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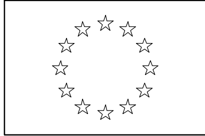
PROPOSAL

from:	the Commission
dated:	17 September 2010
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on OTC derivatives, central counterparties and trade repositories

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Pierre de BOISSIEU, Secretary-General of the Council of the European Union.

Encl.: COM(2010) 484 final



EUROPEAN COMMISSION

Brussels, 15.9.2010
COM(2010) 484 final

2010/0250 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on OTC derivatives, central counterparties and trade repositories

{SEC(2010) 1058}
{SEC(2010) 1059}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The financial crisis has brought over-the-counter (OTC) derivatives to the forefront of regulatory attention. The near-collapse of Bear Sterns in March 2008, the default of Lehman Brothers on 15 September 2008 and the bail-out of AIG the following day highlighted the shortcomings in the functioning of the OTC derivatives market. Within that market, regulators devoted particular attention to the role that credit default swaps (CDS) played during the crisis.

The Commission responded rapidly. In its broad Communication of 4 March 2009 on "Driving European Recovery"[1], the Commission committed to deliver, on the basis of a report on derivatives and other complex structured products, appropriate initiatives to increase transparency and to address financial stability concerns. On 3 July 2009, the Commission adopted a first Communication[2] that specifically examined the role played by derivatives in the financial crisis and looked at the benefits and risks of derivatives markets. That Communication assessed how the identified risks could be reduced[3].

In September 2009, G-20 Leaders agreed in Pittsburgh that:

> *All standardised OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements.*

In June 2010, G20 Leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to "*improve transparency and regulatory oversight of over-the-counter derivatives in an internationally consistent and non-discriminatory way*".

On 20 October 2009, the Commission adopted a second Communication[4] that set out the future policy actions the Commission intended to propose to increase transparency of the derivatives market, reduce counterparty and operational risk in trading and enhance market integrity and oversight. That Communication also announced the Commission's intention to proceed with legislative proposals in 2010, to ensure implementation of the G20 commitments to clear standardised derivatives[5], and that Central Counterparties (CCPs) comply with high prudential standards and adequate regulation of trade repositories. This proposal for a

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[1] COM(2009) 114. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0114:FIN:EN:PDF.

[2] "Ensuring efficient, safe and sound derivatives markets", COM(2009)332. The document is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0332:FIN:EN:PDF.

[3] The Communication is accompanied by a Staff Working Paper, which contains an overview of (i) derivatives markets and (ii) OTC derivative market segments, as well as an assessment of the effectiveness of current measures to reduce risks, notably as regards CDS. The document is available at http://ec.europa.eu/internal_market/docs/derivatives/report_en.pdf.

[4] "Ensuring efficient, safe and sound derivatives markets: Future policy actions" - COM(2009) 563. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0563:FIN:EN:PDF.

[5] http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf

Regulation delivers the Commission's commitments to proceed rapidly and with determination. It takes also into account the strong support and the many of the measures suggested in the Resolution of the European Parliament of 15 June 2010, on "Derivatives markets: future policy actions" (Langen-report).

As already indicated above, this initiative is part of a larger international effort to increase the stability of the financial system in general, and the OTC derivatives market in particular. Given the global nature of the OTC derivatives market an internationally coordinated approach is crucial. It is therefore important that this proposal takes into account what other jurisdictions intend to do or have already done in the area of OTC derivatives regulation to avoid the risk of regulatory arbitrage.

In this context, this proposal is consistent with the recently adopted US legislation on OTC derivatives, the so-called Frank-Dodd Act. The Act has a broadly identical scope of application. It contains similar provisions requiring the reporting of OTC derivative contracts and the clearing of eligible contracts. Furthermore, it puts in place strict capital and collateral requirements for OTC derivatives that remain bilaterally cleared. Finally, it puts in place a regulatory framework for trade repositories and upgrades the existing regulatory framework for CCPs. Similarly to the Commission's proposal, the Act foresees the further elaboration of a number of technical rules.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENT

Since October 2008, the Commission services have been engaged in almost continuous, extensive consultation with stakeholders to determine the appropriate policy response. This interaction has taken the form of many bilateral and multilateral meetings, two public consultations and a conference.

Initially the Commission services’ attention focused solely on the Credit Default Swap (CDS) market which was at the centre of attention with Bear Sterns and Lehman's. In order to facilitate the monitoring of the major dealers’ commitment in this area, the Commission established the Derivatives Working Group (DWG), that included representatives from the financial institutions that committed to clear European referenced CDS by July 2009[6], representatives from central counterparties, trade repositories and other relevant market participants and from relevant European (ECB, CESR, CEBS and CEIOPS)[7] and national (AMF, BaFin and FSA)[8] authorities. In addition to the meetings of the DWG, the Commission held separate, ad-hoc bilateral and multilateral meetings with a large number of stakeholders in the CDS market.

Following industry compliance with the above-mentioned commitment and to prepare legislative measures, the Commission formed a Member States Experts Working Group on Derivatives and Market Infrastructures. It discussed regulatory approaches with experts

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6 The letter of commitment and the list of signatories of the letter can be found on DG MARKT’s website at http://ec.europa.eu/internal_market/financial-markets/derivatives/index_en.htm#cds.

7 Respectively the European Central Bank, the Committee of European Securities Regulators, the Committee of European Banking Supervisors, and Committee of European Insurance and Occupational Pensions Supervisors.

8 Respectively the Autorité des marchés financiers, Bundesanstalt für Finanzdienstleistungsaufsicht and the Financial Services Authority.

representing Member States, the ECB, CESR and CEBS. It held a series of meetings from January to July 2010.

The Commission has also gained valuable information by participating in various international fora, in particular the OTC Derivatives Regulators Group and the Basel Committee's Risk Management and Modelling Group. The Commission has recently also gained observer status on the steering committee of the joint CPSS-IOSCO[9] working group that is currently reviewing the recommendations for CCPs and preparing recommendations for trade repositories. In addition, the Commission has engaged in frequent dialogue with non-EU authorities, in particular US authorities (the CFTC, the SEC[10], the Federal Reserve Bank of New York and the Federal Reserve Board and the US Congress) and is co-chairing a work stream of the Financial Stability Board (FSB) focusing on addressing the challenges related to the implementation of the reporting, clearing and trading obligations agreed at G20 level.

In parallel with the publication of the first Communication, DG MARKT launched a public consultation[11] from 3 July to 31 August 2009. The Commission services received 111 responses, 100 of which have been authorised for publication and have been published on the consultation website[12]. A summary of responses including an introductory analysis of the public stakeholder consultation is available on DG MARKT's website[13]. This was followed by a major conference in Brussels, on 25 September 2009[14]. Three panels of academics, industry representatives and regulators, coming from the EU and the US, presented their views on the need (or lack thereof) to reform the OTC derivatives market to an audience of more than 400 participants and answered their questions. The conference broadly confirmed the views and information obtained through the public consultation.

A second open consultation was organised from 14 June to 10 July 2010 to obtain feedback from interested stakeholders on the contours of the legislative measures. The Commission services received 210 responses, which were for the most part supportive of the suggested reforms.[15]

3. IMPACT ASSESSMENT

The Regulation is accompanied by an impact assessment[16] analysing the options to reduce systemic risk by increasing the safety and efficiency of the OTC derivatives market. Following the analysis, the impact assessment concludes that the largest net benefits would be achieved through the adoption of measures that would:

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9 Respectively the Committee on Payment and Settlement Systems and the International Organisation of Securities Commissions.

10 Respectively the Commodity Futures Trading Commission and the Securities and Exchange Commission.

11 http://ec.europa.eu/internal_market/consultations/2009/derivatives_en.htm.

12 http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/financial_services/derivatives_derivatives&vm=detailed&sb=Title.

13 http://ec.europa.eu/internal_market/consultations/docs/2009/derivatives/summaryderivcons_en.pdf.

14 The conference's recordings and documents are available on DG MARKT's website at http://ec.europa.eu/internal_market/financial-markets/derivatives/index_en.htm#conference.

15 The non-confidential responses can be found on: http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/financial_services/infrastructures&vm=detailed&sb=Title.

16 The impact assessment report can be found on http://ec.europa.eu/internal_market/financial-markets/index_en.htm.

- require the use of CCP clearing for OTC derivatives that meet predefined eligibility criteria;
- set specific targets for legal and process standardisation;
- set specific targets for the bilateral clearing of OTC derivatives transactions;
- require market participants to report all the necessary information on their OTC derivatives portfolios to a trade repository or, if that would not be possible, directly to regulators; and
- require the publication of aggregate position information.

4. LEGAL ELEMENTS OF THE PROPOSAL

4.1. Legal basis

The proposal is based on Article 114 TFEU as the most appropriate legal basis for a Regulation in this field. A Regulation is considered to be the most appropriate legal instrument to introduce a mandatory requirement directed to all actors to clear standardised OTC derivatives through CCPs and to ensure that CCPs, that will as a consequence assume and concentrate significant risk, are subject to uniform prudential standards in the EU. A Regulation is the appropriate legal instrument to confer new powers on ESMA as the sole authority with the responsibility to register and exercise surveillance of trade repositories in the EU.

4.2. Subsidiarity and proportionality

A uniform process at EU-level is needed to determine which OTC Derivatives are eligible for mandatory clearing through CCPs. This can not be left to the discretion of Member States as this would give rise to different and inconsistent application of the clearing obligation throughout the EU. A central role needs therefore to be given to the European Commission and ESMA in identifying the eligible class of derivatives that must be centrally cleared. Furthermore, as the use of CCPs becomes compulsory under EU-law, they must be subject to rigorous organisational, conduct of business and prudential requirements.

In respect of authorisation and supervision of CCPs the Regulation aims at striking a balance between the need for an important central role of ESMA, the competences of national authorities, and the interests of other competent authorities. It takes into account the potential fiscal responsibility of Member States and the cross-border nature of the CCP business.

ESMA will have a central role in the college of competent authorities for the authorisation, withdrawal of authorisation and amendment of authorisation of a CCP. In order to establish a single process and avoid discrepancies between Member States, ESMA is also responsible for recognising a CCP from a third country that seeks to provide clearing services to entities established in the European Union, if certain conditions are met.

As regards the reporting requirement, given the fact that information reported to a trade repository will be of interest to all competent authorities in the European Union and given the need to ensure that all competent authorities will have the same degree of unfettered access under the same conditions to that information, this should be regulated at the EU-level.

