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| from: | General Secretariat |
| to: | Permanent Representatives Committee/Council |
| 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<br>- Outcome of the European Parliament's first reading<br>(Strasbourg, 25 to 26 October 2012) |

## I. INTRODUCTION

The Rapporteur, Mr Markus FERBER (EPP - DE), presented a report consisting of one amendment (amendment 1) on behalf of the Committee on Economic and Monetary Affairs. In addition:

- the EPP, S&D and Greens/EFA political groups jointly submitted one amendment (amendment 2);
- the EUL/NGL political group submitted one amendment (amendment 3);
- the EPP, S&D, ALDE, ECR and Greens/EFA political groups jointly submitted five amendments (amendments 4-5 and 9-11); and
- the EPP, S&D, ALDE and Greens/EFA political groups jointly submitted three amendments (amendments 6-8).

## II. DEBATE

The debate, which took place on 25 October 2012, was a joint debate which covered two Ordinary Legislative Procedure proposals:

- the 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 [COD 2011/0296] - *see section III below for the voting results*; and
- the proposal for a directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (recast) [COD 2011/0298] - *see doc. 15617/12 for the voting results.*

The Rapporteur, Mr Markus FERBER (EPP - DE) opened the debate, which took place on 25 October 2012 and:

- argued that all trade in securities should fall within the scope of MiFID, including OTC products. A new category had therefore been created subject to many conditions, the so-called Organised Trading Facilities (OTF), where non-equities should be traded;
- noted that MiFID had not previously regulated algorithmic trading or High Frequency Trading (HFT). This is a very dangerous area and open to manipulation. Stringent rules are therefore required including minimum holding periods, trading suspensions, tests and examinations of algorithms, the introduction of a so-called tick-size regime, a minimum price level and a proper fee structure;
- stressed the need to limit the speculative element in commodities markets and to avoid adopting poor regulation which would prevent third world populations from purchasing food. A two-pronged approach had therefore been taken to prevent speculation but to avoid damaging the real economy. There should be position limits with strict upper limits on the number of contracts or positions. There should be a position-check system to ensure that those who can show that they really need the product do not also suddenly begin to start speculating; and

- emphasised, with regard to investor protection, the need to identify the needs of specific purchasing groups. Not every small investor needs to have access to every sort of highly complex product. Suitable products should be defined for different target groups. Product checks should be performed. Telephone calls should be recorded. Advice must be suitable. There should be disclosure requirements. However, subsidiarity should be respected when it comes to commissions, because Member States should ensure that national conditions are respected.

Commissioner Barnier:

- observed that the current proposals were to some extent the equivalent for the financial markets of what the Capital Requirements package is for the banking sector. The combined effect will be to ensure transparency, responsibility and security for investors and savers across the whole financial markets sector - without leaving any scope for regulatory arbitrage within the single market or with regard to other G20 partners;
- stated that the aim is that all business, whether multilateral or bilateral, should be transacted in a transparent environment;
- noted that the Parliament had decided to introduce a definition of OTC trading as well as an obligation for small-scale trades to be executed on transparent platforms. The Commission is ready to study this approach. However, the possible suppression of the OTF category for equity trading should be analysed with considerable care. Any limitation of multilateral trading to regulated markets and MTF platforms would signify the renunciation of reforms to the current situation which allows, on certain platforms, high-frequency traders to have cross orders with those of investors who cannot object. Careful reflection is required before any limitation is placed on the scope of OTFs;

- stated that encouraging migration of business onto multilateral and transparent trading platforms entails better regulation of HFT. The Commission and the Parliament share the same objectives in this area. He noted that the proposal provides a chance for a thorough review of the rules on HFT. He accepted that HFT can increase liquidity, but also noted that it can be a source of systemic risk for markets. There has been a vigorous effort to monitor and reduce this type of risk in the banking sector. The same level of ambition is required in the market sector. The Commission has therefore proposed a comprehensive set of precise rules to regulate and render responsible these actors. They will have to be authorised and supervised by the competent authorities. They will also have to undertake to provide liquidity to the markets. The Rapporteur deserves thanks for having proposed to maintain these points. The Commission continues to pursue this debate vigorously outside the EU in order to secure a level regulatory playing field at the global level;
- argued that derivatives markets for commodities are different from other markets. They have an impact on the daily lives of all consumers and, in some developing countries, the basic food security of a large part of the population. Speculation in commodities and its possible impact on food security is absolutely unacceptable. The Commission supports the Parliament's proposals to strengthen the rulebook on position limits whilst leaving it open to commercial enterprises to use these markets when they really are seeking to cover their positions;
- welcomed the Parliament's support for the Commission's proposal regarding the introduction of a European regime for the provision of services by third country enterprises. He was convinced that this regime is the best way to ensure effective regulation of international markets and to avoid all risk of regulatory arbitrage. This is very important in the context of regulatory convergence both at the level of both the G20 and the Financial Stability Board;
- stressed the importance of not leaving open the possibility for some parties to continue to negotiate in total obscurity. The level of transparency should be same, regardless of the technology being used and the type of investor;

- argued that the simple communication of intermediaries' commissions would not ensure an adequate level of investor protection or an adequate level of independence. The Commission's proposal to prohibit the receipt of commissions for independent advice and for portfolio management would ensure more security and independence. That is the only way to attract bona fide investors and healthy investments. There should be no change to the range of instruments which can be considered as non-complex. To expand this too far would be to increase the risk that unsuitable products might be sold to investors; and
- stated that the creation of healthy competition in the post-market environment is necessary to create a truly single financial market and to prevent an excessive concentration of risk in monopolistic market infrastructures.

Speaking on behalf of the Committee on Industry, Research and Energy, Mr Holger KRAHMER (ALDE - DE) stated that there is a risk that small operators might be treated in the same way as large banks due to an unclear scope and poor definitions in the Commission's proposal. They should be treated differently. Small operators do not get involved in speculation.

Speaking on behalf of the EPP political group, Mr Theodor STOLOJAN (EPP - RO):

- noted that the Committee on Economic and Monetary Affairs had adopted both its reports with a large majority. He expected similarly large majorities at the plenary; and
- recalled a recent case where Romanian investors had lost considerable sums due to a poor regulatory framework.

Speaking on behalf of the S&D political group, Mr Robert GOEBBELS (S&D - LU):

- stressed the importance of consumer protection and called for total transparency regarding prices and commissions. Subsidiarity will allow Member States to go as far as banning retrocessions. A revision clause will force the Commission to monitor developments and, possibly, propose corrections;

- stressed the need to act against speculation in commodities and particularly in food; and
- questioned the value produced by HFT. Speed does not imply liquidity. Placing curbs on this form of speculation will help long-term investors and penalise short-term profit hunters. Financial markets are necessary, but they must serve the real economy.

Speaking on behalf of the ALDE political group, Mr Olle SCHMIDT (ALDE - SE):

- emphasised the need to control HFT better. This would boost competition;
- warned that prohibiting commissions could be difficult in practice. A blanket ban might be needed. However, there is a danger that lower revenues might lead to lower quality of service; and
- argued that transparency and fairness are vital in order to enhance consumer protection.

Speaking on behalf of the Greens/EFA political group, Mr Sven GIEGOLD (Greens/EFA - DE):

- stated the Economic and Monetary Affairs Committee had gone much further on high-frequency trading than the Commission had originally proposed;
- noted that the Committee had also tightened up position limits for commodity trading, but argued that further changes were required in order to close loopholes. He hoped these changes would be introduced by the plenary and during the trilogue stage;
- argued that more work needed to be done on consumer protection elements. Whilst welcoming the new possibility to ban certain products, there was as yet no real change in the area of commission-driven advice. The fact that commission is not oriented to the interests of consumers has led to cases in Germany and elsewhere in the EU of consumers losing money. He referred to open property funds. The Committee's compromise would unfortunately not greatly help consumers in, for example, France, Italy, Spain and Germany. Further orientation of commission is required. Appealing to subsidiarity is a little too easy - stronger rules are needed.

Speaking on behalf of the ECR political group, Mrs Kay SWINBURNE (ECR - UK):

- welcomed the strong cross-party support within the Parliament for a text that facilitates and supports investment in the corporate bond markets and government bond markets;
- stressed the increased importance of bond markets now that higher capital requirements are forcing businesses to reduce their reliance on bank funding. The market structure in Europe needs to support businesses' needs. New transparency requirements need to be properly tailored to encourage investment. The Parliament's text does this and should inform the ongoing discussions within the Council;
- expressed her disappointment that it had not yet been possible to reach an agreement to guarantee the highest possible level of investor protection for all consumers in the EU. Whilst Member States will be allowed to ban all commissions and inducements, it was disappointing that the S&D political group and others had chosen to protect bank business models rather than end-consumers. She noted that the United Kingdom and the Netherlands were already well on the way to implementing a full ban. She hoped that other Member States would soon follow;
- stated that there is a common misconception that MiFID is about HFT and food speculation. However, a lot of time had also been devoted to investor protection and G20 commitments;
- recalled the fact that the Economic and Monetary Affairs Committee had included requirements about minimum tick sizes, circuit breakers, algorithm testing and audit trails – all of which are necessary scrutiny measures which do not hinder technological innovation, but which provide safeguards and should therefore reassure retail and long-term investors that they are not being subjected to unfair practices in the market place; and
- called for support for the introduction of a requirement to synchronise all business clocks to one standard. This is vital if there is to be a properly integrated surveillance system for regulators and market participants in a consolidated tape.

Speaking on behalf of the EUL/NGL political group, Mr Jürgen KLUTE (EUL/NGL - DE):

- supported the Commission's position on HFT; and
- agreed with Mr Giegold that further work is needed on commissions.

Speaking on behalf of the EFD political group, Mr Roger HELMER (EFD - UK):

- noted that the United Kingdom hosts 36% of the EU's wholesale finance market, dominates the EU's OTC trading and plays a central role in foreign exchange and interbank activity. He criticised the two proposals as an assault on the United Kingdom's current position. Such detailed micro-regulation can force up costs and make OTC products less attractive. He further alleged that European regulators understand this perfectly well and that this is indeed their motivation;
- argued that forcing trading back onto exchanges will allow the EU to assert its control and restrict both criticism and independence;
- noted that the MiFID report claimed that it wanted to close loopholes. Its impact would in reality be the opposite. It would force traders to engage in an unceasing arms race with regulators;
- argued that trade will move to wherever it is most free. The ineptitude and parochialism which lies at the root of this regulatory approach can only result in euro-sclerosis and euro-decline; and
- asserted that the two reports had been deliberately engineered by Paris, Frankfurt and Berlin because they resent the success of the City of London.

Mr Hans-Peter MARTIN (NA - AT):

- stated that the City of London's interests are not paramount;
- welcomed the provisions on OTC products, but argued that there are other points which the Committee's reports had not sufficiently addressed; and
- questioned why the S&D political group had caved in on the issue of commissions. The incentive system is the root of the problem. Rewarding bad conduct leads to problems.

Mrs Ildikó GÁLL-PELCZ (EPP - HU):

- stressed the need for appropriate cross-border cooperation and welcomed the prospect of an enhanced role for ESMA;
- stated that HFT might create risks for market liquidity, particularly during crises. She supported amendments to address this;
- recalled that SMEs had found it difficult to obtain funding in the past. There should be trading venues specific to issuances for SMEs; and
- argued that regulation should serve the wider interest rather than the interest of market operators.

