improve the ability of competent authorities to monitor the threat as measured in accordance with the criteria and factors specified by the delegated act mentioned in paragraph 10(a);

(b) does not create a risk of regulatory arbitrage as measured in accordance with paragraph 10(c);

(c) does not have any of the following detrimental effects on the efficiency of financial markets: reducing liquidity in those markets, restraining the conditions for reducing risks directly related to the commercial activity of a non-financial counterparty, or creating uncertainty for market participants;

(d) has been taken after consultation with the Agency for the Cooperation of Energy Regulators established under Regulation (EC) No 713/2009, in case the measure relates to wholesale energy products;

(e) has been taken after consultation with the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation 1234/2007/EC, in case the measure relates to agricultural commodity derivatives.

4. Before deciding to undertake or renew any measure referred to in paragraph 1, ESMA shall notify relevant competent authorities of the measure it proposes. In case of a request under subparagraph (a) or (b) of paragraph 1 the notification shall include the identity of the person or persons to whom it was addressed and the details and reasons thereof. In case of a measure under subparagraph (c) of paragraph 1 the notification shall include details of the person or class of persons concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum size of a position the person or class of persons in question can enter into, and the reasons thereof.

5. The notification shall be made not less than 24 hours before the measure is intended to take effect or to be renewed. In exceptional circumstances, ESMA may make the notification less than 24 hours before the measure is intended to take effect where it is not possible to give 24 hours notice.

6. ESMA shall publish on its website notice of any decision to impose or renew any measure referred to in subparagraph (c) of paragraph 1. The notice shall include details of the person or class of persons concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum size of a position the person or class of persons in question can enter into, and the reasons thereof.

7. A measure shall take effect when the notice is published or at a time specified in the notice that is after its publication and shall only apply in relation to a transaction entered into after the measure takes effect.

8. ESMA shall review its measures referred to in subparagraph (c) of paragraph 1 at appropriate intervals and at least every three months. If a measure is not renewed after that three month period, it shall automatically expire. Paragraphs 2 to 8 shall also apply to a renewal of measures.

9. A measure adopted by ESMA under this Article shall prevail over any previous measure taken by a competent authority under Article 71(1)(o) or (p) of Directive [new MiFID].

10. The Commission shall adopt in accordance with Article 41 delegated acts specifying criteria and factors to determine:

a) the existence of a threat as referred to in paragraph 2(a) to the stability of the whole or part of the financial system in the Union or to the orderly functioning and integrity of financial markets or commodity markets including in relation to delivery arrangements for physical commodities, including inter alia: the degree to which positions are used to hedge positions in physical commodities or commodity contracts and the degree to which prices in underlying markets are set by reference to the prices of commodity derivatives;

b) the appropriate reduction of a position or exposure entered into via a derivative mentioned in paragraph (1)(b) of this Article;

c) the situations where a risk of regulatory arbitrage as mentioned in paragraph 3(b) of this Article could arise.

Article 35

Position management powers of ESMA

Deleted

TITLE VIII

PROVISION OF SERVICES WITHOUT A BRANCH BY THIRD COUNTRY FIRMS

Article 36

General provisions

Deleted

Article 37

Equivalence decision

Deleted

Article 38

Register

Deleted

Article 39

Withdrawal of registration

Deleted

TITLE IX

DELEGATED AND IMPLEMENTING ACTS

Chapter 1

Delegated Acts

Article 40
Delegated acts

The Commission shall be empowered to adopt delegated acts in accordance with Article 41 concerning Articles 2(3), –12(2), 14(5), 14(6), 16(3), 18(2–31(8), 32(6) and 35(10).

Article 41
Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The delegation of power shall be conferred for an indeterminate period of time from the date referred to in Article 41 paragraph 1.

3. The delegation of powers may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.

Chapter 2
Implementing acts

Article 42
Committee procedure

1. For the adoption of implementing acts under Articles 24 and 26, the Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC[1]. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011[2].

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

[1] OJ L 191, 13.7.2001, p. 45.
[2] OJ L 55, 28.2.2011, p. 13.

TITLE X

FINAL PROVISIONS

Article 43

Reports and review

1. Before [2 years] following application of MiFIR as specified in Article 46, the Commission after consulting ESMA shall present a report to the European Parliament and to the Council on the impact in practice of the transparency obligations established pursuant to Articles 3 to 12, in particular on the impact and effectiveness of the volume cap mechanism described in Article 4a and how any appropriate sanctioning mechanism for breaches of the volume cap might operate, and on the application and continued appropriateness of the waivers to pre-trade transparency obligations established pursuant to Articles 4(2) to (3) and 8(2) to 8(5).