ESMA is therefore empowered to deal with both the registration and surveillance of trade repositories.

For these reasons, the provisions are in accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, as the objectives of the proposal cannot be sufficiently achieved by the Member States and can therefore be better achieved by the European Union.

4.3. Detailed explanation of the proposal

4.3.1. Title I (Subject matter, scope and definitions)

The scope of the Regulation is wide and lays down uniform requirements covering financial counterparties, non-financial counterparties (exceeding certain thresholds) and all categories of OTC derivative contracts. Its prudential parts apply to central counterparties as a result of the clearing obligation and, for the reporting requirement, to trade repositories. It is important to note, however, that the authorisation and supervision requirements for CCPs apply irrespective of the financial instrument the CCPs clear: OTC or other. This is clarified in Article 1(3). Exemptions are explicitly foreseen for the members of the European System of Central Banks, public bodies charged with or intervening in the management of the public debt, and to multilateral development banks, in order to avoid limiting their powers to intervene to stabilise the market, if and when required.

4.3.2. Title II (Clearing, reporting and risk mitigation of OTC Derivatives)

This part of the regulation is central to implementing the obligation to clear all 'standardised OTC derivatives' as agreed in the G-20. In order to implement this commitment into legislative obligations, 'standardised' contracts will mean those contracts that are eligible for clearing by CCPs. In order to apply this, the Regulation establishes a process that will take into account the risk aspects connected to mandatory clearing. The process is devised so as to ensure that a clearing obligation for OTC derivative contracts will in practice achieve its final objective of reducing risk in the financial system, rather than increasing it: forcing a CCP to clear OTC contracts that it is unable to risk-manage may have adverse repercussions on the stability of the system.

However, in order to establish a process that ensures that as many OTC contracts as possible will be cleared, the Regulation introduces two approaches to determine which contracts must be cleared:

(1) a '*bottom-up*' approach, according to which a CCP decides to clear certain contracts and is authorised to do so by its competent authority, who is then obliged to inform ESMA once it approves the CCP to clear those contracts. ESMA will then have the powers to decide whether a clearing obligation should apply to all of those contracts in the EU. ESMA will need to base that decision on certain objective criteria;

(2) a '*top-down*' approach according to which ESMA, together with the European Systemic Risk Board, will determine which contracts should potentially be subject to the clearing obligation. This process is important to identify and capture those contracts in the market that are not yet being cleared by a CCP.

Both approaches are necessary because, on the one hand, meeting the G20 clearing commitment cannot be left entirely to the initiative of the industry. On the other hand, a regulatory check at European level of the appropriateness of certain arrangements is necessary before the clearing obligation enters into force.

It is important to note that counterparties that are subjected to the clearing obligation cannot simply avoid the requirement by deciding not to participate in a CCP. If those counterparties do not meet the participation requirements or are not interested in becoming clearing members, they must enter into the necessary arrangements with clearing members to access the CCP as clients.

Furthermore, and in order to avoid the erection of barriers and to preserve the global nature of OTC derivatives, CCPs should not be allowed to accept only those transactions concluded on execution venues with which they have a privileged relationship or which are part of the same group. For these reasons, a CCP that has been authorised to clear eligible derivative contracts is required to accept clearing such contracts on a non-discriminatory basis, regardless of the venue of execution.

As regards non-financial (corporate) counterparties, they will in principle not be subject to the rules of this Regulation, unless their OTC derivatives positions reach a threshold and are considered to be systemically important. Because their derivatives activities are generally assumed to cover those derivatives that are directly linked to their commercial activity rather than speculation, those derivatives positions will not be covered by this Regulation.

In concrete terms, this means that the clearing obligation will only apply to those OTC contracts of non-financial counterparties that are particularly active in the OTC derivatives market and if this is not a direct consequence of their commercial activity. For example, this may be the case for energy suppliers that sell future production, agricultural firms fixing the price at which they are going to sell their crops, airlines fixing the price of their future fuel purchases or any commercial companies that must legitimately hedge the risk arising from their specific activity.

There are, however, reasons for not granting non-financial counterparties a full exemption from the scope of this Regulation.

First, non-financial counterparties are active participants in the OTC derivatives market and often transact with financial counterparties. Excluding them entirely would diminish the effectiveness of the clearing obligation. Second, some non-financial counterparties may take systemically important positions in OTC derivatives. Leaving systemically relevant non-financial counterparties whose failure may have a significant negative effect on the market completely outside the scope of regulatory attention would not be an acceptable course of action. Third, a full exclusion of non-financial counterparties could lead to regulatory arbitrage. A financial counterparty could easily circumvent the obligations set out in the Regulation by establishing a new non-financial entity and direct its OTC derivative business through it. Finally, their inclusion in the scope of application is also necessary to ensure global convergence with third countries. The US legislation does not provide a complete exemption of non-financial counterparties from the reporting and the clearing obligations.

In view of the above, the Regulation sets out a process that helps to identify the non-financial institutions with systemically important positions in OTC derivatives and subjects them to

certain obligations specified under the Regulation. The process is based on the definition of two thresholds:

a) an *information* threshold;

b) a *clearing* threshold .

These thresholds will be specified by the European Commission on the basis of draft regulatory standards proposed by ESMA, in consultation with the European Systemic Risk Board ("ESRB") and other relevant authorities. For example, in case of energy markets, ESMA would have to consult the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 in order to ensure that the particularities of the energy sector would be fully taken into account.

The information threshold will allow financial authorities to identify non-financial counterparties that have accumulated significant positions in OTC derivatives. This is necessary, because those counterparties are usually not subject to the supervision of these authorities. In practice, when the Regulation foresees that when the positions of a non-financial counterparty exceed the information threshold, the non-financial counterparty will be required to notify the competent authority defined in the Regulation of this fact. In addition, that counterparty will automatically become subject to the reporting obligation and will be required to provide justification for taking those positions.

The clearing threshold, on the other hand, will be used to establish whether a non-financial counterparty will become subject to the clearing obligation. In practice, if the positions of the counterparty will exceed that threshold, then the counterparty will become subject to the clearing obligation for all its contracts. If some of those contracts will happen to be not eligible for CCP clearing, then the non-financial counterparty will be subject to the capital or collateral requirements specified in the Regulation (see below).

Both thresholds will be defined taking into account the systemic relevance of the sum of net positions and exposures by counterparty per class of derivatives. However, and importantly, and as clarified and confirmed above, in calculating the positions for the clearing threshold, derivative contracts should not be taken into account if they have been entered into to cover the risks arising from an objectively measurable commercial activity.

As not all OTC derivatives will be considered eligible for central clearing, there remains a need to improve arrangements and the safety of those contracts that will continue to be managed on a so-called 'bilateral' basis. The Regulation therefore requires the use of electronic means and the existence of risk management procedures with timely, accurate and appropriately segregated exchange of collateral, and an appropriate and proportionate holding of capital.

Finally, financial counterparties and non-financial counterparty above the clearing threshold must report the details of any derivative contract they have entered into and any modification thereof (including novation and termination) to a registered trade repository. Greater transparency of the OTC market is critical for regulators, policymakers, and the marketplace. In the exceptional case that a trade repository is not capable of recoding the details of a particular OTC derivatives contract, the Regulation requires that this information should be provided directly to the relevant competent authority. The Commission will need to be empowered to determine the details, type, format and frequency of the reports for the different classes of derivatives, following draft technical standards to be developed by ESMA.

4.3.3. Title III (Authorisation and supervision of CCPs)

To ensure that CCPs established in the European Union are safe, the authorisation of a CCP will be subject to that CCP having access to adequate liquidity. Such liquidity could result from access to central bank or to creditworthy and reliable commercial bank liquidity, or a combination of both.

National competent authorities should retain the responsibility for authorising (including withdrawal) and supervising CCPs, as they remain best placed to examine how the CCPs operate on a daily basis, to carry out regular reviews and to take appropriate action, where necessary. Given the systemic importance of CCPs and the cross-border nature of their activities, it is important that in the authorisation process a central role is played by ESMA. This will be achieved in the following ways:

– the adoption of this legislative act in the specific form of a Regulation will give ESMA a central role and responsibility for ensuring its common and objective application, as clearly specified in the ESMA Regulation;

– ESMA will be required to develop a number of draft technical standards in critical areas for the correct application of the Regulation;

– ESMA will facilitate the adoption of an opinion by the college.

As CCPs are considered to be systemically relevant institutions, the relevant competent authorities in the college of competent authorities must define contingency plans to cope with emergency situation. Furthermore, the Commission in its future initiative on crisis management and resolution will need to define the specific policy and measures to address a crisis situation in a systemically relevant institution.

As regards CCPs from third countries, ESMA will also have the direct responsibility of recognising such CCPs, if certain conditions are met. In particular, the recognition will require that the Commission has ascertained the legal and supervisory framework of that third country as equivalent to the EU one, that the CCP is authorised and subject to effective supervision in that third country and ESMA has established co-operation arrangements with the third country competent authorities. A CCP of a third country will not be allowed to perform activities and services in the Union, if these conditions are not met.

4.3.4. Title IV (Requirements for CCPs)

Organisational requirements

As the Regulation will introduce a mandatory clearing obligation for OTC derivatives, critical attention needs to be awarded to the robustness and regulation of CCPs. To begin with, a CCP must have in place robust governance arrangements. These will respond to any potential conflicts of interest between owners, management, clearing members and indirect participants. The role of independent board members is particularly relevant. The roles and responsibilities of the risk committee are also clearly defined in the Regulation: its risk management function should report directly to the board and not be influenced by other business lines. The Regulation also requires governance arrangements to be publicly disclosed. In addition, a CCP should have adequate internal systems, operational and administrative procedures, and should be subject to independent audits.

All of these measures are considered more effective in addressing any potential conflicts of interest that may limit the capacity of CCPs to clear, than any other form of regulation which may have undesirable consequence on market structures (e.g. limitation of ownership, which would need to extend also to so-called vertical structures in which exchanges own a CCP).

Prudential requirements

As the CCP will be a counterparty to every position, it bears the risk that one of its counterparties might fail. Similarly, any counterparty of a CCP bears the risk that the CCP itself might fail. The Regulation therefore provides that a CCP must mitigate its counterparty credit risk exposure through a number of reinforcing mechanisms. These include stringent, but non-discriminatory participation requirements, financial resources, and other guarantees.