Mrs Pervenche BERÈS (S&D - FR) welcomed the prospect of ESMA being able to prohibit the sale of certain financial products which had been shown to pose a threat to the economy.

Mrs Sharon BOWLES (ALDE - UK):

- noted the publicity accorded to commodity derivatives and food speculation. Position management had been too flexible. Fixed position limits are not problematic in principle, so long as they can be tightened in emergencies if cornering takes places or so long as they can be varied if a major market position has to be rescued;
- stated that it will become possible in the future to have automated real-time transaction mapping, enabling much better interrogation of data without overburdening resources. This would also enable comprehensive and faster monitoring in areas such as food speculation. She therefore supports openness and FRAND licensing in standards and technology, and regrets that more had not been done in the Committee's report; and
- welcomed the work done on consumer protection, clamping down on inducements for giving advice to investors. Consumers must be sure they are getting advice which is best for them and that they are not being encouraged to take decisions purely for the adviser's benefit. Ultimately a total ban has to be the way forward.

Mr Francisco SOSA WAGNER (NA - ES):

- stressed the importance of market transparency; and
- stated that investors must understand the information they receive so that they can give informed consent to the risks which they accept.

Mr Burkhard BALZ (EPP - DE):

- welcomed the prospect of reduced systemic risk, enhanced consumer protection and greater legal certainty;
- recognised the diversity in incentivisation practice which exists across the EU. The aim should be to improve openness and transparency, but not necessarily to prohibit; and
- stressed the role of education and training in protecting consumers.

Mrs Arlene McCARTHY (S&D - UK):

- recalled that there had been cases across Europe of consumers being missold investments because the commission inducement system created a bias towards products paying the highest level of commission. Studies had shown that disclosure and transparency are not enough, and that consumers do not trust the independence of advice if inducements are paid to push a particular product. A ban is the only way to remove this conflict of interest and to give strong protection to the investor. Many Member States - the Netherlands, Finland, Denmark, Sweden and Belgium - have recognised this and are in the process of introducing a ban. A merely optional ban will not protect consumers, but is instead encouraging the current Conservative government in the United Kingdom to scrap the ban introduced by the previous Labour administration; and
- regarding excessive commodity speculation, called for the closing of the loophole whereby, during the famine in the Horn of Africa, the World Food Programme paid €50,000,000 of UN aid to one large commodity trader, Glencore, for wheat it ordered to feed the poorest and hungriest population in the world. This was immoral and unjust. She called for support for amendment 3 in this regard.

Mr Thomas MANN (EPP - DE):

- stressed the need for investors to receive better protection and correct information;
- called for stricter rules for HFT. 500 milliseconds is the right level; and
- welcomed the compromise reached on position limits and on the maximum limit for risky financial contracts. Speculation is harmful.

Mr Werner LANGEN (EPP - DE):

- welcomed the compromise reached in the Committee on Economic and Monetary Affairs;
- supported the compromise on position limits;
- called for Member States to be allowed some flexibility regarding commissions; and
- supported speed limits for HFT to prevent powerful computers and computer systems manipulating the financial market even more than has been the case to date.

Mr Hermann WINKLER (EPP - DE):

- emphasised the enormous scale of the economic threat posed by HFT, questioned its economic benefits and called for the fullest possible controls to be placed on it. The solutions proposed by the Economic and Monetary Affairs Committee go some way to reduce this threat;
- called for consumers to receive sufficient and transparent information on whether they are receiving commission-related advice. Consumers should be fully informed on costs and volatility of products. All products, old and new, should be annually reviewed to ensure that they are really in the interests of consumers; and
- opposed EU-wide rules on an outright ban on commission. That decision should be left to the Member States.

Mrs Inês ZUBER (EUL/NGL - PT) called for an outright ban on derivatives trading and tax havens. Anything short of this would be just a drop in the ocean.

Commissioner BARNIER once more took the floor and:

- rejected Mrs Zuber's argument that the EU's response was limited to a set of half-measures;
- outlined several ways in which the current proposals will respond to the needs of the real economy and of SMEs in particular. Specific measures are needed to provide SMEs with access to the financial markets;
- supported the inclusion of a review clause. The financial markets are so efficient and imaginative in using not only technology but also loopholes in global regulation that they can outpace democratic institutions. Review clauses are needed to address this;

- noted the exponential growth in the financialisation of trading in agricultural commodities – and the concomitant increase in market volatility in these commodities as well as many additional speculation risks. He therefore supported the Committee's amendments to improve the Commission's proposal on this point;
- opposed calls for an outright ban on HFT. It can be useful in forming prices, but it must be properly framed and regulated. Abuses must be prevented. The May 2010 crash in the United States has not yet been fully understood. It remained to be seen whether a review clause would be enough;
- regarding the amendments to introduce stricter limits on positions, noted that IOSCO had just issued a report stating that this was the right direction to take. He would like the rest of the G20 - and the United States in particular - to take the same approach;
- regarding commissions, called for retrocessions to be regulated and, if necessary, banned. Prohibitions should be introduced when it comes to independent advice and portfolio management. Such bans could entail significant changes in some markets. The Commission proposal therefore leaves open the possibility for investors to take non-independent advice if they so wish. He recalled that the Commission's proposal on PRIPs increases and simplifies the information which individual investors are entitled to receive;
- noted Mr Helmer's remarks concerning the importance of the City of London. Having such an important financial centre as London is an opportunity not only for the United Kingdom but for the whole of the EU. He could not see how MiFID, which reinforces transparency and promotes healthy markets, could be considered as an attack on the City. The leaders of the City and the British government have supported the Commission's efforts to promote a single market in financial services, transparency and healthy markets. He recalled that Adam Smith had written that there can be no market without rules and morality. The Commission is in the process of drawing the right lessons from the crisis and re-establishing both rules and morality; and
- agreed with Mr Balz on the importance of education and training consumers.

The Rapporteur once more took the floor and stated that trading should add value to the economy. It should not be an end in itself.

## III. VOTE

On 26 October 2012, the Parliament voted to adopt ten amendments (amendments 1-2 and 4-11) to the Commission's proposal which is set out, as thus amended, in the annex to this current document.

Rather than vote on the draft legislative resolution, however, the Parliament decided to refer the matter back to the Committee.

**ANNEX**
**(26.10.2012)**

**P7_TA-PROV(2012)0407**

# Markets in financial instruments and amendment of the EMIR Regulation on OTC derivatives, central counterparties and trade repositories ***I

**Amendments adopted by the European Parliament on 26 October 2012 on the 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 (COM(2011)0652 – C7-0359/2011 – 2011/0296(COD))**[1]

**(Ordinary legislative procedure: first reading)**

**[Amendment No 1 unless otherwise indicated]**

AMENDMENTS BY THE EUROPEAN PARLIAMENT*

to the Commission proposal

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REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on markets in financial instruments and amending ***Regulation (EU) No 648/2012*** 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[2],

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

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1 The matter was referred back to the committee responsible for reconsideration pursuant to Rule 57(2), second subparagraph (A7-0303/2012).

* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol ▌.

2. OJ C 143, 22.5.2012, p. 74.

3 Position of the European Parliament of 26 October 2012.

Whereas:

(1) The ***recent*** financial crisis has exposed weaknesses in the transparency of financial markets ***which can contribute to harmful socio-economic effects***. Strengthening transparency is one of the shared principles to strengthen the financial system as confirmed by the G-20 Leaders' Statement 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 on markets in financial instruments[1].

(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 regulations. 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 internal 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 of the Treaty on the Functioning of the European Union (TFEU), as interpreted in accordance with the consistent case-law of the Court of Justice of the European Union.

(4) Directive 2004/39/EC 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 need 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, to reduce regulatory complexity and firms' compliance costs, especially for financial institutions operating on a cross-border basis, and to contribute to the elimination of distortions of

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

competition. The adoption of a regulation ensuring direct applicability is best suited to accomplish those 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 multilateral trading facility (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. 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 ***and should be able to operate other trading protocols including systems whereby users are able to request quotes from multiple providers***. 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, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this Regulation and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. ***The definitions require that interests be brought together in such a way as to result in a contract which occurs where execution takes place under the system's rules or by means of the system's protocols or internal operating procedures.*** The term 'buying and selling interests' is to be understood in a broad sense and includes orders, quotes and indications of interest. ***One of the important requirements concerns the obligation*** 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 ▌ rules ***that*** leave the ***regulated market or the market operator or*** investment firm operating an MTF with no discretion as to how interests may interact. ▌

(7) In order to make European markets more transparent and ***efficient*** to level the playing field between various venues offering ***multilateral*** trading services it is necessary to introduce a new category of organised trading facility (OTF) ***for bonds, structured finance products, emissions allowances and derivatives and to ensure that it is appropriately regulated and applies non-discriminatory rules regarding access to the facility***. 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 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 ***which should be*** eligible for trading clearing-eligible and sufficiently liquid derivatives ***but which do not have the characteristics of the existing categories of trading venue. By contrast, it*** should 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, or electronic post-trade confirmation services.

(8) This new category of OTF will complement the existing types of trading venues. While regulated markets and MTFs are characterised by non-discretionary execution of transactions, the operator of an OTF should have discretion over how a transaction is to be executed.

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. However, because an OTF ***although only accessible to its clients*** constitutes a genuine trading platform, the platform operator should be neutral. Therefore, the operator of an OTF should ***be subject to requirements in relation to the sound management of potential conflicts of interest and non-discriminatory execution and should*** not be allowed to execute in the OTF any transaction between multiple third-party buying and selling interests including client orders brought together in the system against his own proprietary capital. This ***should*** also exclude them from acting as systematic internalisers in the OTF operated by them.

(9) All organised trading should be conducted on regulated venues ***with maximal pre- and post-trade transparency***. ***Appropriately calibrated transparency*** requirements ***should*** therefore ▌ apply to all types of trading venues, and to all financial instruments traded thereon.

(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 of 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 Supervisory Authority (European Securities and Markets Authority) (ESMA) established by Regulation 1095/2010 of the European Parliament and of the Council[2] 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 should be made, following the same procedure, as to whether they are still in compliance with the rules set out in this Regulation and in delegated acts provided for herein.

(12) The financial crisis exposed specific weaknesses in the way information on trading opportunities and prices in financial instruments other than shares is available to market participants, namely in terms of timing, granularity, equal access, and reliability. ***Timely pre-*** and post-trade transparency requirements taking account of the different characteristics and market structures of specific types of instruments other than shares should thus be introduced ***and adapted as necessary so as to be workable for request-for-quote systems, whether automated or involving voice trading***. In order to provide a sound transparency framework for all relevant instruments, these should apply to bonds and structured finance products with

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

[2] OJ L 331, 15.12.2010, p. 84.

a prospectus or which are admitted to trading either on a regulated market or are traded on an MTF or an OTF, to derivatives which are traded or admitted to trading on regulated markets, MTFs and OTFs or considered eligible for central clearing, as well as, in the case of post-trade transparency, to derivatives reported to trade repositories. Thus only those financial instruments ▌ which ▌ are bespoke in their design ***or insufficiently liquid*** would be outside the scope of the transparency obligations.

(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, in particular, include asset backed securities as defined in Article 2(5) of Regulation (EC) No 809/2004[1], comprising among others collateralised debt obligations.