1a The report referred to in paragraph 1 above shall include the impact on European equity markets of the use of the waiver under Article 4 (1)(a) and 4(1)(b)(i), with particular reference to:

a. the level and trend of non-lit order book trading within the European Union since the introduction of [MiFIR];
b. the impact on the pre-trade transparent quoted spreads;
c. the impact on the depth of liquidity on lit order books;
d. the impact on competition and on investors within the Union;
e. take due account of developments at international level and discussions with third countries and international organisations.

1b If the report concludes that the use of the waiver under Article 4(1)(a) and 4(1)(b)(i) is harmful to price formation, the Commission shall make proposals, including amendments to this Regulation, regarding the use of these waivers. Such proposals shall include an impact assessment of the proposed amendments, and shall take into account the objectives of this Regulation and the effects on market disruption and competition, and potential impacts on investors in the Union.

2. Before [2 years] following application of MiFIR as specified in Article 46, the Commission, after consulting ESMA shall present a report to the Council and the Parliament on the functioning of Article 23, including whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enable to monitor the activities of investment firms in accordance with Article23(1). The Commission may make any appropriate proposals, including providing for transactions to be reported to a system appointed by ESMA instead of to competent authorities, which allows relevant competent authorities to access all the information reported pursuant to this Article.

3. Before [2 years] following application of MiFIR as specified in Article 46, the Commission after consulting ESMA shall present a report to the European Parliament and to the Council on the progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms pursuant to Articles 22 and 24.

4. (new) Before [2 years] following application of MiFIR as specified in Article 46, the Commission after consulting ESMA shall present a report to the European Parliament and to the Council on the development in prices for pre and post trade transparency data from regulated markets, MTFs, OTFs, CTPs and APAs.

5. (new) Before 2 years following application of MiFIR as specified in Article 46, the Commission, after consulting ESMA, shall present a report to the Council and Parliament reviewing the interoperability provisions in Article 29 and Article 8 of Regulation (EU) No 648/2012.

6. (new) Before 2 years following application of MiFIR as specified in Article 46 the Commission, after consulting ESMA, shall present a report to the Council and Parliament on the application of Articles 28 , 29 and 30 and of Articles 7 and 8 of Regulation (EU) No 648/2012.

6a. (new) Before 2 years following application of MiFIR as specified in Article 46, the Commission, after consulting ESMA, shall present a report to the Council and the Parliament on the impact of Article 28 and 29 of this Regulation on newly established CCPs as referred to in Article 28(4a) and trading venues connected to those CCPs by close links and whether the transitional arrangement specified in Article 28(4a) should be extended, weighing the possible benefits to consumers of improving competition and the degree of choice available to market participants against the possible disproportionate effect of these provisions on newer CCPs and the constraints of local market participants in accessing global CCPs and the smooth functioning of the market. Subject to the conclusions of this report, the Commission may adopt a delegated act in accordance with Article 41 to extend the transitional period in accordance with Article 28(4a) by a maximum of three years.

7. (new) Before five years following application of MiFIR as specified in Article 46 the Commission, after consulting ESMA, shall present a report to the Council and Parliament on whether the threshold specified in Article 29(4a)(new) remains appropriate and whether the opt out mechanism in respect of exchange traded derivatives should remain available.

8. (new) By six months before the date of application of this Regulation as specified in Article 46, the Commission, based on a risk assessment carried out by ESMA in consultation with the ESRB, shall present a report to the Council and the Parliament assessing the need to temporarily exclude exchange traded derivatives from the scope of Article 28 and 29. This report shall take into account risks, if any, resulting from open access provisions regarding exchange traded derivatives to the stability and orderly functioning of financial markets. Subject to the conclusions of this report, the Commission may adopt a delegated act in accordance with Article 41 to exclude exchange traded derivatives from the scope of Articles 28 and 29 for up to three years from the application of this Regulation.

Article 44

Amendment of EMIR

The following subparagraph shall be added to Article 67(2) of Regulation (EU) No 648/2012: "A trade repository shall transmit data to competent authorities in accordance with the requirements under Article 23 of Regulation [MiFIR]."

Article 45

Transitional provision

Deleted

Article 46

Entry into force and application

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

This Regulation shall apply thirty two months after the entry into force of this Regulation provided that the delegated acts referred to in this Regulation are adopted by the Commission and the Member States, if required, except for :

a) Articles 2(3), 4(3), 4a(7), 6(2), 8(5), 10(4), 11(2), 12(2), 13(7), 14(5), 14(6), 16(3), 18(2,), 18(3), 19(3), 20(4), 20b(3), 20c(3), 22(3), 23(8), 23a(2) 24(5), 26, 26a, 28(7), 29(6), 30(3), 31, 32 and 33, which shall apply immediately following the entry into force of this Regulation.

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*