By virtue of its central role, a CCP is a critical component of the market it serves. Consequently, the failure of a CCP would in almost all cases become a potential systemic event for the financial system. In view of their systemically important role and in view of the proposed legislative requirement to clear all 'standardised' OTC derivatives through CCPs, the need to subject them to strict prudential regulation at EU-level cannot be over-emphasized. As the present national laws regulating CCPs differ between Member States, the resulting unlevel playing field also makes the cross-border provision of CCP services potentially less safe and more costly than would be desirable and represents a barrier to the integration of the European financial market.

Outsourcing of functions by a CCP will only be allowed, if it does not impact on the proper operation of the CCP and on its ability to manage risks, including those arising from the outsourced functions. Thus, CCPs must always monitor and have full control of the outsourced functions and continuously manage the risks they face. In practical terms, no risk management functions will be allowed to be outsourced.

A minimum quantum of capital must be required for authorisation to exercise the activities of a CCP. A CCP's own capital is also its last line of defence in the event of the default of one or more members, after the margins collected from the defaulting member(s), the default fund and any other financial resources have been exhausted. If a CCP decides to use part of its capital as an additional financial resource to be used for risk management purposes, then this portion must be in addition to the capital needed to perform the services and activities of a CCP on an on-going basis.

The Regulation will require a CCP to have a mutualised default fund to which members of the CCP will have to contribute. A default fund enables loss-mutualisation and thus represents an additional line of defence that a CCP can use in case of the insolvency of one or more of its members.

The Regulation also introduces important rules on segregation and portability of positions and corresponding collateral. These are critical to effectively reduce counterparty credit risk through the use of CCPs, to achieve a level playing field among European CCPs and to protect the legitimate interests of clients of clearing members. This responds to a call by clearing members and their clients for greater harmonisation and protection in this field. It also responds to the issues highlighted by Lehman's demise.

4.3.5. *Title V (Interoperability)*

Interoperability is an essential tool to achieve an effective integration of the post-trading market in Europe. However, interoperability may expose CCPs to additional risks. For this reason regulatory approval is required before entering into an interoperable arrangement. CCPs should carefully consider and manage the extra risks that interoperability entails and satisfy the competent authorities about the soundness of the systems and procedures adopted. In view of the complexity of derivatives markets and the early stage of development of CCP clearing for OTC derivatives, it is not appropriate to extend the provisions on interoperability to instruments other than cash securities at this point in time. However, this exclusion should not limit the possibility of CCPs to enter into such arrangements in a safe manner, subject to the conditions provided in the Regulation.

4.3.6. *Title VI (Registration and surveillance of trade repositories)*

As mentioned above (section 4.3.2) the Regulation provides for a reporting requirement of OTC derivative transactions to increase the transparency of this market. The information must be reported to trade repositories. The latter will therefore hold regulatory information which will be relevant for a number of regulators. In view of the central role of trade repositories in the collection of regulatory information, the Regulation gives ESMA the powers to register trade repositories, withdraw the registration and to perform the surveillance of trade repositories. Granting surveillance powers to authorities in the Member State where a trade repository is established would create an unbalanced situation between competent authorities of the different Member States. Furthermore, as there are no fiscal responsibilities implications connected to the surveillance of trade repositories, a national supervisory approach is not necessary. ESMA's role will also ensure an unfettered access to all the relevant European authorities and a unique counterparty representing Europe to deal with competent authorities of third countries trade repositories.

4.3.7. *Title VII (Requirements for trade repositories)*

The Regulation also contains provisions for trade repositories to guarantee their compliance with a set of standards. These are designed to ensure that the information that trade repositories maintain for regulatory purposes is reliable, secured and protected. In particular, trade repositories will be subject to organisational and operational requirements and ensure appropriate safeguarding and transparency of data.

In order to be registered, trade repositories must be established in the EU. However, a trade repository established in a third country can be recognised by ESMA if it meets a number of requirements designed to establish that such trade repository is subject to equivalent rules and appropriate surveillance in that third country. In order to ensure that there are no legal obstacles in place that would prevent an effective mutual exchange of information and unfettered access to data maintained in a trade repository located in a third country, the Regulation foresees the need to conclude an international agreement to that effect. The Regulation stipulates that if such an agreement is not in place a trade repository established in that third country would not be recognised by ESMA.

5. FINAL PROVISIONS

The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union in respect of the details to be

included in the notification to ESMA and in the register and the criteria for the decision of ESMA on the eligibility for the clearing obligation, on the information and clearing threshold, on the maximum time lag regarding the contract, on liquidity, on the minimum content of governance rules, on details of record keeping, on minimum content of business continuity plan and the services guaranteed, on percentages and time horizon for margin requirements, on extreme market conditions, on highly liquid collateral and haircuts, on highly liquid financial instruments and concentration limits, on details for performance of tests, on details concerning the application of a trade repository for registration with ESMA, on fines and on details concerning the information that a trade repository should make available, as referred to in this Regulation. ESMA should draft regulatory technical standards for these delegated acts and carry out appropriate impact assessments.

The Commission should be empowered to determine the format of reports, record keeping and the format for the registration application of a trade repository. According to Article 291 TFEU, rules and general principles concerning mechanisms for the control by Member States of the Commission's exercise of implementing powers are to be laid down in advance by a Regulation adopted in accordance with the ordinary legislative procedure. Pending the adoption of that new Regulation, Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission continues to apply, with the exception of the regulatory procedure with scrutiny, which is not applicable.

6. BUDGETARY IMPLICATION

The proposal has no implication for the Union budget.

2010/0250 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on OTC derivatives, central counterparties and trade repositories

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee[17],

Having regard to the opinion of the European Central Bank,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) At the request of the Commission, a report published on 25 February 2009 by a high-level group of experts chaired by J. de Larosière concluded that the supervisory framework needed to be strengthened to reduce the risk and severity of future financial crisis and recommended far-reaching reforms to the structure of supervision of the financial sector in Europe, including the creation of a European System of Financial Supervisors, comprising three European Supervisory Authorities, one for the securities sector, one for the insurance and occupational pensions sector and one for the banking sector, and the creation of a European Systemic Risk Board.

(2) The Commission Communication of 4 March 2009, "Driving European Recovery"[18], proposed to strengthen the Union's regulatory framework for financial services. In its Communication of 3 July 2009[19], the Commission assessed the role of derivatives in the financial crisis, and in its Communication of 20 October 2009[20], the Commission outlined the actions it intends to take to reduce the risks associated with derivatives.

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17 OJ C , , p. .

18 "Driving European Recovery" - COM(2009) 114.

19 "Ensuring efficient, safe and sound derivatives markets" - COM(2009) 332.

20 "Ensuring efficient, safe and sound derivatives markets: Future policy actions" - COM(2009) 563.

(3) On 23 September 2009, the Commission adopted proposals for three Regulations establishing the European System of Financial Supervisors, including the creation of three European Supervisory Authorities to contribute to a consistent application of Union legislation and to the establishment of high quality common regulatory and supervisory standards and practices. These are the European Banking Authority (EBA) established by Regulation …/…EU…, the European Securities and Markets Authority (ESMA) established by Regulation …/…EU…, and the European Insurance and Occupational Pensions Authority (EIOPA) established by Regulation …/…EU….

(4) Over-the-counter (OTC) derivatives lack transparency as they are privately negotiated contracts and any information concerning them is usually only available to the contracting parties. They create a complex web of interdependence which can make it difficult to identify the nature and level of risks involved. The financial crisis has demonstrated that such characteristics increase uncertainty in times of market stress and accordingly, pose risks to financial stability. This Regulation lays down conditions for mitigating those risks and improving the transparency of derivative contracts.

(5) At the 26 September 2009 summit in Pittsburgh, G20 Leaders agreed that all standardised OTC derivative contracts should be cleared through central counterparties (CCP) by end-2012 at the latest and that OTC derivative contracts should be reported to trade repositories. In June 2010, G20 Leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of over-the-counter derivatives in an internationally consistent and non-discriminatory way. The Commission will endeavour to ensure that these commitments are implemented in a similar way by our international partners.

(6) The European Council, in its Conclusions of 2 December 2009, agreed with the need to substantially improve the mitigation of counterparty credit risk and with the importance of improving transparency, efficiency and integrity for derivative transactions. The European Parliament resolution of 15 June 2010 on "Derivatives markets: future policy actions" called for mandatory clearing and reporting of OTC derivatives.

(7) The European Securities and Markets Authority (ESMA) acts within the scope of this Regulation by safeguarding the stability of financial markets in emergency situations and ensuring the consistent application of Union rules by national supervisory authorities and settling disagreements between them. It is also entrusted with developing legally binding regulatory technical standards and has a central role in the authorisation and monitoring of central counterparties and trade repositories.

(8) Uniform rules are required for derivative contracts set out in Annex I, Section C, numbers (4) to (10) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC[21] that are traded over-the-counter.

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

(9) Incentives to promote the use of CCPs have not proven to be sufficient to ensure that standardised OTC derivatives are actually cleared. Mandatory CCP clearing requirements for those OTC derivatives that can be cleared are therefore necessary.

(10) It is likely that Member States will adopt divergent national measures which could create obstacles to the smooth functioning of the internal market and be to the detriment of market participants and financial stability. A uniform application of the clearing obligation in the Union is also necessary to ensure a high level of investor protection and to create a level playing field between market participants

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

(12) This Regulation sets out the criteria for determining the eligibility to the clearing obligation. In view of its pivotal role, ESMA should decide whether a class of derivatives meets the eligibility criteria and from when the clearing obligation take effect.

(13) For an OTC derivative contract to be cleared, both parties to that contract must consent. Therefore, exemptions to the clearing obligation should be narrowly tailored as they would reduce the effectiveness of the obligation and the benefits of CCP clearing and may lead to regulatory arbitrage between groups of market participants.

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

(15) Rules on clearing and reporting obligations and rules on risk mitigation techniques for OTC derivative contracts not cleared by a CCP should apply to financial counterparties, namely investment firms as set out in Directive 2004/39/EC, credit institutions as defined in Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast)[22], insurance undertakings as defined in Directive 73/239/EEC [NB: to be repealed by Solvency II in 2012], assurance undertakings as defined in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance[23], reinsurance undertakings as defined in Directive 2005/68/EC, undertakings for collective investments in transferable securities (UCITS) as defined in Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[24], institutions for occupational retirement provision as defined in Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision[25] and alternative investment funds managers as defined in Directive 2010/.../EU.

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[22] OJ L 177, 30.6.2006, p. 1.
[23] OJ L 345, 19.12.2002, p. 1.
[24] OJ L 302, 17.11.2009, p. 32.
[25] OJ L 235, 23.9.2003, p. 10.