***(13a) In the interests of legal certainty, it is appropriate to clarify certain exclusions from the scope of this Regulation. While it is important to regulate currency derivatives including currency swaps which give rise to a cash settlement determined by reference to currencies in order to ensure transparency and market integrity spot currency transactions should not fall within the scope of this Regulation. Similarly, it is important to clarify that contracts of insurance in respect of activities of classes set out in Annex I to Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[2] are not derivatives for the purposes of this Regulation if entered into with a Union or third-country insurance or reinsurance undertaking. Furthermore while risks arising from algorithmic trading should be regulated the use of algorithms in post-trade risk reduction services does not constitute algorithmic trading.***

(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 ***proportionate and*** calibrated for different types of instruments, including equities, bonds, and derivatives, ***taking into account the interests of investors and issuers, including government bond issuers, and market liquidity. The requirements should also be calibrated*** for different types of trading, including order-book and quote-driven systems ***such as request for quote*** as well as hybrid and voice broking systems, and take account of issuance, transaction size and characteristics of national markets.

(15) In order to ensure that trading carried out over the counter (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, exchange-traded funds, certificates or other similar financial instruments, and bonds, structured finance products, and clearing-eligible derivatives.

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1 Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements(OJ L 149, 30.4.2004, p. 1).

2 OJ L 335, 17.12.2009, p. 1.

(16) An investment firm executing client orders against own proprietary capital should be deemed a systematic internaliser, unless the transactions are carried out outside regulated markets, MTFs and OTFs on an ▌ ad hoc and irregular basis. Systematic internalisers should be defined as investment firms which, on an organised ***regular*** and systematic basis, deal on own account by executing client orders ***bilaterally*** outside a regulated market, an MTF or an OTF. In order to ensure the objective and effective application of this definition to investment firms, any bilateral trading carried out ***by executing client orders*** should be relevant and quantitative criteria ***determined by financial instrument or by asset class could*** complement the qualitative criteria for the identification of investment firms required to register as systematic internalisers, laid down in Article 21 of Regulation (EC) No 1287/2006. 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. ***In order to guarantee the quality of the price formation process it is appropriate to limit the circumstances in which OTC trading can be carried out outside a systematic internaliser and competent authorities should ensure that for shares no participant in a system where an investment firm executes client orders against own proprietary capital is in a privileged position with regard to order execution.***

(17) Systematic internalisers may decide to give access to their quotes only to ***their*** retail clients, only to ***their*** professional clients, or to both. They should not be allowed to discriminate within those categories of clients ***but should be entitled to take account of distinctions between clients, for example in relation to credit risk***. Systematic internalisers are not obliged to publish firm quotes in relation to transactions ***in equity instruments*** above standard market size ***and in non-equity instruments above retail market size***. The standard market size ***or retail market size*** for any class of financial instrument should not be significantly disproportionate to any financial instrument included in that class.

(18) It is ***appropriate to ensure that as much trading as possible which occurs outside regulated execution venues takes place in organised systems to which appropriate transparency requirements apply while ensuring that large scale and irregular transactions can be concluded. It is*** not the intention that this Regulation require the application of pre-trade transparency rules to ***OTC*** transactions ***involving primary issuance***, the characteristics of which include that ***the instruments*** are ***bespoke*** and ***designed for the specific requirements of eligible financial or non-financial*** counterparties ***and are part of a business relationship which is itself characterised by dealings above standard market size or standard retail 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 ***and approved publication arrangements used to ensure the consistency and quality of such data and to enable the delivery of a consolidated tape for post-trade 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

[1] OJ L 281, 23.11.1995, p. 31.

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[1] 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 G-20 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 ▌. ***This Regulation is not intended to prohibit or limit the use of bespoke derivative contracts or make them excessively costly for non-financial institutions. Therefore, 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. ***In addition, this Regulation is not intended to prevent the use of post-trade risk reduction services.***

(22) Considering the agreement reached by the parties to the G-20 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 ***trading model***. The possibility for operators of venues to arrange transactions pursuant to this commitment between ***their participants*** in a discretionary fashion should however be foreseen in order to improve the conditions for execution and liquidity.

(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.

(24) ***In order to ensure the orderly functioning and integrity of financial markets, investor protection and financial stability it is necessary to provide a mechanism for monitoring of the design of investment products and for powers to prohibit or restrict*** the marketing, distribution and sale of any ***investment product or*** financial instrument giving rise to serious concerns regarding investor protection, the orderly functioning and integrity of financial markets, or the stability of the whole or part of the financial system, together with appropriate

[1] OJ L 8, 12.1.2001, p. 1

coordination and contingency powers for ESMA. The exercise of such powers ***by competent authorities and, in exceptional cases, by ESMA*** should be subject to the need to fulfil a number of specific conditions. ***Where those conditions are met, the competent authority or, in exceptional cases, ESMA should be able to impose a prohibition or restriction on a precautionary basis before an investment product or financial instrument has been marketed, distributed or sold to clients.***

(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 those measures.

(27) The details of transactions in financial instruments should be reported to competent authorities ***through a system coordinated by ESMA,*** 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 such oversight includes all instruments which are admitted to trading on a regulated market ***or traded on a trading venue*** as well as all instruments the value of which depends on or influences the value of those instruments. In order to avoid an unnecessary administrative burden on investment firms, financial instruments not traded in an organised way and that are not susceptible to market abuse should be excluded from the reporting obligation. ***The reports should use a legal entity identifier in line with the G-20 commitments. The Commission should also report on whether the content and format of the reports are sufficient to detect market abuse, on priorities for monitoring given the vast amount of data reported, on whether the identity of the decision-maker responsible for the use of an algorithm is needed, and on specific arrangements needed to ensure robust reporting of securities lending and repurchase agreements so as to enable oversight by all relevant competent authorities.***

(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 (EU) No 236/2012 by the European Parliament and by the Council of 14 March 2012 on short selling and certain aspects of credit default swaps[1], the marking of short sales provides useful supplementary information to enable competent authorities to monitor levels of short selling. Investment firms are required to identify whether sales of shares or of debt instruments issued by a sovereign issuer are short sales***. 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 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

[1] ***OJ L 86, 24.3.2012, p. 1.***

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.

(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 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 ▌ be subject to a clearing obligation ***in the same way as those traded elsewhere***.

(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 ***transferable securities and money market*** 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. Access should only be denied if ***such access would clearly threaten the smooth and orderly functioning of the CCP or the functioning of the financial markets in a manner that causes systemic risk***.

(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 the trading venue ***except where such access would threaten the smooth or orderly functioning of markets***. ***The right of access of a CCP to a trading venue should allow for arrangements whereby multiple CCPs are using trade feeds of the same trading venue. However, this should not lead to interoperability for derivatives clearing or create liquidity***

[1] OJ L 281, 23.11.1995, p. 31.

[2] OJ L 8, 12.1.2001, p. 1.

***fragmentation.*** 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.

(34) The provision of services by third-country firms in the Union is subject to national regimes and requirements. Those regimes are highly differentiated and the firms authorised in accordance with them do not enjoy the freedom to provide services and the right of establishment in Member States other than the one where they are established. It is appropriate to introduce a common regulatory framework at Union level. The regime should harmonize the existing fragmented framework, ensure certainty and uniform treatment of third-country firms accessing the Union, ensure that ***an*** assessment ***of effective equivalence*** has been carried out by the Commission in relation to the regulatory and supervisory framework of third countries and should provide for a comparable level of protections to ***clients*** in the Union receiving services by third-country firms ***and reciprocal access to third-country markets***. ***In applying the regime the Commission and Member States should prioritise the areas covered by the G-20 commitments and agreements with the Union's largest trading partners and should have regard to the central role that the Union plays in worldwide financial markets and ensure that the application of third-country requirements does not prevent Union investors and issuers from investing in or obtaining funding from third countries or third-country investors and issuers from investing, raising capital or obtaining other financial services in Union markets unless this is necessary for objective and evidence-based prudential reasons.***

(35) The provision of services to retail clients ***or retail clients who have opted to be treated as professional clients within the Union*** should always require the establishment of a branch in the Union. The establishment of the branch ***should*** be subject to authorisation and supervision in the Union. Proper cooperation arrangements should be in place between the competent authority concerned and the competent authority in the third country. The provision of services without branches should be limited to eligible counterparties ***and non-opted up professional clients***. It should be subject to registration by ESMA and to supervision in the third country. Proper cooperation arrangements should be in place between ESMA and the competent authorities in the third country.

(36) The provisions of this Regulation regulating the provision of services ***or undertaking of activities*** by third-country firms in the Union should not affect the possibility for persons established in the Union to receive investment services by a third-country firm ***in the Union*** at their own exclusive initiative ***or for Union investment firms or credit institutions to receive investment services or activities from a third-country firm or for a client to receive investment services from a third-country firm through the mediation of such a credit institution or investment firm***. Where a third-country firm provides services at own exclusive initiative of a person established in the Union, the services should not be deemed as provided in the territory of the Union. Where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.

(37) A range of fraudulent practices have occurred in spot secondary markets in emission allowances (EUAs) 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)[1] ▌.

(38) The ***power*** to adopt delegated acts in accordance with Article 290 ***TFEU*** should be ***delegated to the Commission*** in respect of ***the specification of certain*** definitions; the precise characteristics of trade transparency requirements; detailed conditions for waivers from pre-trade transparency; deferred post-trade publication arrangements; criteria for the application of the pre-trade transparency obligations for systematic internalisers; 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. ***It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level and in particular with ESMA. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.***

(39) ***In order to ensure uniform conditions for the implementation of this Regulation,*** implementing powers ***should be conferred on the Commission. Those powers should relate*** to the adoption of the equivalence decision concerning third-country legal and supervisory frameworks for the provision of services by third-country firms and they 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[2].

(40) Since the objectives of this Regulation, namely to establish uniform requirements relating to financial instruments in relation to disclosure of trade data, reporting of transactions to the competent authorities, trading of derivatives on organised venues, non-discriminatory access to clearing, product intervention powers and powers on position management and position limits, provision of investment services or activities by third-country firms cannot be sufficiently achieved by the Member States, because, 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, and can therefore, by reason of its scale and effects, 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.

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1 OJ L 96, 12.4.2002, p. 16.

2 OJ L 55, 28.2.2011, p. 13.

(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 regarding the content and specifications of transaction reports, ***specifying the types of derivative contracts which have a direct, substantial and foreseeable effect within the Union, specifying whether a class of derivatives declared subject to the clearing obligation under Regulation (EU) No 648/2012 or a relevant subset thereof should be traded only on organised trading venues,*** regarding the liquidity criteria for derivatives to be considered subject to an obligation to trade on organised trading venues, and concerning the information that the applicant third-country firm should provide to ESMA in its application for registration***. The Commission should adopt those draft regulatory technical standards*** by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No ***1095/2010***.

▌

(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, in particular 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.

***(45a) The European Data Protection Supervisor has been consulted,***

– 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 and position limits;

(f) provision of investment services or activities without a branch by third-country firms.

2. This Regulation applies to ***credit institutions authorised under Directive 2006/48/EC and*** investment firms ▌ authorised under Directive ***.../.../EU*** [new MiFID] where ***the credit institution or investment firm is*** providing one or more investment services and/or performing investment activities, and ***to market operators***.

3. Title V of this Regulation also applies to all financial counterparties as defined in ***Article [2(8)] of Regulation (EU) No 648/2012*** and all non-financial counterparties falling under ***Article 10(1)(b)*** of that Regulation.

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

***4a. Title VII of this Regulation also applies to all financial counterparties as defined in Article 2(8) of Regulation (EU) No 648/2012.***

***4b. Title VIII of this Regulation applies to third-country firms providing investment services or activities within a Member State other than through a branch in a Member State.***

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 of Directive …/…/EU [new MiFID] only if, without prejudice to the other requirements imposed in Directive …/…/EU [new MiFID], in this Regulation and in Directive …/…/EU [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) 'credit institution' means credit institution within the meaning of point (1) of Article 4 of Directive 2006/48/EC;

***(2a) 'multilateral system' means a system that brings together or facilitates the bringing together of multiple buying and selling interests in financial instruments, irrespective of the actual number of orders that are executed in the resulting transactions;***

***(2b) 'bilateral system' means a system that brings together or facilitates the bringing together of buying and selling interests in financial instruments whereby the investment firm operating the system only executes client orders by dealing on own account;***

***(2c) 'over-the-counter trading' means bilateral trading which is carried out by an eligible counterparty on its own account, outside a trading venue or a systematic internaliser, on an occasional and irregular basis with eligible counterparties and always at large in scale sizes;***

(3) 'systematic internaliser' means an investment firm which, on an organised, ***regular*** and systematic basis, deals on own account by executing client orders outside a regulated market, a multilateral trading facility or an organised trading facility, ***in a bilateral system***;

(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 and 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 …/…/EU [new MiFID];

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

(7) 'organised trading facility' means ***a multilateral*** system or facility, which is not a regulated market, a multilateral trading facility ***or a central counterparty***, operated by an investment firm or a market operator, in which multiple third-party buying and selling interests in ***bonds, structured finance products, emission allowances or derivatives*** 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 ***.../.../EU*** [new MiFID];

(8) 'financial instrument' means those instruments specified in Section C of Annex I to Directive …/…/EU [new MiFID];

(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 funds' ***means funds at least one unit or share class of which are traded throughout the day on at least one regulated market, a multilateral trading facility or organised trading facility with at least one market maker which takes action to ensure that the stock exchange value of its units or shares does not significantly vary from their net asset value and where applicable 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) of Directive …/…/EU [new MiFID] and referred to in Annex I, Section C (4) to (10) thereto;

(15) 'commodity derivatives' means those financial instruments defined in paragraph 9(c) of Directive …/…/EU [new MiFID] relating to a commodity or an underlying referred to in points (5), (6), (7) or (10) of Section C of Annex I thereto;

(16) 'actionable indication of interest' means a message from one participants to another in a trading system about available trading interest that contains all necessary information to agree on a trade;

(17) ‘competent authority’ means the authority, designated by each Member State in accordance with ***Article 69*** of Directive ***.../.../EU*** [new MiFID], unless otherwise specified in that Directive;

(18) ‘approved publication arrangement’ means a person authorised under the provisions established in Directive …/…/EU [new MiFID] to provide the service of publishing trade reports on behalf of ***trading venues or*** investment firms pursuant to Articles **5, 9,** 11 and 12 of this Regulation;

(19) ‘consolidated tape provider’ means a person authorised under the provisions established in Directive ***.../.../EU*** [new MiFID] to provide the service of collecting trade reports for financial instruments listed in Articles 5, 6, 11 and 12 of this Regulation from regulated markets, multilateral trading facilities, organised trading facilities and ***approved publication arrangements*** and consolidating them into a continuous electronic live data stream providing real-time ***and, where provided for in Article 66(1) and (2) of Directive .../.../EU [new MiFID], delayed*** price and volume data per financial instrument;

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

(21) ‘management body’ means the governing body ***of an investment firm, market operator or*** of a data reporting services provider, comprising the supervisory and the managerial functions, which has the ultimate decision-making authority and is empowered to set the ***investment firm's, the market operator's or the data services provider's*** strategy, objectives and overall direction***, including*** persons who effectively direct the business of the entity;

▌

(24) 'benchmark ***index***' means any ***tradable or broadly used*** commercial index or published figure calculated by the application of a formula to the value of one or more underlying assets or prices, ***including estimated prices, interest rates or other values or surveys,*** by reference to which the amount payable under a financial instrument is determined***, which acts as the standard measure of the performance of the relevant assets or class or group of assets***;

(25) 'trading venue' means a regulated market, a multilateral trading facility or an organised trading facility;

(26) ‘CCP’ means a CCP within the meaning of ***point (1) of*** Article 2 ▌ of Regulation (EU) No 648/2012.

***(26a) 'interoperability arrangement' means an interoperability arrangement within the meaning of point (12) of Article 2 of Regulation (EU) No 648/2012.***

(27) 'investment services and activities' means the services and activities ***within the meaning of point (1) of Article 4(2)*** of Directive ***.../.../EU*** [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 activities listed in Directive 2006/48/EC, Directive …/…/EU [new MiFID], Directive 2009/138/EC, Directive 2009/65/EC, Directive 2003/41/EC or Directive 2011/61/EU.

***(28a) 'third-country firm' means a third-country firm within the meaning of point (33d) of Article 4(2) of Directive .../.../EU [new MiFID***]

(29) 'wholesale energy product' means those contracts and derivatives within the meaning of Article 2(4) of Regulation ***(EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency***[1].

***(29a) 'primary issuance' means a transaction in instruments with bespoke material terms designed for the specific requirements of financial or non-financial counterparties which would be classified as eligible counterparties or professional clients according to Article 30 of Directive .../.../EU [new MiFID] and Annex II thereto.***

2 The definitions provided in ***Article 4(2) of*** Directive …/…/EU [new MiFID] ***also apply to this Regulation***.

3. The Commission ***shall be empowered to*** adopt delegated acts in accordance with Article 41***, after consulting ESMA,*** specifying ***certain*** technical elements of the definitions laid down in ***points (3), (7), (10) to (16), (18) to (26a), (28) and (29) of*** paragraph 1 to adjust them to market development.

***Article 2a***
***Obligation to trade over the counter (OTC) through systematic internalisers***

***1. All transactions in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments, which are not intragroup transactions as referred to in Article 3 of Regulation (EU) No 648/2012, which meet the thresholds in Article 13 of this Regulation, and which are not concluded on a regulated market or a multilateral trading facility (MTF) shall be concluded through a systematic internaliser unless the transaction involves the primary issuance of the instrument. This requirement shall not apply to transactions which are large in scale as determined in accordance with Article 4.***

***2. All transactions in bonds, structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and derivatives which are eligible for clearing or which are admitted to trading on a regulated market or are traded on an MTF or an organised trading facility (OTF) and which are not subject to the trading obligation under Article 26, which are not concluded on a regulated market, an MTF, an OTF or a third-country trading venue assessed as equivalent in accordance with Article 26(4), and which meet the thresholds in Article 17, shall be concluded through a systematic internaliser unless the transaction involves the primary issuance of the instrument. This requirement shall not apply to transactions which are large in scale as determined in accordance with Article 8.***

***3. Where a financial instrument listed in paragraph 1 or 2 is admitted to trading on a regulated market or is traded on an MTF or an OTF and no systematic internaliser is available, transactions may be carried out OTC other than through a systematic internaliser, the characteristics of which are that the transaction is ad hoc and irregular, where:***

***(a) the parties to the transaction are eligible counterparties or professional clients; and:***

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[1] ***OJ L 326, 8.12.2011, p. 1.***

***(b) the transaction is large in scale; or***

***(c) there is not a liquid market for the bond or class of bond, as determined in accordance with Articles 7, 8, 13 and 17.***

## TITLE II

## TRANSPARENCY FOR TRADING VENUES ***WITH MULTILATERAL SYSTEMS***

## CHAPTER 1

## TRANSPARENCY FOR EQUITY INSTRUMENTS

### Article 3
### Pre-trade transparency requirements for trading venues in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments

1. Regulated markets and investment firms and market operators operating an MTF ▌ 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, exchange-traded funds, certificates and other similar financial instruments admitted to trading ***on a regulated market*** or which are traded on an MTF ▌. This requirement shall also apply to actionable indications of interests. Regulated markets and investment firms and market operators operating an MTF ▌ shall make this information available to the public on a continuous basis during normal trading hours.

2. Regulated markets and investment firms and market operators operating an MTF ▌ shall give access, on reasonable commercial terms and on a 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 their quotes in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments pursuant to Article 13.

### Article 4
### ▌ Waivers ***for equity instruments***

1. Competent authorities shall be able to waive the obligation for regulated markets and investment firms and market operators operating an MTF ▌ to make public the information referred to in Article 3(1) based on the market model or the type and size of orders in the cases defined in accordance with paragraph 3. In particular, the competent authorities shall be able to waive the obligation in respect of***:*** ▌

   - orders that are large in scale compared with normal market size for the share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument ***concerned, or***

- ***a trading methodology by which the price is determined in accordance with a reference price generated by another system, where that reference price is widely published and is generally regarded by market participants as a reliable reference price***.

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 request and provide an explanation regarding its functioning. Notification of the intention to grant a waiver shall be made not less than ***four months*** before the waiver is intended to take effect. Within ***two months*** following receipt of the notification, ESMA shall issue ***a non-binding*** opinion to the competent authority in question assessing the compatibility of each waiver with the requirements established in paragraph 1 and specified in the delegated act adopted pursuant to paragraphs 3(b) and (c). ***A competent authority shall only grant waivers upon a non-binding opinion by ESMA.*** 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 shall submit an annual report to the Commission on how they are applied in practice.

***2a. A competent authority may withdraw a waiver granted under paragraph 1, as specified pursuant to paragraph 3 if it observes that the waiver is being used in a way that deviates from its original purpose or if it believes that the waiver is being used to circumvent the rules established in this Article.***

***Before withdrawing the waiver, and as soon as possible, the competent authority shall notify ESMA and other competent authorities of its intention providing full reasons. Within one month of receipt of the notification, ESMA shall issue a non-binding opinion to the competent authority in question. After receiving the opinion, the competent authority shall make its decision effective.***

3. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:

   (a) the range of bid and offers 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;

   (b) the size or type of orders for which pre-trade disclosure may be waived under paragraph 1 for each class of financial instrument concerned;

   (c) ***the detailed arrangements for applying the pre-trade disclosure obligation in Article 3*** to trading methods operated by regulated markets ***and MTFs*** which conclude transactions by periodic auction for each class of financial instrument concerned ***or through negotiated transactions***.

4. Waivers granted by competent authorities in accordance with Article 29(2) and Article 44(2) of Directive 2004/39/EC and Articles 18, 19 and 20 of Regulation (EC) No 1287/2006 before ...* shall be reviewed by ESMA by ...**. ESMA shall issue an opinion to the competent

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* OJ please insert a date 18 months after the date of entry into force of this Regulation.

** OJ please insert date: 42 months after the date of entry into force of this Regulation.

authority in question assessing the continued compatibility of each of those waivers with the requirements established in this Regulation and any delegated act based on this Regulation.

Article 5

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

1. Regulated markets and investment firms and market operators operating an MTF ▌ shall make public ***through an approved publication arrangement (APA)*** the price, volume and time of the transactions executed in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments admitted to trading ***on a regulated market*** or which are traded on an MTF ▌ . Regulated markets and investment firms and market operators operating an MTF ▌ shall make details of all such transactions public as close to real-time as is technically possible.

2. Regulated markets and investment firms and market operators operating an MTF ▌ shall give ***effective*** 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, exchange-traded funds, certificates and other similar financial instruments pursuant to Article 19.