(16) Where appropriate, rules applicable to financial counterparties, should also apply to non-financial counterparties. It is recognised that non-financial counterparties use OTC-contracts in order to cover themselves against commercial risks directly linked to their commercial activities. Consequently, in determining whether a non-financial counterparty should be subject to the clearing obligation, consideration should be given to the purpose for which that non-financial counterparty uses OTC derivatives and to the size of the exposures that it has in those instruments. When establishing the threshold for the clearing obligation, ESMA should consult all relevant authorities, as for example regulators responsible for commodity markets, in order to ensure that the particularities of these sectors are fully taken into account. Moreover, by 31 December 2013, the Commission shall assess the systemic importance of the transactions of non-financial firms in OTC derivatives in different sectors, including the energy sector.

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

(18) Central banks and other national bodies performing similar functions, other public bodies charged with or intervening in the management of the public debt, and multilateral development banks listed in Section 4.2 of Part 1 of Annex VI of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions[26] should be excluded from the scope of this Regulation in order to avoid limiting their powers to intervene to stabilise the market, if and when required.

(19) As not all market participants that are subject to the clearing obligation are able to become clearing members of the CCP, they should have the possibility to access CCPs as clients.

(20) The introduction of a clearing obligation along with a process to establish which CCPs can be used for the purpose of this obligation may lead to unintended competitive distortions of the OTC derivatives market. For example, a CCP could refuse to clear transactions executed on certain trading venues because the CCP is owned by a competing trading venue. In order to avoid such discriminatory practices, CCPs should accept to clear transactions executed in different venues, to the extent that those venues comply with the operational and technical requirements established by the CCP. Generally, the Commission should continue to closely monitor the evolution of the OTC derivatives market and should, where necessary, intervene in order to prevent such competitive distortions from occurring in the Internal Market.

(21) In order to identify the relevant classes of OTC derivatives that should be subject to the clearing obligation, the thresholds and systemically relevant non-financial counterparties, reliable data is needed. Therefore, for regulatory purposes, it is important that a uniform OTC derivatives data reporting requirement is established at Union level.

(22) It is important that market participants report all details regarding OTC derivative contracts they have entered into to trade repositories. As a result, information on the risks inherent in OTC derivatives markets will be centrally stored and easily accessible to ESMA, the relevant competent authorities and the relevant central banks of the ESCB.

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

[26] OJ L 177, 30.6.2006, p. 1.

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

(25) There should be effective, proportionate and dissuasive penalties with regard to the clearing and reporting obligations. Member States should enforce those penalties in a manner that does not reduce the effectiveness of those rules.

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

(27) As this Regulation introduces a legal obligation to clear through specific CCPs for regulatory purposes, it is essential to ensure that those CCPs are safe and sound and comply at all times with stringent organisational, conduct of business and prudential requirements established by this Regulation. They should apply to the clearing of all financial instruments CCPs deal with, in order to ensure a uniform application.

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

(29) Direct rules regarding the authorisation and supervision of CCPs are an essential corollary to the obligation to clear OTC derivatives. It is appropriate that national competent authorities should retain the responsibility for all aspects of the authorisation and the supervision of CCPs, including the verification that the applicant CCP is compliant with this Regulation and with Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[27], in view of the fact that those national competent authorities remain best placed to examine how the CCPs operate on a daily basis, to carry out regular reviews and to take appropriate action, where necessary.

(30) Where a CCP risks insolvency, the fiscal responsibility may lie predominantly with the Member State in which it is established. It follows that authorization and supervision of that CCP should be exercised by the relevant competent authority of that Member State. However, since a CCP's clearing members may be established in different Members States and they will be the first to be impacted by the CCP's default, it is imperative that all relevant competent authorities are involved in the authorization and supervision process and that appropriate cooperation mechanisms, including colleges, are put in place. This will avoid divergent national measures or practices and obstacles to the internal market. ESMA should be a participant in every college in order to ensure the consistent and correct application of this Regulation.

(31) It is necessary to reinforce provisions on exchange of information between competent authorities and to strengthen the duties of assistance and cooperation between them. Due to

[27] OJ L 166, 11.6.1998, p. 45.

increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions so as to ensure the effective enforcement of this Regulation, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. For the exchange of information, strict professional secrecy is needed. It is essential, due to the wide impact of OTC derivative contracts, that other relevant authorities, such as tax authorities and energy regulators, have access to information necessary to the exercise of their functions.

(32) In view of the global nature of financial markets, ESMA should be directly responsible for recognising CCPs established in third countries and thus allowing them to provide clearing services within the Union, provided that the Commission has recognised the legal and supervisory framework of that third country as equivalent to the Union framework and that certain other conditions are met. In this context, agreements with the Union's major international partners will be of particular importance in order to ensure a global level playing field and ensure financial stability.

(33) CCPs should have robust governance arrangements, senior management of good repute and independent members on its board, irrespective of its ownership structure. However, different governance arrangements and ownership structures of a CCP may influence a CCP's willingness or ability to clear certain products. It is thus appropriate that the independent members of the board and the risk committee to be established by the CCP should address any potential conflict of interests within a CCP. Clearing members and clients need to be adequately represented as they may be impacted by decisions taken by the CCP. (34) A CCP may outsource functions other than its risk management functions, but only where those outsourced functions do not impact on the proper operation of the CCP and on its ability to manage risks.

(35) The participation requirements for a CCP should therefore be transparent, proportionate, and non-discriminatory and should allow for remote access to the extent that this does not expose the CCP to additional risks.

(36) Clients of clearing members that clear their OTC derivatives with CCPs should be granted a high level of protection. The actual level of protection depends on the level of segregation that those clients choose. Intermediaries should segregate their assets from those of their clients. For this reason, CCPs should keep updated and easily identifiable records.

(37) A CCP should have a sound risk management framework to manage credit risks, liquidity risks, operational and other risks, including the risks that it bears or poses to other entities as a result of interdependencies. A CCP should have adequate procedures and mechanisms in place to deal with the default of a clearing member. In order to minimise the contagion risk of such a default, the CCP should have in place stringent participation requirements, collect appropriate initial margins, maintain a default fund and other financial resources to cover potential losses.

(38) Margin calls and haircuts on collateral may have procyclical effects. CCPs and competent authorities should therefore adopt measures to prevent and control possible procyclical effects in risk management practices adopted by CCPs, to the extent that a CCP's soundness and financial security is not negatively affected.

(39) Exposure management is an essential part of the clearing process. Access to, and use of, the relevant pricing sources should be granted to provide clearing services in general. Such pricing

sources should include, but not be limited to, those related to indices that are used as references to derivatives or other financial instruments.

(40) Margins are the primary line of defence for a CCP. Although CCPs should invest the margins received in a safe and prudent manner, they should make particular efforts to ensure adequate protection of margins to guarantee that they are returned in a timely manner to the non-defaulting clearing members or to an interoperable CCP where the CCP collecting these margins defaults.

(41) The "European Code of Conduct for Clearing and Settlement" of 7 November 2006[28] established a voluntary framework for establishing links between CCPs and trade repositories. However, the post-trade sector remains fragmented along national lines, making cross-border trades more costly and hindering harmonisation. It is therefore necessary to lay down the conditions for the establishment of interoperable arrangements between CCPs to the extent these do not expose the relevant CCPs to risks that are not appropriately managed.

(42) Interoperability arrangements are important tools for greater integration of the post-trading market within the Union and regulation should be provided for. However, interoperability arrangements may expose CCPs to additional risks. Given the additional complexities involved in an interoperability arrangement between CCPs clearing OTC derivative contracts, it is appropriate at this stage to restrict the scope of interoperability arrangements to cash securities. However, by 30 September 2014, ESMA should submit a report to the Commission on whether an extension of that scope to other financial instruments would be appropriate.

(43) Trade repositories collect data for regulatory purposes that are relevant to authorities in all Member States. In view of the fact that surveillance of trade repositories does not have any fiscal implications and that many authorities across Member States will need access to the data maintained by trade repositories, ESMA should assume responsibility for the registration, withdrawal and surveillance of trade repositories.

(44) Given that regulators, CCPs and other market participants rely on the data maintained by trade repositories, it is necessary to ensure that those trade repositories are subject to strict record-keeping and data management requirements.

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

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

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[28] http://ec.europa.eu/internal_market/financial-markets/docs/code/code_en.pdf

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

(48) It is essential that Member States and ESMA protect the right to privacy of natural persons when processing personal data, in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the freedom of movement of such data[29].

(49) It is important to ensure international convergence of requirements for central counterparties and trade repositories. This Regulation follows the recommendations developed by CPSS-IOSCO[30] and ESCB-CESR[31] and creates a Union framework in which CCPs can operate safely. ESMA should consider these developments when drawing up the regulatory technical standards as well as the guidelines and recommendations foreseen in this Regulation.

(50) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect of the details to be included in the notification to ESMA and in the register and the criteria for the decision of ESMA on the eligibility for the clearing obligation, on the information and clearing threshold, on the maximum time lag regarding the contract, on liquidity, on the minimum content of governance rules, on details of record keeping, on minimum content of business continuity plan and the services guaranteed, on percentages and time horizon for margin requirements, on extreme market conditions, on highly liquid collateral and haircuts, on highly liquid financial instruments and concentration limits, on details for performance of tests, on details concerning the application of a trade repository for registration with ESMA, on fines and on details concerning the information that a trade repository should make available, as referred to in this Regulation. In defining the delegated acts, the Commission should make use of the expertise of the relevant European Supervisory Authorities (ESMA, EBA and EIOPA). In view of the expertise of ESMA regarding issues concerning securities and securities markets, ESMA should play a central role in advising the Commission on the preparation of the delegated acts. However, where appropriate, ESMA should consult closely with the other two European Supervisory Authorities.

(51) According to Article 291 TFEU, rules and general principles concerning mechanisms for the control by Member States of the Commission's exercise of implementing powers are to be laid down in advance by a Regulation adopted in accordance with the ordinary legislative procedure. Pending the adoption of that new Regulation, Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission continues to apply, with the exception of the regulatory procedure with scrutiny, which is not applicable.

(52) Since the objectives of this Regulation, namely to lay down uniform requirements for over-the-counter (OTC) derivative contracts and to also lay down uniform requirements for the performance of activities of central counterparties and trade repositories, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the

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[29] OJ L 281, 23..1.1995, p. 31.