Article 6

Authorisation of deferred publication

1. Competent authorities shall be able to authorise regulated markets to provide for deferred publication of the details of transactions based on their type or size. In particular, competent authorities may authorise deferred publication in respect of transactions that are large in scale compared with the normal market size for that share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument or that class of share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument. Regulated markets and investment firms and market operators operating an MTF ▌ 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.

***Where a competent authority authorises deferred publication and a competent authority of another Member State disagrees with this or disagrees with the effective application of the authorisation granted, 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.***

2. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:

   (a) the details that need to be specified by regulated markets, investment firms, including systematic internalisers and investment firms and regulated markets operating a MTF ▌ in the information to be made available to the public for each class of financial instrument concerned;

(b) the conditions for authorising a regulated market, an investment firm, including a systematic internaliser or an investment firm or market operator operating an MTF ▌ for a deferred publication of trades and the criteria to be applied when deciding the transactions for which, due to their size, or the type***, including liquidity profile,*** of ***the*** share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument involved, deferred publication is allowed for each class of financial instrument concerned.

## 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. Regulated markets and investment firms and market operators operating an MTF or an OTF based on the trading system operated shall make public prices and the depth of trading interests at those prices for orders or quotes advertised through their systems for bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published ***and that are sufficiently liquid***, emission allowances and for derivatives ***which are subject*** to ***the*** trading ***obligation referred to in Article 24***. This requirement shall also apply to actionable indications of interests. Regulated markets and investment firms and market operators operating an MTF or an OTF shall make this information available to the public on a continuous basis during normal trading hours. ***That publication obligation does not apply to those derivative transactions of non-financial counterparties which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.***

   ***The requirements set out in the first subparagraph shall be calibrated to the size of issue and transaction size and shall take into account the interests of both issuers and investors and financial stability. The requirements set out in this Article shall only apply to those financial instruments which are determined to be sufficiently liquid or for which there is a liquid market. Where transactions are negotiated between eligible counterparties and professional clients through voice negotiation pre-trade indicative prices must be published as close to the transaction price as reasonably practicable.***

2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give ***effective*** 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.

Article 8

▌ Waivers ***relating to non-equity instruments***

1. Competent authorities shall be able to waive the obligation for regulated markets and investment firms and market operators operating an MTF or an OTF to make public the information referred to in Article 7(1) for specific sets of products based on the ▌ liquidity ***and other criteria*** defined in accordance with paragraph 4.

2. Competent authorities shall be able to waive the obligation for regulated markets and investment firms and market operators operating an MTF or an OTF to make public the information referred to in Article 7(1) based on the type and size of orders and method of trading in accordance with paragraph 4 of this Article. In particular, the competent authorities shall be able to waive the obligation in respect of orders that are large in scale compared with normal market size for the bond, structured finance product, emission allowance or derivative or type of bond, structured finance product, emission allowance or derivative in question.

3. Before granting a waiver in accordance with paragraphs 1 and 2, competent authorities shall notify ESMA and other competent authorities of its intended use and provide an explanation regarding its functioning. Notification of the intention to grant a waiver shall be made not less than ***four months*** before the waiver is intended to take effect. Within ***two months*** following receipt of the notification, ESMA shall issue ***a non-binding*** opinion to the competent authority in question assessing the compatibility of each individual waiver request with the requirements established in paragraphs 1 and 2 and specified in the delegated act adopted pursuant to paragraph 4(b). ***A competent authority shall only grant waivers upon a non-binding opinion by ESMA.*** 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 shall submit an annual report to the Commission on how they are applied in practice.

***3a. A competent authority may withdraw a waiver granted under paragraph 1, as specified pursuant to paragraph 4, if it observes that the waiver is being used in a way that deviates from its original purpose or if it believes that the waiver is being used to circumvent the rules established in this Article.***

***Before withdrawing the waiver, and as soon as possible, the competent authorities shall notify ESMA and other competent authorities of its intention, providing full reasons. Within one month of receipt of the notification, ESMA shall issue a non-binding opinion to the competent authority in question. After receiving the opinion, the competent authority shall make its decision effective.***

***3b. Where the liquidity of a bond or class of bonds falls below the threshold determined in accordance with paragraph 3c, the obligations referred to in Article 7(1) may be temporarily suspended by a competent authority responsible for supervising one or more trading venues on which the financial instrument is traded. This threshold shall be defined based on objective criteria.***

***The 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. The suspension may be renewed for further periods not exceeding three months at a time if the grounds for***

***the suspension continue to be applicable. If the suspension is not renewed after any three-month period, it shall automatically expire.***

***Before suspending or renewing the suspension under this paragraph, the relevant competent authority shall notify ESMA of its proposal, providing full reasons. ESMA shall issue an opinion to the competent authority as soon as practicable on whether in its view the conditions referred to in this paragraph have arisen.***

***3c. ESMA shall develop draft regulatory technical standards specifying the parameters and methods for calculating the threshold of liquidity 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.***

***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 turnover on trading venues supervised by the notifying authority relative to the average level of turnover on those venues for the financial instrument concerned.***

4. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:

(a) the range of orders or quotes, the prices and the depth of trading interest at those prices, to be made public for each class of financial instrument concerned in accordance with Article 7(1);

***(aa) the calibration of the requirements in Article 7(1) and Article 17(1) for the size of issue and transaction size and for the publication of pre-trade indicative prices in negotiated transactions; and***

(b) the conditions under which pre-trade disclosure may be waived for each class of financial instrument concerned in accordance with paragraphs 1 and 2, based on the following:

▌

– (iii) the liquidity profile, including the number and type of market participants in a given market and any other relevant criteria for assessing liquidity ***for a particular financial instrument***;

– (iv) the size or type of orders***, in particular to allow for appropriate differentiation between retail and other markets,*** and the size and type of an issue of a financial instrument.

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* ***OJ please insert date: 12 months after the date of entry into force of this Regulation.*** **[Am. 4]**

Article 9

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

1. Regulated markets and investment firms and market operators operating an MTF or an OTF shall make public***, through an APA,*** the price, volume and time of the transactions executed in respect of bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and for derivatives admitted to trading ***on a regulated market*** or which are traded on an MTF or an OTF. Regulated markets and investment firms and market operators operating an MTF or an OTF shall make details of all such transactions public as close to real-time as is technically possible.

2 Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access, on reasonable commercial terms and on a 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 regulated markets and investment firms and market operators operating an MTF or an OTF to provide for deferred publication of the details of transactions based on their type or size ***and the liquidity profile of the financial instrument***. In particular, the competent authorities may authorise the deferred publication in respect of transactions that ***are over EUR 100 000 or*** are ***otherwise*** large in scale compared with the normal market size for that bond, structured finance product, emission allowance or derivative or that class of bond, structured finance product, emission allowance or derivative ***or where liquidity falls below the threshold determined in accordance with Article 8(3b)***.

2. Regulated markets and investment firms and market operators operating an MTF or an OTF 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 investing 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.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:

   (a) the details that need to be specified by regulated markets, investment firms, including systematic internalisers and investment firms and regulated markets operating a MTF or an OTF in the information to be made available to the public for each class of financial instrument concerned;

   (b) the conditions for authorising for each class of financial instrument concerned a deferred publication of trades for a regulated market, an investment firm, including a systematic internaliser or an investment firm or market operator operating an MTF or an OTF and the criteria to be applied when deciding the transactions for which, due to their size or the type***, including liquidity profile,*** of ***the*** bond, structured finance product,

emission allowance or derivative involved, deferred publication ***and/or the omission of the volume of the transaction and the aggregation of transactions*** is allowed.

## 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. Regulated markets and market operators and investment firms operating MTFs and***, where applicable,*** OTFs 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. The Commission ***shall, after consulting ESMA,*** adopt delegated acts in accordance with Article 41 specifying the offering 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.

### Article 12
### Obligation to make pre- and post-trade data available on a reasonable commercial basis

1 Regulated markets, MTFs and***, where applicable,*** OTFs shall make the information published in accordance with Articles 3 to 10 available to the public on a reasonable commercial basis ***and ensure effective non-discriminatory access to the information***. The information shall be made available free of charge 15 minutes after the publication of a transaction.

2. The Commission may adopt delegated acts in accordance with Article 41 clarifying what constitutes a reasonable commercial basis to make information public as referred to in paragraph 1.

## TITLE III

## TRANSPARENCY FOR SYSTEMATIC INTERNALISERS AND INVESTMENT FIRMS TRADING OTC

### Article 13
### Obligation for investment firms to make public firm quotes

1. Systematic internalisers in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments shall publish a firm quote in those shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments admitted to trading on a regulated market or traded on an MTF ▌ for which they are systematic

internalisers and for which there is a liquid market. In the case of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments for which there is not a liquid market, systematic internalisers shall disclose quotes to their clients on request.

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

3. Systematic internalisers may decide the size or sizes at which they will quote. The minimum quote size shall at least be the equivalent of 10% of the standard market size of a share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument. For a particular share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument 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, exchange-traded funds, 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, exchange-traded fund, certificate or other similar financial instrument.

4. Shares, depositary receipts, exchange-traded funds, 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, exchange-traded funds, 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, exchange-traded fund, certificate or other similar financial instrument shall be comprised of all orders executed in the European Union in respect of that financial instrument excluding those 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, exchange-traded fund, 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 ***and communicated to ESMA which shall publish the information on its website***.

7. In order to ensure the efficient valuation of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and maximises the possibility of investment firms of obtaining the best deal for their clients the Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying the elements related to the publication of a firm quote as referred to in paragraph 1 and to the standard market size as referred to in paragraph 2.

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 may update their quotes at any time. They shall also be allowed, under exceptional market conditions, to withdraw their quotes.

The quote 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 …/…/EU [new MiFID], execute the orders they receive from their clients in relation to the shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments for which they are systematic internalisers at the quoted prices at the time of reception of the order.

However, they may execute those orders at a better price in justified cases 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 …/…/EU [new MiFID], except where otherwise permitted under the conditions of paragraphs 2 and 3 of this Article.

5. In order to ensure the efficient valuation of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and maximises the possibility of investment firms of obtaining the best deal for their clients the Commission shall adopt delegated acts in accordance with Article 41 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 be empowered to adopt delegated acts in accordance with Article 41, ***after consulting ESMA,*** 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 may decide, on the basis of their commercial policy and in an objective non-discriminatory way, the investors 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 investors on the basis of commercial considerations such as the investor credit status, the counterparty risk and the final settlement of the transaction.

2. In order to limit the risk of exposure to multiple transactions from the same client, systematic internalisers may limit in a non-discriminatory way the number of transactions from the same client which they undertake to enter at the published conditions. They may also, in a non-discriminatory way and in accordance with the provisions of Article 28 of Directive …/…/EU [new MiFID], 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, exchange-traded funds, certificates and other similar financial instruments and maximises the possibility of investment firms of obtaining the best deal for their clients the Commission shall***, after consulting ESMA,*** adopt delegated acts in accordance with Article 41 specifying:

(a) the criteria specifying when a quote is published on a regular and continuous basis and is easily accessible 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 APA;

– (iii) through proprietary arrangements;

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

(c) the criteria specifying what can be considered as exceptional market circumstances that allow for the withdrawal of quotes as well as conditions for updating quotes;

(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 to publish firm quotes in bonds, structured finance products, emission allowance and derivatives

1. Systematic internalisers shall provide firm quotes in bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and derivatives which are clearing-eligible or are admitted to trading on a regulated market or are traded on an MTF or an OTF ***for which they are systematic internalisers and for which there is a liquid market as determined in accordance with Articles 7 and 8,*** 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.