[30] Committee on Payment and Settlement Systems (CPSS) of the central banks of the Group of Ten countries and the Technical Committee of the International Organization of Securities Commissions.

[31] European System of Central Banks and the Committee of European Securities Regulators.

principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(53) In view of the rules regarding interoperable systems, it was deemed appropriate to amend Directive 98/26/EC to protect the rights of a system operator that provides collateral security to a receiving system operator in the event of insolvency proceedings against that receiving system operator.

HAVE ADOPTED THIS REGULATION:

Title I
Subject matter, scope and definitions

Article 1

Subject matter and scope

1. This Regulation lays down uniform requirements for derivative contracts set out in Annex I Section C numbers (4) to (10) of Directive 2004/39/EC that are traded over-the-counter and lays down uniform requirements for the performance of activities of central counterparties and trade repositories.

2. This Regulation shall apply to central counterparties, financial counterparties and to trade repositories. It shall apply to non-financial counterparties where so provided.

3. Title V shall only apply to transferable securities and money-market instruments, as defined in Article 4(1) point 18 (a) and (b) and point 19 of Directive 2004/39/EC.

4. This Regulation shall not apply to:

   (a) the Members of the European System of Central Banks and other national bodies performing similar functions and other public bodies charged with or intervening in the management of the public debt;

   (b) multilateral development banks, as listed under Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC.

Article 2

Definitions

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

(1) 'central counterparty (CCP)' means an entity that legally interposes itself between the counterparties to the contracts traded within one or more financial markets, becoming the buyer to every seller and the seller to every buyer and which is responsible for the operation of a clearing system;

(2) 'trade repository' means an entity that centrally collects and maintains the records of OTC derivatives;

(3) 'clearing' means the process of establishing settlement positions, including the calculation of net positions, and the process of checking that financial instruments, cash or both are available to secure the exposures arising from a transaction;

(4) 'class of derivatives' means a number of OTC derivative contracts that share common, essential characteristics;

(5) 'over the counter (OTC) derivatives' means derivative contracts whose execution does not take place on a regulated market as defined by Article 4 (1) point 14 of Directive 2004/39/EC;

(6) 'financial counterparty' means investment firms as set out in Directive 2004/39/EC, credit institutions as defined in Directive 2006/48/EC, insurance undertakings as defined in Directive 73/239/EEC, assurance undertakings as defined in Directive 2002/83/EC, reinsurance undertakings as defined in Directive 2005/68/EC, undertakings for collective investments in transferable securities (UCITS) as defined in Directive 2009/65/EC, institutions for occupational retirement provision as defined in Directive 2003/41/EC and alternative investment funds managers as defined in Directive 2010/.../EU;

(7) 'non-financial counterparty' means an undertaking established in the Union other than the entities referred to in point (6);

(8) 'counterparty credit risk' means the risk that the counterparty to a transaction defaults before the final settlement of the transaction's cash flows;

(9) 'interoperability arrangement' means an arrangement between two or more CCPs that involves a cross-system execution of transactions;

(10) 'competent authority' means the authority designated by each Member State in accordance with Article 18;

(11) 'clearing member' means an undertaking which participates in a CCP and which is responsible for discharging the financial obligations arising from that participation;

(12) 'client' means an undertaking with a contractual relationship with a clearing member which enables that undertaking to clear its transactions with that CCP;

(13) ‘qualifying holding’ means any direct or indirect holding in a CCP or trade repository which represents 10% or more of the capital or of the voting rights, as set out in Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market[32], taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the CCP or trade repository in which that holding subsists;

(14) ‘parent undertaking’ means a parent undertaking within the meaning of Articles 1 and 2 of Council Directive 83/349/EEC[33];

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[32] OJ L 390, 31.12.2004, p. 38.
[33] OJ L 193, 18.7.1983, p. 1.

(15) ‘subsidiary’ means a subsidiary undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;

(16) ‘control’ means control as defined in Article 1 of Directive 83/349/EEC;

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

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

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

A situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons.

(18) 'capital' means capital within the meaning of Article 22 of Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions[34] in so far it has been paid up, plus the related share premium accounts, it fully absorbs losses in going concern situations, and in the event of bankruptcy or liquidation ranks after all other claims;

(19) 'reserves' means reserves as set out in Article 9 of Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies[35] and profits and losses brought forward as a result of the application of the final profit or loss;

(20) 'the board' means the administrative or supervisory board, or both, in accordance with national company law;

(21) 'independent member of the board' means a member of the board that has no business, family or other relationship that raises a conflict of interest with the CCP, its controlling shareholder(s) or management or its clearing members or management;

(22) 'senior management' means the person or persons who effectively direct the business of the CCP and the executive member or members the board.

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[34] OJ L 372, 31.12.1986, p. 1.
[35] OJ L 222, 14.8.1978, p. 11.

Title II
Clearing, reporting and risk mitigation of OTC Derivatives

Article 3
Clearing obligation

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

   That clearing obligation shall also apply to financial counterparties and to the non-financial counterparties referred to in Article 7(2) which enter into eligible OTC derivative contracts with third country entities.

2. For the purpose of complying with the clearing obligation under paragraph 1, financial counterparties and the non-financial counterparties referred to in Article 7(2) shall become either a clearing member or a client.

Article 4
Eligibility for the clearing obligation

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

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

   (a) whether that class of derivatives is eligible for the clearing obligation pursuant to Article 3;

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

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

   (a) reduction of systemic risk in the financial system;

   (b) the liquidity of contracts;

   (c) availability of pricing information;

   (d) ability of the CCP to handle the volume of contracts;

   (e) level of client protection provided by the CCP.

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

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

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

5. ESMA shall, on its own initiative and in consultation with the European Systemic Risk Board (ESRB), identify and notify to the Commission the classes of derivatives contracts that should be included in its public register, but for which no CCP has yet received authorisation.

6. Powers are delegated to the Commission to adopt regulatory technical standards specifying the following:

(a) the details to be included in the notification referred to in paragraph 1;

(b) the criteria referred to in paragraph 3;

(c) the details to be included in the register referred to in paragraph 4.

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

The draft regulatory standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

ESMA shall submit drafts for those regulatory standards to the Commission by 30 June 2012.

Article 5
Access to a CCP

A CCP that has been authorised to clear eligible OTC derivative contracts shall accept clearing such contracts on a non-discriminatory basis, regardless of the venue of execution.

Article 6
Reporting obligation

1. Financial counterparties shall report to a trade repository registered in accordance with Article 51 the details of any OTC derivative contract they have entered into and any modification or termination. The details shall be reported no later than the working day following the execution, clearing, or modification of the contract.

Other entities may report any such modification or termination as referred to in paragraph 1, on behalf of the original counterparties, to the extent that all the details of the contract are reported without duplication.

2. Where a trade repository is not able to record the details of an OTC derivative contract, financial counterparties shall report the details of their positions in those contracts to the competent authority designated in accordance with Article 48 of Directive 2004/39/EC.

The details to be reported to the competent authority shall be at least those that would be reported to the trade repository.

3. A counterparty which is subject to the reporting obligation may delegate the reporting of the details of the OTC derivative contract to the other counterparty.

A counterparty that reports the full details of a contract to a trade repository on behalf of another counterparty shall not be considered in breach of any restriction on disclosure of information imposed by that contract or by any legislative, regulatory or administrative provision.

No liability resulting from that disclosure shall lie with the reporting entity or its directors or employees.

4. Powers are delegated to the Commission to determine the details and type of the reports referred to in paragraphs 1 and 2 for the different classes of derivatives.

Those reports shall contain at least:

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

(b) the main characteristics of the contract, including the type, underlying, maturity and notional value are reported.

The draft regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with [Articles 7 to 7d] of Regulation …/… [ESMA Regulation].

ESMA shall develop draft regulatory technical standards for submission to the Commission by 30 June 2012.

5. In order to ensure uniform conditions of application of paragraphs 1 and 2, powers are conferred upon the Commission to determine format and frequency of the reports referred to in paragraphs 1 and 2 for the different classes of derivatives. The draft implementing standards referred to in the first subparagraph shall be adopted in accordance with [Article 7e] of Regulation …/… [ESMA Regulation].

ESMA shall develop draft implementing technical standards for submission to the Commission by 30 June 2012.

Article 7

Non-financial counterparties

1. Where a non-financial counterparty takes positions in OTC derivative contracts that exceed the information threshold to be determined pursuant to paragraph 3(a), it shall notify the competent authority designated in accordance with Article 48 of Directive 2004/39/EC thereof, providing justification for taking those positions.

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

2. Where a non-financial counterparty takes positions in OTC derivative contracts exceeding the clearing threshold to be determined pursuant to paragraph 3(b), it shall be subject to the clearing obligation set out in Article 3 with regard to all its eligible OTC derivative contracts.

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

3. Powers are delegated to the Commission to adopt regulatory technical standards specifying:

(a) the information threshold;

(b) the clearing threshold.

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

The regulatory standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

ESMA, in consultation with the European Systemic Risk Board ("ESRB") and other relevant authorities, shall submit drafts for those regulatory standards to the Commission by 30 June 2012 at the latest.

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

5. The Commission, in consultation with ESMA, ESRB and other relevant authorities, shall periodically review the thresholds established in paragraph 3 and amend them, where necessary.

Article 8

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

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

(a) where possible, electronic means ensuring the timely confirmation of the terms of the OTC derivative contract;

(b) robust, resilient and auditable processes in order to reconcile portfolios, to manage the associated risk and to identify disputes between parties early and resolve them, and to monitor the value of outstanding contracts.

For the purposes of point (b), the value of outstanding contracts shall be marked-to-market on a daily basis and risk management procedures shall require the timely, accurate and appropriately segregated exchange of collateral or the appropriate and proportionate holding of capital.

2. Powers are delegated to the Commission to adopt regulatory technical standards specifying the maximum time lag between the conclusion of an OTC derivative contract and the confirmation referred to in paragraph 1(a).

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

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

3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the arrangements and levels of collateral and capital required for compliance with paragraph 1(b) and the second subparagraph of paragraph 1.

Depending on the legal nature of the counterparty, the regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with either Articles [7 to 7d] of Regulation EU…/…[EBA], Articles [7 to 7d] of Regulation EU…/…[ESMA] or Articles [7 to 7d] of Regulation EU…/…[EIOPA].

EBA, ESMA and EIOPA shall submit, jointly, a common draft to the Commission for those regulatory technical standards by 30 June 2012.

Article 9
Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the rules under this Title and shall take all measures necessary to ensure that they are implemented. Those penalties shall include at least administrative fines. The penalties provided for shall be effective, proportionate and dissuasive.

2. Member States shall ensure that the competent authorities responsible for the supervision of financial, and where, appropriate, non-financial counterparties disclose every penalty that has been imposed for infringements of Articles 3 to 8 to the public, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

By 30 June 2012 at the latest, the Member States shall notify the rules referred to in paragraph 1 to the Commission. They shall notify the Commission of any subsequent amendment thereto without delay.

3. The Commission, with the assistance of ESMA, shall verify that the administrative penalties referred to in paragraph 1 and the thresholds referred to in Article 7 (1) and (2) are effectively and consistently applied.

Title III
Authorisation and supervision of CCPs

Chapter 1
Conditions and Procedures for the Authorisation of a CCP

Article 10
Authorisation of a CCP

1. Where a CCP that is a legal person established in the Union and has access to adequate liquidity intends to perform its services and activities, it shall apply for authorisation to the competent authority of the Member State where it is established.

   Such liquidity could result from access to central bank liquidity or to creditworthy and reliable commercial bank liquidity, or a combination of both. Access to liquidity could result from an authorisation granted in accordance with Article 6 of Directive 2006/48/EC or other appropriate arrangements.

2. The authorisation shall be effective for the entire territory of the Union.

3. The authorisation shall specify the services or activities which the CCP is authorised to provide or perform including the classes of financial instruments covered by the authorisation.

4. A CCP shall comply at all times with the conditions necessary for the initial authorisation.

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

5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the criteria for adequate liquidity referred to in paragraph 1.

   The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

   EBA shall, in consultation with ESMA, submit a draft to the Commission for those regulatory technical standards by 30 June 2012.

Article 11
Extension of activities and services

1. A CCP wishing to extend its business to additional services or activities not covered by the initial authorisation shall submit a request for extension. The offering of clearing services in a different currency or in financial instruments that significantly differ in their risk characteristics from those for which the CCP has already been authorised shall be considered an extension of that authorisation.

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

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

Article 12

Capital requirements

1. A CCP shall have a permanent, available and separate initial capital of at least EUR 5 million to be authorised pursuant to Article 10.

2. Capital, together with retained earnings and reserves of a CCP, shall at all times be sufficient to ensure an orderly winding-down or restructuring of the activities over an appropriate time span and that the CCP is adequately protected against operational and residual risks.

3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the capital, retained earnings and reserves of a CCP referred to in paragraph 2.

   The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

   ESMA shall, in consultation with EBA, submit a draft to the Commission for those regulatory technical standards by 30 June 2012.

Article 13

Procedure for granting and refusing authorisation

1. The competent authority shall only grant authorisation where it is fully satisfied that the applicant CCP complies with all the requirements set out in this Regulation, the requirements adopted pursuant to Directive 98/26/EC, and following the joint positive opinion of the college referred to in Article 15 and the opinion of ESMA.

2. The applicant CCP shall provide all information, necessary to enable the competent authority to satisfy itself that the applicant CCP has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations set out in this Regulation.

3. Within six months of the submission of a complete application, the competent authority shall inform the applicant CCP in writing whether the authorisation has been granted.

Article 14

Colleges

1. The competent authority of the Member State of establishment of a CCP shall establish and chair a college to facilitate the exercise of the tasks referred to in Articles 10, 11, 46 and 48.

   The college shall consist of:

(a) ESMA ;

(b) the competent authority of the Member State of establishment of the CCP;

(c) the competent authorities responsible for the supervision of the clearing members of the CCP established in the three Member States with the largest contributions to the default fund of the CCP referred to in Article 40 on an aggregate basis;

(d) the competent authorities responsible for the supervision of regulated markets, or multilateral trading facilities, served by the CCP or both;

(e) the competent authorities supervising CCPs with whom interoperability arrangements have been established;

(f) the authority responsible for the oversight of the CCP and the central banks of issue of the most relevant currencies of the financial instruments cleared.

2. The college shall, without prejudice to the responsibilities of the competent authorities under this Regulation, ensure:

(a) the preparation of the joint opinion referred to in Article 15;

(b) the exchange of information, including requests for information pursuant to Article 21;

(c) agreement on the voluntary entrustment of tasks among its members;

(d) the determination of supervisory examination programmes based on a risk assessment of the CCP;

(e) the improvement of efficiency of supervision by removing unnecessary duplication of supervisory requirements;

(f) consistency in the application of supervisory practices;

(g) the determination of procedures and contingency plans to address emergency situations, as referred to in Article 22.

3. The establishment and functioning of the college shall be based on a written agreement between all its members.

That agreement shall determine the practical arrangements for the functioning of the college and may determine tasks to be entrusted to the competent authority of the Member State of establishment of a CCP or another member of the college.

Article 15
Joint opinion

1. The competent authority of the Member State where the CCP is established shall conduct a risk assessment of the CCP and submit a report to the college.

The college shall reach a joint opinion on that report within two months of receiving it.

2. ESMA shall facilitate the adoption of a joint opinion in accordance with its settlement of disagreement powers under Article 11 of Regulation …/… [ESMA Regulation] and its general coordination function under Article 16 of the same Regulation. It shall have no voting rights on joint opinions of the college.

Article 16

Withdrawal of authorisation

1. The competent authority shall withdraw the authorisation in any of the following circumstances:

   (a) where the CCP has not made use of the authorisation within 12 months, expressly renounces the authorisation or has provided no services or performed no activity for the preceding six months;

   (b) where the CCP has obtained the authorisation by making false statements or by any other irregular means;

   (c) where the CCP is no longer in compliance with the conditions under which authorisation was granted;

   (d) has seriously and systematically infringed the requirements set out in this Regulation;

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

3. The competent authority may limit the withdrawal to a particular service, activity, or financial instrument.

Article 17

Review and evaluation

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

The review and evaluation shall have regard to the size, systemic importance, nature, scale and complexity of the activities of the CCP.

Chapter 2
Supervision and oversight of CCPs

Article 18
Competent authorities

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

   Where a Member State designates more than one competent authority, it shall clearly determine the respective roles and shall designate a single authority to be responsible for co-ordinating co-operation and the exchange of information with the Commission, ESMA and other Member States' competent authorities in accordance with Articles 19 to 22.

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

3. Each Member State shall ensure that appropriate administrative measures, in conformity with national law, can be taken or imposed against the natural or legal persons responsible where the provisions in this Regulation have not been complied with.

   Those measures shall be effective, proportionate and dissuasive.

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

Chapter 3
Cooperation

Article 19
Cooperation between authorities

1. Competent authorities shall cooperate closely with each other and with ESMA.

2. The competent authorities shall, in the exercise of their general duties, duly consider the potential impact of their decisions on the stability of the financial system in all other Member States concerned, in particular the emergency situations referred to in Article 22, based on the available information at the time.

Article 20
Professional secrecy

1. The obligation of professional secrecy shall apply to all persons working or who have worked for the competent authorities designated in accordance with Article 18, ESMA, or auditors and experts instructed by the competent authorities or ESMA.

   No confidential information they may receive in the course of their duties may be divulged to any person or authority whatsoever, except in summary or aggregate form such that an individual CCP, trade repository or any other person cannot be identified, without prejudice to cases covered by criminal law or the other provisions of this Regulation.

2. Where a CCP has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings where necessary for carrying out the proceeding.

3. Without prejudice to cases covered by criminal law, the competent authorities, ESMA, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Regulation may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Regulation or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them or in the context of administrative or judicial proceedings specifically related to the exercise of those functions, or both. Where ESMA, the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.

4. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraphs 1, 2 and 3.

   However, those conditions shall not prevent ESMA, the competent authorities and the relevant central banks from exchanging or transmitting confidential information in accordance with this Regulation and with other legislation applicable to investment firms, credit institutions, pension funds, undertakings for collective investment in transferable securities("UCITS"), alternative investment fund managers ("AIFM"), insurance and reinsurance intermediaries, insurance undertakings, regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.

5. Paragraphs 1, 2 and 3 shall not prevent the competent authorities from exchanging or transmitting confidential information, in accordance with national law, that has not been received from a competent authority of another Member State.

Article 21
Exchange of information

1. Competent authorities shall provide ESMA and one another with the information required for the purposes of carrying out their duties under this Regulation.

2. Competent authorities and other bodies or natural and legal persons receiving confidential information in the exercise of their duties under this Regulation shall only use it in the course of their duties.

3. ESMA shall transmit confidential information relevant to the performance of their tasks to the competent authorities responsible for the supervision of the CCPs. Competent authorities and other relevant authorities shall communicate the necessary information for the exercise of their duties set out in this Regulation to ESMA and other competent authorities.

4. Competent authorities shall communicate information to the central banks of the ESCB where such information is relevant for the exercise of their duties.

Article 22

Emergency situations

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

Chapter 4
Relations with third countries

Article 23

Third countries

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

2. ESMA shall recognise a CCP from a third country, where the following conditions are met:

(a) the Commission has adopted a Decision in accordance with paragraph 3;

(b) the CCP is authorised in, and is subject to, effective supervision in that third country;

(c) co-operation arrangements have been established in paragraph 4.

3. The Commission may adopt a Decision in accordance with the procedure referred to in Article 69(2), determining that the legal and supervisory arrangements of a third country ensure that CCPs authorised in that third country comply with legally binding requirements which are equivalent to the requirements resulting from this Regulation and that these CCPs are subject to effective supervision and enforcement in that third country on an ongoing basis.

4. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent to this Regulation in accordance with paragraph 3. Such arrangements shall specify at least:

(a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned;

(b) the procedures concerning the coordination of supervisory activities.

Title IV
Requirements for CCPs

Chapter 1
Organisational Requirements

Article 24

General provisions

1. A CCP shall have robust governance arrangements, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks to which it is or might be exposed, and adequate internal control mechanisms, including sound administrative and accounting procedures.

2. A CCP shall adopt policies and procedures which are sufficiently effective so as to ensure compliance with this Regulation, including compliance of its managers and employees with all the provisions of this Regulation.

3. A CCP shall maintain and operate an organisational structure that ensures continuity and orderly functioning in the performance of its services and activities. It shall employ appropriate and proportionate systems, resources and procedures.

4. A CCP shall maintain a clear separation between the reporting lines for risk management and those for the other operations of the CCP.

5. A CCP shall adopt, implement and maintain a remuneration policy which promotes sound and effective risk management and which does not create incentives to relax risk standards.