***1a. The obligation in paragraph 1 shall be calibrated in accordance with Article 7(1) and Article 8(4)(aa) and may be waived where the conditions specified in Article 8(4)(b) are met.***

***1b. Systematic internalisers may update their quotes at any time in response to changes in market conditions or to correct errors. They may also, under exceptional market conditions, withdraw their quotes.***

2. Systematic internalisers shall make the firm quotes provided pursuant to paragraph 1 available to other clients of the investment firm ***where the quoted size is at or below a size specific to the financial instrument*** in an objective non-discriminatory way on the basis of their commercial policy. ***Systematic internalisers may refuse to enter into or discontinue business relationships with investors on the basis of commercial considerations such as the investor credit status, the counterparty risk and settlement risk.***

3. Systematic internalisers shall undertake to enter into transactions with any other client to whom the quote is made available under ***their commercial policy*** when the quoted size is at or below a size specific to the ***financial*** instrument.

4. Systematic internalisers may 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 made pursuant to paragraph 1 and at or below the size mentioned in ***paragraphs 2 and 3*** shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.

6. The quotes shall be such as to ensure that the firm complies with its obligations under Article 27 of Directive …/.../EU [new MiFID], ***where applicable,*** and shall reflect prevailing market conditions in relation to prices at which transactions are concluded for the same or similar instruments on regulated markets, MTFs or OTFs.

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 made available 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 taking place on regulated markets, MTFs, or OTFs. By ***….****, ESMA shall report to the Commission on the application of ***this Article***. In the event 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 that date.

2. The Commission shall***, after consulting ESMA,*** adopt delegated acts in accordance with Article 41 specifying the sizes ***specific to the financial instrument*** mentioned in ***Article 17(2) and*** (3) at which firm shall ***make firm quotes available to other clients and undertake to*** enter into transactions with any other client to whom the quote is made available. ***Until such a time as a higher threshold is set by means of such delegated acts for a specific financial instrument the size specific to the financial instrument shall be EUR 100 000.***

3. The Commission ***shall*** adopt delegated acts in accordance with Article 41 clarifying what constitutes a reasonable commercial basis to make quotes public as referred to in Article 17(5).

Article 19

Post-trade disclosure by investment firms, including systematic internalisers, in respect of shares, depositary receipts, exchange-traded funds, 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, exchange-traded funds, certificates or other similar financial instruments admitted to trading on a regulated market or which are traded on an MTF ▌, shall make public ***as close to real time as is technically possible*** 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 6. Where the measures adopted pursuant to Article 6 provide for deferred reporting for certain categories of transaction in shares, depositary receipts, exchange-traded funds, certificates or other similar financial instruments, this possibility shall also apply to those transactions when undertaken outside regulated markets ***or*** MTFs ▌.

3. The Commission may adopt delegated acts in accordance with Article 41 specifying the following:

   (a) identifiers for the different types of trades 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.

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***** ***OJ please insert date: 24 months after the date of entry into force of this Regulation.***

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 and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and derivatives which are clearing-eligible ▌ in accordance with ***Article 5(2)*** of Regulation (EU) No 648/2012 or are admitted to trading on a regulated market or are traded on an MTF or an OTF 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 10. Where the measures adopted pursuant to Article 10 provide for deferred ***and/or aggregated*** reporting ***and/or the omission of the volume of the transaction*** for certain categories of transaction in bonds, structured finance products, emission allowances or derivatives, this possibility shall also apply to those transactions when undertaken outside regulated markets, MTFs or OTFs.

3. The Commission may adopt delegated acts in accordance with Article 41 specifying the following:

   (a) identifiers for the different types of trades 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) the criteria specifying 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.

# 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 (EU) No …/… [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 at least five years, the relevant data relating to 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. 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.

2. The operator of a regulated market, MTF or OTF 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)***. ESMA shall perform a facilitation and coordination role in relation to the access by competent authorities to information under the provisions of this paragraph.

Article 23
Obligation to report transactions

1. Investment firms which execute transactions in financial instruments shall report 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 …/…/EU [new MiFID], establish the necessary arrangements in order to ensure that ***ESMA and*** the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives this information.

2. ***Paragraph 1 shall apply to the following financial instruments when traded outside a trading venue:***

   ***(a) financial instruments which are traded on a trading venue;***

   ***(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 basket composed of financial instruments traded on a trading venue.***

3. The reports shall, in particular, include details of the ***type, asset class,*** 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, and means of identifying the investment firms concerned***, and a designation to identify a short sale of a share or a debt instrument issued by a sovereign issuer as defined in Article 3 of Regulation (EU) No 236/2012***. For transactions not carried out on a regulated market, MTF or OTF, 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(3)(a). ***For commodity derivatives, the reports shall also indicate whether the transaction reduces risk in an objectively measurable way in accordance with Article 59 of Directive .../.../EC [new MiFID].***

4. Investment firms which transmit orders shall include in the ***type, asset class,*** transmission of that order all the details required for the purposes of paragraphs 1 and 3. Instead of including a designation to identify the clients on whose behalf the investment firm has transmitted that order or 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, an investment firm may also choose to report the transmitted order in accordance with the requirements under paragraph 1.

5. The operator of a regulated market, MTF or OTF shall report details of transactions in instruments traded on their platform which are executed through their systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3.

***5a. In reporting the designation to identify the clients as required under paragraphs 3 and 4, investment firms shall use a legal entity identifier established to identify clients that are legal persons, in the form of a 20 digit alphanumeric code.***

***ESMA shall develop guidelines to ensure that the application of legal entity identifiers within the Union complies with international standards, in particular those established by the Financial Stability Board.***

6. The reports shall be made to the competent authority either by the investment firm itself, an approved reporting mechanism (ARM) acting on its behalf or by the regulated market or MTF or OTF through whose systems the transaction was completed. 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 cases where transactions are reported directly to the competent authority by a regulated market, an MTF, an OTF or an ARM, the obligation on the investment firm laid down in paragraph 1 may be waived. In cases where transactions have been reported to a trade repository in accordance with ***Article 9*** of Regulation (EU) No 648/2012 ***which is approved as an ARM*** and where these reports contain the details required under paragraphs 1 and 3, ***including the relevant regulatory technical standards regarding the form and content of reports, and are systematically transmitted to the relevant competent authority within the time limit set by paragraph 1*** the obligation on the investment firm laid down in paragraph 1 shall be considered to have been complied with.

***6a. The competent authorities shall transmit all the information received pursuant to this Article to a single system, appointed by ESMA, for transaction reporting at Union level. The single system shall allow relevant competent authorities access to all the information reported pursuant to this Article.***

7. When, in accordance with Article 37(8) of Directive …/…/EU [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 they 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 published 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, means of identifying the investment firms concerned, the way in which the transaction was executed, and data fields necessary for the processing and analysis of the transaction reports in accordance with paragraph 3;

***(ca) the processing of the single system referred to in paragraph 6a and the procedures for the exchange of information between that system and the competent authorities;***

***(cb) the conditions upon which national identifiers are developed, attributed and maintained, by Member States, and the conditions under which these national identifiers are used by investment firms so as to provide, pursuant to paragraphs 3, 4 and 5, for the designation to identify the clients in the transaction reports they are required to establish pursuant to 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 Articles 10 to 14 of Regulation (EU) No 1095/2010.

9. ***By …**** ESMA shall report to the Commission on the functioning of this Article, including ***its interaction with the related reporting obligations under Regulation (EU) No 648/2012, and*** whether the content and format of transaction reports received and exchanged ***between the single system referred to in paragraph 6a and*** competent authorities comprehensively enable to monitor the activities of investment firms in accordance with Article 21 ***of this Regulation***. The Commission may take steps to propose any changes, including providing for transactions to be transmitted ***only*** to ***the single*** system ***referred to in paragraph 6a*** instead of to competent authorities ▌. ***The Commission shall forward ESMA's report to the European Parliament and to the Council.***

***Article 23a***
***Obligation to supply instrument reference data***

***1. With regard to instruments admitted to trading on regulated markets or traded on MTFs or OTFs these trading venues shall systematically supply ESMA and competent authorities with identifying instrument reference data for the purpose of transaction reporting under Article 21. This reference data for a given instrument shall be submitted to ESMA and competent authorities before trading commences in that particular instrument. With regard to other instruments, ESMA and competent authorities shall ensure that trade associations and other similar bodies that collect and distribute instrument reference data, supply them with relevant reference data.***

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* ***OJ please insert date: 12 months after the date of entry into force of this Regulation.***

** ***OJ please insert date: 24 months after the date of entry into force of this Regulation.***

***2. The obligation laid down in paragraph 1 of this Article only applies to the financial instruments specified in Article 23(2). It therefore shall not apply to any other instrument.***

***3. The instrument reference data referred to in paragraph 1 shall be updated whenever relevant so as to ensure its appropriateness.***

***4. In order to allow competent authorities to monitor, pursuant to Article 21, 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, ESMA and the competent authorities shall establish the necessary arrangements in order to ensure that:***

***(a) ESMA and the competent authorities effectively receive the instrument reference data pursuant to paragraph 1;***

***(b) the quality of the data so received is appropriate for the purpose of transaction reporting under Article 21;***

***(c) the instrument reference data received pursuant to paragraph 1 is efficiently exchanged between the relevant competent authorities.***

***5. ESMA shall develop draft regulatory technical standards to determine:***

***(a) data standards and formats for the instrument reference data in accordance with paragraph 1, including the methods and arrangements for supplying the data and any update thereto to ESMA and competent authorities, and the form and content of such data;***

***(b) the measures and conditions that are necessary in relation to the arrangements to be made by ESMA and the competent authorities pursuant to paragraph 4.***

***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.***

## 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 nonfinancial counterparties that meet the conditions referred to in ***Article 10(1b)*** thereof shall conclude transactions which are neither intragroup transactions as defined in ***Article 3 nor transactions covered by the transitional provisions in Article 89 of that Regulation*** with

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* ***OJ please insert date: 12 months after the date of entry into force of this Regulation.*** **[Am. 5]**

other such financial counterparties or other such non-financial counterparties that meet the conditions referred to in ***Article 10(1(b)*** of Regulation [ ] (EMIR) in derivatives pertaining to a class of derivatives that has ***also*** 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 ***where the derivative is not admitted to trading on a regulated market or traded on an MTF***; 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 an ***effective system for the*** equivalent ▌ recognition of trading venues authorised under Directive …/…/EU [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 derivatives 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 derivatives 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.

***ESMA shall regularly monitor the activity in derivatives which have not been declared subject to the trading obligation as described in Article 24(1) in order to identify cases where a particular class of contracts may pose systemic risk and to prevent regulatory arbitrage between derivative transactions subject to the trading obligation and derivative transactions which are not subject to the trading obligation.***

3. Derivatives declared subject to the trading obligation ***pursuant to Article 24(1)*** shall be eligible to be admitted to trading ***on a regulated market*** 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 ***examination*** procedure referred to in ***Article 42(2)*** 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 are equivalent to the requirements for the trading venues referred to in paragraph 1(a), (b) and (c) ***of this Article,*** resulting from this Regulation, Directive ***.../.../EU*** [new MiFID], and Regulation ***(EU) No …/...*** [new MAR], and which are subject to effective supervision and enforcement in that third country.

The legal and supervisory framework of a third country is considered equivalent 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 by preventing market abuse in the form of insider dealing and market manipulation.