6. A CCP shall maintain information technology systems adequate to deal with the complexity, variety and type of services and activities performed so as to ensure high standards of security and the integrity and confidentiality of the information maintained.

7. A CCP shall make its governance arrangements and the rules governing the CCP available to the public.

8. The CCP shall be subject to frequent and independent audits. The results of these audits shall be communicated to the board and made available to the competent authority.

9. Powers are delegated to the Commission to adopt regulatory technical standards specifying the minimum content of the rules and governance arrangements referred to in paragraphs (1) to (8).

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.

Article 25

Senior Management and the Board

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

2. A CCP shall have a board of which at least one third, but no less than two, of its members are independent. The compensation of the independent and other non-executive members of the board shall not be linked to the business performance of the CCP.

   The members of the board, including its independent members, shall be of sufficiently good repute and have sufficient expertise in financial services, risk management and clearing services.

3. A CCP shall clearly determine the roles and responsibilities of the board and shall make the minutes of the board meetings available to the competent authority.

Article 26

Risk committee

1. A CCP shall establish a risk committee, which shall be composed of representatives of its clearing members and independent members of the board. The risk committee may invite employees of the CCP to attend risk committee meetings in a non-voting capacity. The advice of the risk committee shall be independent from any direct influence by the management of the CCP.

2. A CCP shall clearly determine the mandate, the governance arrangements to ensure its independence, the operational procedures, the admission criteria and the election mechanism for risk committee members. The governance arrangements shall be publicly available and shall, at least, determine that the risk committee is chaired by an independent member of the board, reports directly to the board and holds regular meetings.

3. The risk committee shall advise the board on any arrangements that may impact the risk management of the CCP, such as, but not limited to, a significant change in its risk model, the default procedures, the criteria for accepting clearing members or the clearing of new classes of instruments. The advice of the risk committee is not required for the daily operations of the CCP or in emergency situations.

4. Without prejudice to the right of competent authorities to be duly informed, the members of the risk committee shall be bound by confidentiality. Where the chairman of the risk committee determines that a member has an actual or potential conflict of interest on a particular matter, that member shall not be allowed to vote on that matter.

5. A CCP shall promptly inform the competent authority of any decision in which the board decides not to follow the advice of the risk committee.

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

Article 27
Record keeping

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

2. A CCP shall maintain, for a period of at least ten years following the termination of a contract, all information on all contracts it has processed. That information shall at a minimum enable the identification of the original terms of a transaction before clearing by that CCP.

3. A CCP shall make the records and information referred to in paragraphs 1 and 2 and all information on the positions of cleared contracts, irrespective of the venue where the transactions was executed, available upon request to the competent authority and to ESMA.

4. Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of the records and information to be retained as referred to in paragraphs 1 and 2.

   The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

   ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.

5. In order to ensure uniform conditions of application of paragraph 1 and 2, powers are conferred to the Commission to determine the format of the records and information to be retained.

   The implementing technical standards referred to in the first subparagraph shall be adopted in accordance with [Article 7e] of Regulation …/… [ESMA Regulation].

   ESMA shall submit drafts on those implementing technical standards to the Commission by 30 June 2012.

Article 28
Shareholders and members with qualifying holdings

1. The competent authority shall not authorise a CCP until it has been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and the amounts of those holdings.

2. The competent authority shall refuse authorisation to a CCP where, it is not satisfied as to the suitability of the shareholders or members that have qualifying holdings in the CCP, taking into account the need to ensure the sound and prudent management of a CCP.

3. Where close links exist between the CCP and other natural or legal persons, the competent authority shall grant authorisation only where those links do not prevent the effective exercise of the supervisory functions of the competent authority.

4. Where the persons referred to in paragraph 1 exercise an influence which is likely to be prejudicial to the sound and prudent management of the CCP, the competent authority shall take appropriate measures to terminate that situation.

5. The competent authority shall refuse authorisation where the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the CCP has close links, or difficulties involved in their enforcement, prevent the effective exercise of the supervisory functions of the competent authority.

Article 29

Information to competent authorities

1. A CCP shall notify the competent authority of any changes to its management, and shall provide the competent authority of all the information necessary to assess whether the board members are of sufficiently good repute and sufficiently experienced.

Where the conduct of a member of the board is likely to be prejudicial to the sound and prudent management of the CCP, the competent authority shall take appropriate measures, including removing that member from the board.

2. Any natural or legal person or such persons acting in concert (hereinafter referred to as “the proposed acquirer’), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a CCP or to further increase, directly or indirectly, such a qualifying holding in a CCP as a result of which the proportion of the voting rights or of the capital held would reach or exceed 10%, 20%, 30% or 50% or so that the CCP would become its subsidiary (hereinafter referred to as the proposed acquisition), shall first notify in writing the competent authorities of the CCP in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 30(4).

Any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in a CCP shall first notify the competent authority in writing thereof, indicating the size of the intended holding. Such a person shall likewise notify the competent authority where he has taken a decision to reduce his qualifying holding so that the proportion of the voting rights or of the capital held would fall below 10%, 20 %, 30 % or 50 % or so that the CCP would cease to be his subsidiary.

The competent authority shall, promptly and in any event within two working days following receipt of the notification as referred to in paragraph 2, as well as following receipt of the information referred to in paragraph 3, acknowledge receipt in writing thereof to the proposed acquirer or vendor.

The competent authority shall have a maximum of sixty working days as from the date of the written acknowledgement of receipt of the notification and all documents required to be attached to the notification on the basis of the list referred to in Article 30(4) (hereinafter referred to as the assessment period), to carry out the assessment provided for in Article 30(1) (hereinafter referred to as 'the assessment').

The competent authority shall inform the proposed acquirer or vendor of the date of the expiry of the assessment period at the time of acknowledging receipt.

3. The competent authority may, during the assessment period, where necessary, and no later than on the 50th working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed.

   For the period between the date of request for information by the competent authority and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. The interruption shall not exceed 20 working days. Any further requests by the competent authority for completion or clarification of the information shall be at its discretion but may not result in an interruption of the assessment period.

4. The competent authority may extend the interruption referred to in the second subparagraph of paragraph 3 up to thirty working days where the proposed acquirer or vendor is either of the following:

   (a) situated or regulated outside the Union;

   (b) a natural or legal person not subject to supervision under this Regulation or Directives 73/239/EEC, 85/611/EEC, 92/49/EEC, 2002/83/EC, 2003/41/EC, 2004/39/EC, 2005/68/EC, 2006/48/EC, 2009/65/EC or 2010/.../EU (AIFM).

5. Where the competent authority, upon completion of the assessment, decides to oppose the proposed acquisition, it shall, within two working days, and not exceeding the assessment period, inform the proposed acquirer in writing and provide the reasons for that decision. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. However, Member States may allow a competent authority to make such disclosure in the absence of a request by the proposed acquirer.

6. Where the competent authority does not oppose the proposed acquisition within the assessment period, it shall be deemed to be approved.

7. The competent authority may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

8. Member States shall not impose requirements for notification to, and approval by, the competent authority of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Regulation.

Article 30
Assessment

1. Where assessing the notification provided for in Article 29(2) and the information referred to in Article 29(3), the competent authority shall, in order to ensure the sound and prudent management of the CCP in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the CCP, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:

   (a) the reputation and financial soundness of the proposed acquirer;

   (b) the reputation and experience of any person who will direct the business of the CCP as a result of the proposed acquisition;

   (c) whether the CCP will be able to comply and continue to comply with the provisions set out in this Regulation;

   (d) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC[36] is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

   Where assessing the financial soundness of the proposed acquirer, the competent authority shall pay particular attention to the type of business pursued and envisaged in the CCP in which the acquisition is proposed.

   Where assessing the ability to comply with this Regulation, the competent authority shall pay particular attention to whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities.

2. The competent authorities may oppose the proposed acquisition only where there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or where the information provided by the proposed acquirer is incomplete.

3. Member States shall neither impose any prior conditions in respect of the level of holding that must be acquired nor allow their competent authorities to examine the proposed acquisition in terms of the economic needs of the market.

4. Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification referred to in Article 29(2). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.

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[36] OJ L 309, 25.11.2005, p.15.

5. Notwithstanding Article 29(2), (3) and (4), where two or more proposals to acquire or increase qualifying holdings in the same CCP have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

6. The relevant competent authorities shall work in full consultation with each other when carrying out the assessment where the proposed acquirer is one of the following:

(a) a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a security settlement system, a UCITS management company or an AIFM authorised in another Member State;

(b) the parent undertaking of a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a security settlement system, a UCITS management company or an AIFM authorised in another Member State;

(c) a natural or legal person controlling a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a security settlement system, a UCITS management company or an AIFM authorised in another Member State.

7. The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. The competent authorities shall, upon request, communicate all relevant information to each other and shall communicate all essential information at their own initiative. A decision by the competent authority that has authorised the CCP in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer.

Article 31

Conflicts of interest

1. A CCP shall maintain and operate effective written organisational and administrative arrangements to identify and manage any potential conflicts of interest between itself, including its managers, employees, or any person directly or indirectly linked to them by control or close links and its clearing members or their clients or between them. It shall maintain and implement adequate resolution procedures whenever possible conflicts of interest occur.

2. Where the organisational or administrative arrangements of a CCP to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of a clearing member or client will be prevented, it shall clearly disclose the general nature or sources of conflicts of interest to the clearing member before accepting new transactions from that clearing member. Where the client is not known to the CCP, the CCP shall inform the clearing member whose client is concerned.

3. Where the CCP is a parent undertaking or a subsidiary, the written arrangements must also take into account any circumstances, of which the CCP is or should be aware, which may give

rise to a conflict of interest arising as a result of the structure and business activities of other undertakings with which it has a parent undertaking or a subsidiary relationship.

4. The written arrangements established in accordance with paragraph 1 shall include the following:

   (a) the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of one or more clearing members or clients;

   (b) procedures to be followed and measures to be adopted in order to manage such conflicts.

5. A CCP shall take all reasonable steps to prevent any misuse of the information maintained in its systems and shall prevent the use of that information held for other business activities. Sensitive information recorded in one CCP shall not be used for commercial use by any other natural or legal person that has a parent undertaking or a subsidiary relationship with the CCP.

Article 32

Business continuity

1. A CCP shall establish, implement and maintain an adequate business continuity policy and disaster recovery plan aiming at ensuring the preservation of its functions, the timely recovery of operations and the fulfilment of the CCP's obligations. Such a plan shall at a minimum allow for the recovery of all transactions at the time of disruption to allow the CCP to continue to operate with certainty and to complete settlement on the scheduled date.