5. ***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 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.***

***Where possible, the regulatory technical standards referred to in this paragraph shall be identical to those adopted under Article 4(4) of Regulation (EU) No 648/2012.***

Article 25
Clearing obligation for derivatives traded on regulated markets

The operator of a regulated market shall ensure that all transactions in derivatives pertaining to a class of derivatives declared subject to the clearing obligation pursuant to ***Article 5***(***2***) of ***Regulation (EU) No 648/2012*** that are concluded on the regulated market are cleared by a central counterparty (CCP).

Article 26
Trading obligation procedure

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

(a) which of the class of derivatives declared subject to the clearing obligation in accordance with ***Article 5***(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) of this Regulation;

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

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

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* ***OJ please insert date: 12 months after the date of entry into force of this Regulation.***

***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.***

Power is conferred 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.

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

   (a) the class of derivatives ***pursuant to paragraph 1(a)*** or a relevant subset thereof must be admitted to trading ***on a regulated market*** or must be traded on at least one regulated market, MTF or OTF as referred to in Article 24(1), and

   (b) the class of derivatives ***pursuant to paragraph 1(a)*** or a relevant subset thereof must be considered sufficiently liquid to trade only on the venues referred to in Article 24(1).

3. In developing the draft ***regulatory*** technical standards referred to in paragraph 1, ESMA shall consider the class of derivatives or a relevant subset thereof as sufficiently liquid ***taking into account at least*** the following criteria:

   (a) the average frequency of trades;

   (b) the average size of trades ***and the frequency of large in scale trades*** ;

   (c) the number and type of active market participants;

***ESMA shall also determine whether the class of derivatives or relevant subset thereof is only sufficiently liquid in transactions below a certain size.***

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 ***on a regulated market*** or traded on a venue referred to in Article 24(1). Following ***the*** notification ***referred to in the first subparagraph,*** 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 ***Articles 10 to 14*** of Regulation (EU) No 1095/2010.

6. ***ESMA shall develop draft*** regulatory technical standards specifying the criteria referred to in paragraph 2(b).

ESMA shall submit drafts for those 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 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 ***transferable securities and money market*** 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***, unless such access would clearly threaten the smooth and orderly functioning of the CCP or the functioning of the financial markets in a manner that causes systemic risk***. This in particular should ensure that a trading venue has the right to non-discriminatory treatment in terms of how contracts traded on its platforms are treated ▌. This requirement does not apply to any derivative contract that is already subject to the access obligations under ***Article 7*** of Regulation (EU) No 648/2012. ***Access of a trading venue to a CCP under this Article shall be granted only where such access would not require interoperability or threaten the smooth and orderly functioning of markets or adversely affect systemic risk.***

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

3. The CCP shall provide a written response to the trading venue within ***12 months*** either permitting access, under the condition that the relevant competent authority has not denied access pursuant to paragraph 4, or denying access. The CCP may only deny a request for access ***based on a comprehensive risk analysis and*** under the conditions specified in paragraph 6. If a CCP refuses access it shall provide full reasons in its response and inform its competent authority in writing of the decision. The CCP shall make access possible within

* ***OJ please insert date: 12 months after the date of entry into force of this Regulation.***

three months of providing a positive response to the access request. ***Any associated costs that arise from paragraphs 1 to 3 shall be borne by the trading venue requesting access, unless otherwise agreed between the CCP and the trading venue requesting access.***

4. The competent authority of the CCP may only deny a trading venue access to a CCP where such access would threaten the smooth or orderly functioning of financial markets. If a competent authority denies access on that basis it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons to the CCP and the trading venue including the evidence on which the decision is based.

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 and provided that the legal framework of that third country provides for an effective equivalent recognition of trading venues authorised under Directive …/…/EU [new MiFID] to request access to CCPs established in that third country.

6. ***ESMA*** shall ***develop draft regulatory technical standards*** specifying:

   (a) the conditions under which access could be denied by a CCP, ***for transferable securities and money market instruments,*** including conditions based on the volume of transactions, the number and type of users or other factors creating undue risks;

   (b) the conditions under which access is granted, including confidentiality of information provided regarding ***transferable securities and money market*** instruments during the development phase, the non-discriminatory and transparent basis as regards clearing fees, collateral requirements and operational requirements regarding margining.

   ***ESMA shall submit those draft regulatory 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 28 a***
***Clearing obligation for equities and bonds traded on regulated markets, MTFs and OTFs***

***The operator of a regulated market, an MTF, or an OTF shall ensure that all transactions in equities and bonds that are concluded on a regulated market, an MTF and OTF are cleared by a CCP when a CCP accepts to clear that financial instrument.***

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 ***for transferable securities and money market instruments*** on a non-discriminatory and transparent basis, including as regards fees related to access, on request to

* ***OJ please insert date: 12 months after the date of entry into force of this Regulation.*** **[Am. 6]**

any CCP authorised or recognised by Regulation (EU) No 648/2012 that wishes to clear financial transactions executed 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.

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

3. The trading venue shall provide a written response to the CCP within three months either permitting access, under the condition that the relevant competent authority has not denied access pursuant to paragraph 4, or denying access. The trading venue may only deny access ***based on a comprehensive risk analysis and*** under the conditions specified under paragraph ***paragraphs 4 and*** 6. When access is refused the trading venue shall provide full reasons in its response to the trading venue and inform its competent authority in writing of the decision. The trading venue shall make access possible within three months of providing a positive response to the access request.

4. ***For transferable securities and money market instruments,*** the competent authority of the trading venue may only deny a CCP access to a trading venue where such access would threaten the smooth or orderly functioning of markets. **[Am. 7]**

***4a.*** If a competent authority denies access on that basis it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons to the trading venue and the CCP including the evidence on which its decision is based.

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 and provided that the legal framework of that third country provides for an effective equivalent recognition of a CCP authorised under Regulation (EU) No 648/2012 to trading venues established in that third country.

6. ***ESMA*** shall ***develop draft regulatory technical standards*** specifying:

   (a) the conditions under which access could be denied by a trading venue ***for transferable securities and money market*** instruments, including conditions based on the volume of transactions, the number of users or other factors creating undue risks;

   (b) the conditions under which access is 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;

   ***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.*** **[Am. 8]**

▌

[*] ***OJ please insert date: 12 months after the date of entry into force of this Regulation.***

# TITLE VII

## SUPERVISORY MEASURES ON PRODUCT INTERVENTION AND POSITIONS

## CHAPTER 1

## PRODUCT INTERVENTION

### Article 31
### ESMA ***intervention*** powers ▌

***-1. In accordance with Article 9(2) of Regulation (EU) No 1095/2010, ESMA shall monitor the investment products, including structured deposits and financial instruments which are marketed, distributed or sold in the Union and may proactively investigate new investment products or financial instruments before they are marketed, distributed or sold in the Union in cooperation with the competent authorities.***

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may, where it is satisfied on reasonable grounds that the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:

   (a) the marketing, distribution or sale of ***certain specified investment products, including structured deposits, certain specified investment products, including structured deposits,*** financial instruments or ***investment products, including structured deposits, or*** financial instruments with certain ***specified*** 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*** threat to investor protection or to the orderly functioning and integrity of financial 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 ***investment product,*** financial instrument or activity do not address the threat;

   (c) a competent authority or competent authorities have not taken action to address the threat or actions that have been taken do not adequately address the threat.

   ***Where the conditions set out in the first subparagraph are fulfilled, ESMA may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before an investment product or financial instrument has been marketed or sold to clients.***

3. When taking action under this Article ESMA shall take into account the extent to which 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; and

   (b) does not create a risk of regulatory arbitrage.

   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.

***4a. Before taking a decision under paragraph 1, ESMA shall give notice of its intention to prohibit or restrict an investment product or financial instrument unless certain changes are made to features of the investment product or financial instrument within a specified timescale.***

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 delegated acts in accordance with Article 41 specifying criteria and factors to be taken into account by ESMA in determining when the threats to investor protection or to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a) arise. ***Those delegated acts shall ensure that ESMA is able to act, where appropriate, on a precautionary basis and shall not be required to wait until the product or financial instrument has been marketed or the type of activity or practice has been undertaken before taking action.***

Article 32
Product intervention by competent authorities

***-1. Competent authorities shall monitor the investment products, including structured deposits and financial instruments which are marketed, distributed or sold in or from their Member State and may proactively investigate new investment products or financial instruments before they are marketed, distributed or sold in or from the Member State. Particular attention shall be given to financial instruments offering commodity index replications.***

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

(a) the marketing, distribution or sale of certain ***specified investment products, including structured deposits,*** financial instruments or ***investment products, including structured deposits, or*** financial instruments with certain ***specified*** 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) ***an investment product,*** a financial instrument or activity or practice gives rise to significant investor protection concerns or poses a serious threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system ***within one or more Member States, including through the marketing, distribution, remuneration or provision of inducements related to the investment product or financial instrument***;

***(ab) a derivative product has a detrimental effect on the price formation mechanism in the underlying market;***

(b) existing regulatory requirements under Union law applicable to the ***investment product,*** financial instrument or activity or practice do not sufficiently address the risks referred to in point (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) the competent authority has properly consulted competent authorities in other Member States that may be significantly affected by the action; and

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

***Where the conditions set out in the first subparagraph are fulfilled, the competent authority may impose a prohibition or restriction on a precautionary basis before an investment product or financial instrument has been marketed, distributed or sold to clients.***

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

***2a. Before imposing a prohibition or restriction under paragraph 1, the competent authority shall give notice of its intention to prohibit or restrict an investment product or financial instrument unless certain changes are made to features of the investment product or financial instrument within a specified timescale.***

3. The competent authority shall not ***impose a prohibition or restriction*** under this Article unless, not less than one month before it takes the action, it has notified all other competent authorities ***involved*** and ESMA in writing ***or through another medium agreed between the authorities*** of 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 1 are met.

***3a. Where the time needed to consult in accordance with paragraph 2(d) and the one-month delay provided for in paragraph 3 could cause irreversible damage to consumers, the competent authority may take action under this Article on a provisional basis for a period not exceeding three months. In that case the competent authority shall immediately inform all other authorities and ESMA of the action taken.***

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 1 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 1 no longer apply.

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

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 it considers 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 its opinion. The opinion shall be published on ESMA's website.

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

## 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(2)(i) and Article 72(1)(f) and (g) of Directive …/…/EU [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 …/…/EU [new MiFID] ESMA shall record the measure and the reasons thereof. In relation to measures pursuant to Article 72(1)(f) and (g) of Directive …/…/EU [new MiFID], it shall maintain and publish on its website a database with summaries of the measures in force including details on the person or class of persons concerned, the applicable financial instruments, any quantitative measures or thresholds such as the maximum ***net position*** persons can enter into ***or hold over a specific period of time*** before a limit is reached, any exemptions thereto, and the reasons therefor.

### Article 35
### Position management powers of ESMA

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA shall, where ***one of the*** conditions in paragraph 2 ***is*** satisfied, take one or more of the following measures: **[Am. 2]**

   (a) request from any person information including all relevant documentation regarding the size and purpose of a position or exposure entered into via a derivative;

   (b) after analysing the information obtained, require any such person ***or class of person*** to take steps to reduce the size of ***or to eliminate*** the position or exposure;

   (c) limit the ability of a person from entering into a commodity derivative.

2. ESMA ***may*** only take a decision under paragraph 1 if ***one*** of the following conditions ***is*** fulfilled: **[Am. 9]**

   (a) the measures listed in points (a) to (c) of paragraph 1 address a threat to the orderly functioning and integrity of financial markets including in relation to delivery arrangements for physical commodities ***and the factors listed in Article 59(1)(a) to (cb) of Directive …/…/EU [new MiFID]***, or the stability of the whole or part of the financial system in the Union; **[Am. 10]**

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

Measures related to wholesale energy products shall be taken after consultation with the Agency for the Cooperation of Energy Regulators established under Regulation (EC) No 713/2009.

3. When taking measures referred to in paragraph 1, ESMA shall take into account the extent to which the measure:

   (a) does significantly address the threat to the orderly functioning and integrity of financial markets ***including the factors listed in Article 59(1)(a) to (cb) of Directive …/…/EU [new MiFID],*** or of delivery arrangements for physical commodities, or 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; **[Am. 11]**

   (b) does not create a risk of regulatory arbitrage;

   (c) does not have a detrimental effect on the efficiency of financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure.

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 paragraph 1(a) or (b) the notification shall include the identity of the person or persons to whom it was addressed and the details and reasons thereof. In the event of a measure under paragraph 1(c) the notification shall include details on the person or class of persons concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum ***net position*** the person or class of persons in question can enter into ***or hold over a specific period of time***, 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 paragraph 1(c). The notice shall include details on the person or class of persons concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum ***net position*** the person or class of persons in question can enter into ***or hold over a specific period of time***, 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 paragraph 1(c) 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 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 72(f), (g) and (ha) of Directive .../.../EU [new MiFID]***.

10. The Commission shall adopt delegated acts in accordance with Article 41 specifying criteria and factors to be taken into account by ESMA in determining when a threat to the orderly functioning and integrity of financial markets including in relation to delivery arrangements for physical commodities, or the stability of the whole or part of the financial system in the Union referred to in paragraph 2(a) arise. ***Those criteria and factors shall take into account the draft regulatory technical standards developed in accordance with Article 59(3) of Directive .../.../EU [new MiFID] and shall differentiate between situations where ESMA takes action because a competent authority has failed to act and those where ESMA addresses an additional risk which the competent authority is not able to address pursuant to Article 72(f), (g) and (ha) of Directive .../.../EU [new MiFID].***

# TITLE VIII

# PROVISION OF SERVICES ***OR ACTIVITIES*** WITHOUT A BRANCH BY THIRD-COUNTRY FIRMS

## Article 36
## General provisions

1 A third-country firm may provide ***investment*** services ***or perform activities*** to eligible counterparties ***and to professional clients within the meaning of Section I of Annex II to Directive .../.../EU [new MiFID]*** established in the Union without the establishment of a branch only where it is registered in the register of third-country firms kept by ESMA in accordance with Article 37.

2. ESMA ***shall*** register a third-country firm that has applied for the provision of investment services ***or performance of*** activities in the Union in accordance with paragraph 1 only where the following conditions are met:

(a) the Commission has adopted a decision in accordance with Article 37(1);

(b) the firm is authorised in the jurisdiction where ***its head office*** is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country;

(c) cooperation arrangements have been established pursuant to Article 37(2).

***2a. Where a third-country firm is registered in accordance with this Article, Member States shall not impose any additional requirements on the third-country firm in respect of matters covered by this Regulation or by Directive …/…/EU [new MiFID].***

3. The third-country firm referred to in paragraph 1 shall submit its application to ESMA after the adoption by the Commission of the decision referred to in Article 37 determining that the legal and supervisory framework of the third country in which the third-country firm is authorised is equivalent to the requirements described in Article 37(1).

The applicant third-country firm shall provide ESMA with all information necessary for its registration. Within 30 working days of receipt of the application, ESMA shall assess whether

the application is complete. If the application is not complete, ESMA shall set a deadline by which the applicant third-country firm is to provide additional information.

The registration decision shall be based on the conditions set out in paragraph 2.

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

4. Third-country firms providing services in accordance with this Article shall inform clients established in the Union, before the provision of any investment services, that they are not allowed to provide services to clients other than eligible counterparties ***and to professional clients within the meaning of Section I of Annex II to Directive .../.../EU [new MiFID]*** and that they are not subject to supervision in the Union. They shall indicate the name and the address of the competent authority responsible for supervision in the third country.

The information in the first subparagraph shall be provided in writing and in a prominent way.

Persons established in the Union may receive investment services by a third-country firm not registered in accordance with paragraph 1 only at their own exclusive initiative. ***An initiative by a natural person shall not entitle the third-country firm to market new categories of investment product or investment service to that individual.***

5. ***Third-***country firms ***providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities*** to the jurisdiction of a ***court or arbitral tribunal in a*** Member State.

6. ***ESMA shall develop draft*** regulatory technical standards specifying the information that the applicant third-country firm shall provide to ESMA in its application for registration in accordance with paragraph 3 and the format of information to be provided in accordance with paragraph 4.

***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 37
Equivalence decision

1. The Commission ***shall*** adopt a decision in accordance with the ***examination*** procedure referred to in ***Article 42(2)*** in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding requirements which have equivalent effect to the requirements set out in this Regulation, in Directive 2006/49/EC and in Directive No ***.../.../EU*** [MiFID] and in the implementing measures ***adopted under this Regulation and under those Directives***.

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[*] ***OJ please insert date: 12 months after the date of entry into force of this Regulation.***

The prudential ***and business conduct*** framework of a third country may be considered ***to have*** equivalent ***effect*** where that framework fulfils all the following conditions:

(a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;

(b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body;

(c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions;

(d) firms providing investment services and activities are subject to appropriate conduct of business rules;

(e) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.

***A decision of the Commission under this paragraph may be limited to one or more categories of investment firm or to market operators. A third-country firm may be registered in accordance with Article 36 where it falls within a category covered by the Commission's decision.***

2. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent in accordance with paragraph 1. Such arrangements shall specify at least:

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

(b) the mechanism for prompt notification to ESMA where a third country competent authority deems that a third-country firm that it is supervising and ESMA has registered in the register provided for in Article 38 is in breach of the conditions of its authorisation or other legislation to which it is obliged to adhere;

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

Article 38
Register

ESMA shall keep a register of the ***third-country*** firms allowed to provide investment services or ***perform investment*** activities in the Union in accordance with Article 36. The register shall be publicly accessible on the website of ESMA and shall contain information on the services or activities which the ***third-country*** firms are permitted to provide ***or perform*** and the reference of the competent authority responsible for their supervision in the third country.

Article 39
Withdrawal of registration

1. ESMA shall withdraw ▌ the registration of a ***third-country*** firm in the register established in accordance with Article 38 where:

   (a) ESMA has well-founded reasons based on documented evidence to believe that, in the provision of investment services and activities in the Union, the ***third-country*** firm is acting in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of markets; or

   (b) ESMA has well-founded reasons based on documented evidence to believe that, in the provision of investment services and activities in the Union, the ***third-country*** firm has seriously infringed the provisions applicable to it in the third country and on the basis of which the Commission has adopted the Decision in accordance with Article 37(1).

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

   (a) ESMA has referred the matter to the competent authority of the third country and that ***third-country*** competent authority has not taken the appropriate measures needed to protect investors and the proper functioning of the markets in the Union or has failed to demonstrate that the third-country firm concerned complies with the requirements applicable to it in the third country; and

   (b) ESMA has informed the third-country competent authority of its intention to withdraw the registration of the third-country firm at least 30 days before the withdrawal.

3. ESMA shall inform the Commission of any measure adopted in accordance with paragraph 1 without delay and shall publish its decision on its website.

4. The Commission shall assess whether the conditions under which a Decision in accordance with Article 37(1), has been adopted continue to persist in relation to the third country concerned.

# 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 Article 2(3), Article 4(3), Article 6(2), Article 8(4), Article 10(2), Article 11(2),

Article 12(2), Article 13(7), Article 14(5) and 14(6), Article 16(3), Article 18(2) and (3), Article 19(3), Article 20(3), Article 28(6), Article 29(6), Article 30(3), Article 31(8), Article 32(6) and Article 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 ▌ power ***to adopt delegated acts referred to in Article 2(3), Article 4(3), Article 6(2), Article 8(4), Article 10(2), Article 11(2), Article 12(2), Article 13(7), Article 14(5) and 14(6), Article 16(3), Article 18(2) and 18(3), Article 19(3), Article 20(3), Article 28(6), Article 29(6), Article 30(3), Article 31(8), Article 32(6), and Article 35(10)*** shall be conferred for an indeterminate period of time from the date referred to in Article 41 paragraph 1.

3. The delegation of ***power referred to in Article 2(3), Article 4(3), Article 6(2), Article 8(4), Article 10(2), Article 11(2),Article 12(2), Article 13(7), Article 14(5) and 14(6), Article 16(3), Article 18(2) and 18(3), Article 19(3), Article 20(3), Article 28(6), Article 29(6), Article 30(3), Article 31(8), Article 32(6), and Article 35(10)*** 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 ***three 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 ***three months*** at the initiative of the European Parliament or the Council.

## CHAPTER 2

## IMPLEMENTING ACTS

Article 42

Committee procedure

1. ***The*** Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply ▌.

# TITLE X

# FINAL PROVISIONS

## Article 43
## Reports and review

1. Before **…***, the Commission shall, after consulting ESMA, 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 application and continued appropriateness of the waivers to pre-trade transparency obligations established pursuant to Article 3(2) and ▌ Article 4(2) and (3)***, and 8***.

2. Before **…***, the Commission shall, after consulting ESMA, present a report to the European Parliament and to the Council 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 ***Article 23(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 ***for the purposes of this Regulation and of Directive …/…/EU [new MiFID] and the detection of insider dealing and market abuse in accordance with Regulation (EU) No …/… [MAR]***.

***2a. Before …*, the Commission shall, after consulting ESMA, present a report to the European Parliament and to the Council on the feasibility of developing a European best bid and offer system for consolidated quotes and whether it could be an appropriate commercial solution to reducing information asymmetries between market participants as well as being a tool for regulators to better monitor quotation activities on trading venues.***

Before **…***, the Commission shall, after consulting ESMA, present a report to the European Parliament and to the Council on the on the progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms pursuant to Articles 22 and 24.

## Article 44
## Amendment of Regulation (EU) No 648/2012

In ***Article 81(3)*** of Regulation (EU) No 648/2012, the following subparagraph is added:

"A trade repository shall transmit data to competent authorities in accordance with the requirements under Article 23 of Regulation (EU) No .../... [MiFIR][1].

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* ***OJ please insert date: 42 months after the date of entry into force of this Regulation.***

[1] OJ L …".

Article 45
Transitional provision

***Third-country firms*** shall be able to continue to provide services and activities in Member States, in accordance with national regimes until ***one year*** after the ***adoption by the Commission*** of ***a decision in relation to the relevant third country in accordance with Article 41(3) of Directive .../.../EU [new MiFID***].

Article 46
Entry into force and application

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

This Regulation shall apply from ***…****, except for Article 2(3), Article 4(3), Article 6(2), Article 8(4), Article 10(2), Article 11(2), Article 12(2), Article 13(7), Article 14(5) and (6), Article 16(3), Article 18(2) and (3), Article 19(3), Article 20(3), Article 23(8), Article 24(5), Article 26, Article 28(6), Article 29(6), Article 30(3) and Articles 31 to 35, 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 …,

*For the European Parliament* *For the Council*

*The President* *The President*

* ***OJ please insert date: 18 months after the date of entry into force of this Regulation.***