2. Powers are delegated to the Commission to adopt regulatory technical standards specifying the minimum content of the business continuity plan and the minimum level of services that the disaster recovery plan shall guarantee.

   The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

   ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.

Article 33

Outsourcing

1. Where a CCP outsources operational functions, services or activities, it shall remain fully responsible for discharging all of its obligations under this Regulation and shall comply at all times with the following conditions:

   (a) outsourcing does not result in the delegation of its responsibility;

   (b) the relationship and obligations of the CCP towards its clearing members or where relevant their clients are not altered;

   (c) the conditions for the authorisation of the CCP do not effectively change;

(d) outsourcing does not prevent the exercise of supervisory and oversight functions;

(e) outsourcing does not result in depriving the CCP from the necessary systems and controls to manage the risks it faces;

(f) the CCP retains the necessary expertise to evaluate the quality of the services provided, the organisational and capital adequacy of the service provider; and to supervise the outsourced functions effectively and manage the risks associated with the outsourcing and must constantly supervise those functions and manage those risks;

(g) the CCP has direct access to the relevant information of the outsourced functions;

(h) the service provider cooperates with the competent authority in connection with the outsourced activities;

(i) the service provider protects any sensitive and confidential information relating to the CCP and its clearing members and clients.

2. The competent authority shall require the CCP to clearly allocate and set out its rights and obligations, and those of the service provider, in a written agreement.

3. A CCP shall make all information necessary to enable the competent authority to assess the compliance of the performance of the outsourced activities with the requirements of this Regulation available on request.

Chapter 2
Conduct of Business Rules

Article 34
General provisions

1. When providing services to its clearing members, and where relevant, to their clients, a CCP shall act fairly and professionally in accordance with the best interests of the clearing members and clients and sound risk management.

2. A CCP shall have transparent rules for the handling of complaints.

Article 35
Participation requirements

1. A CCP shall establish the categories of admissible clearing members and the admission criteria. Such criteria shall be non-discriminatory, transparent and objective so as to ensure fair and open access to the CCP and shall ensure that clearing members have sufficient financial resources and operational capacity to meet the obligations arising from participation in a CCP. Criteria that restrict access shall only be permitted to the extent that their objective is to control the risk for the CCP.

2. A CCP shall ensure that the application of the criteria referred to in paragraph 1 is met on an on-going basis and shall have timely access to the information relevant for the assessment. A CCP shall conduct, at least once a year, a comprehensive review of the compliance with the provisions in this article by its clearing members.

3. Clearing members that clear transactions on behalf of their clients shall have the necessary additional financial resources and operational capacity to perform this activity. Clearing members shall, upon request, inform the CCP about the criteria and arrangements they adopt to allow their clients to access the services of the CCP.

4. A CCP shall have objective and transparent procedures for the suspension and orderly exit of clearing members that no longer meet the criteria referred to in paragraph 1.

5. A CCP may only deny access to clearing members meeting the criteria referred to in paragraph 1 where it is duly justified in writing and based on a comprehensive risk analysis.

6. A CCP may impose specific additional obligations on clearing members, such as, but not limited to, the participation in auctions of a defaulting clearing member's position. Such additional obligations shall be proportional to the risk brought by the clearing member and shall not restrict participation to certain categories of clearing members.

Article 36

Transparency

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

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

3. A CCP shall publicly disclose the price information used to calculate its end of day exposures with its clearing members and the volumes of the cleared transactions for each class of instruments.

Article 37

Segregation and portability

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

2. A CCP shall require each clearing member to distinguish and segregate in accounts with the CCP the assets and positions of that clearing member from those of its clients. A CCP shall allow clients to have a more detailed segregation of their assets and positions. The CCP shall publicly disclose the risks and costs associated with the different levels of segregation.

3. Depending on the level of segregation chosen by a client, the CCP shall ensure that it is able to transfer on request at a pre-defined trigger event, without the consent of the clearing member and within a pre-defined transfer period its assets and positions to another clearing member. That other clearing member shall only be obliged where it has previously entered into a contractual relationship for that purpose.

4. Provided that the client is not exposed to the default of the clearing member through which it has access to the CCP or of any other clients, Annex III, Part 2, point 6 of Directive 2006/48/EC shall apply.

5. The requirements set out in paragraphs 1 to 4 shall prevail over any conflicting laws, regulations and administrative provisions of the Member States that prevent the parties from fulfilling them.

Chapter 3
Prudential Requirements

Article 38
Exposure management

A CCP shall measure and assess its liquidity and credit exposures to each clearing member and, where relevant, to another CCP with whom it has concluded an interoperable arrangement, on a near to real time basis. A CCP shall have access in a timely manner and on a non discriminatory basis to the relevant pricing sources to effectively measure its exposures.

Article 39
Margin requirements

1. A CCP shall impose, call and collect margins to limit its credit exposures from its clearing members, and where relevant, from CCPs which have interoperable arrangements. Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant positions. They shall be sufficient to cover losses that result from at least 99 per cent of the exposures movements over an appropriate time horizon and they shall ensure that a CCP fully collateralises its exposures with all its clearing members, and where relevant with CCPs which have interoperable arrangements, at least on a daily basis.

2. A CCP shall adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared and take into account the interval between margin collections, market liquidity and the possibility of changes over the duration of the transaction. The models and parameters shall be validated by the competent authority and subject to a joint opinion of the college referred to in Article 15.

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

4. A CCP shall segregate the margins posted by each clearing member and, where relevant, by CCPs that have interoperable arrangements and shall ensure the protection of the margins posted against the default of other clearing members, the institution where they are deposited, or of the CCP itself and from any other loss the CCP may experience.

5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the appropriate percentage and time horizon, as referred to in paragraph 1, to be considered for the different classes of financial instruments.

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

ESMA, in consultation with EBA, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.

Article 40
Default fund

1. A CCP shall maintain a default fund to cover losses arising from the default, including the opening of an insolvency procedure of one or more clearing members.

2. A CCP shall establish the minimum size of contributions to the default fund and the criteria to calculate the contributions of the single clearing members. The contributions shall be proportional to the exposures of each clearing member, in order to ensure that the contributions to the default fund at least enable the CCP to withstand the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members, if the sum of their exposures is larger.

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

Article 41
Other risk controls

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

2. A CCP shall develop scenarios of extreme but plausible market conditions, which include the most volatile periods that have been experienced by the markets for which the CCP provides its services. The default fund referred to in Article 40 and the other financial resources referred to in paragraph 1 shall at all times enable the CCP to withstand the default of the two clearing members to which it has the largest exposures and shall enable the CCP to withstand sudden sales of financial resources and rapid reductions in market liquidity.

3. A CCP shall obtain the necessary credit lines or similar arrangements to cover its liquidity needs in case the financial resources at its disposal are not immediately available. Each clearing member, parent undertaking or subsidiary of the clearing member may not provide more than 25 per cent of the credit lines needed by the CCP.

4. A CCP may require non-defaulting clearing members to provide additional funds in the event of a default of another clearing member. The clearing members of a CCP shall have limited exposures toward the CCP.

5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the extreme conditions referred to in paragraph 2 that the CCP shall withstand.

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles 7 to 7d of Regulation …/… [ESMA Regulation].

ESMA, in consultation with EBA, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.

Article 42

Default waterfall

1. A CCP shall use the margins posted by a defaulting clearing member prior to other financial resources in covering losses.

2. Where the margins posted by the defaulting clearing member are not sufficient to cover the losses incurred by the CCP, the CCP shall use the default fund contribution of the defaulting member to cover these losses.

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

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

Article 43

Collateral requirements

1. A CCP shall only accept highly liquid collateral with minimal credit and market risk to cover its exposure to its clearing members. It shall apply adequate haircuts to asset values that reflect the potential for their value to decline over the interval between their last revaluation and the time by which they can reasonably be assumed to be liquidated. It shall take into account the liquidity risk following the default of a market participant and the concentration risk on certain assets that may result in establishing the acceptable collateral and the relevant haircuts.

2. A CCP may accept, where appropriate and sufficiently prudent the underlying of the derivative contract or the financial instrument that originate the CCP exposure as collateral to cover its margin requirements.

3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the type of collateral that can be considered highly liquid and the haircuts referred to in paragraph 1.

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

ESMA, in consultation with the ESCB and EBA, shall submit drafts on those regulatory technical standards to the Commission by 30 June 2012.

Article 44

Investment policy

1. A CCP shall only invest its financial resources in highly liquid financial instruments with minimal market and credit risk. The investments shall be capable of being liquidated rapidly with minimal adverse price effect.

2. Financial instruments posted as margins shall be deposited with operators of securities settlement systems that ensure non-discriminatory access to CCPs and the full protection of those instruments. A CCP shall have prompt access to the financial instruments when required.

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

4. A CCP shall take into account its overall credit risk exposures to individual obligors in making its investment decision and shall ensure that its overall risk exposure to any individual obligor remains within acceptable concentration limits.

5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the highly liquid financial instruments referred to in paragraph 1 and the concentration limits referred to in paragraph 4.

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

ESMA, in consultation with EBA, shall submit drafts on those regulatory technical standards to the Commission by 30 June 2012.

Article 45

Default procedures

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

2. A CCP shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall ensure that the closing out of any clearing member's positions does not

disrupt its operations or expose the non-defaulting clearing members to losses that they cannot anticipate or control.

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

4. A CCP shall establish that its default procedures are enforceable. It shall take all the reasonable steps to ensure that it has the legal powers to liquidate the proprietary positions of the defaulting clearing member and to transfer or liquidate the client's positions of the defaulting clearing member.

Article 46

Review of models, stress testing and back testing

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

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

3. A CCP shall publicly disclose key information on its risk management model and assumptions adopted to perform the stress tests referred to in paragraph 1.

4. Powers are delegated to the Commission to adopt regulatory technical standards specifying the following:

   (a) the type of tests to be undertaken for different classes of financial instruments and portfolios;

   (b) the involvement of clearing members or other parties in the tests;

   (c) the frequency of tests;

   (d) the time horizons of tests;

   (e) the key information referred to in paragraph 3.

   The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

   ESMA, in consultation with EBA, shall submit drafts on those regulatory technical standards to the Commission by 30 June 2012.

Article 47
Settlement

1. A CCP shall, where available, use central bank money to settle its transactions. Where central bank money is not accessible, steps shall be taken to strictly limit credit and liquidity risks.

2. A CCP shall clearly state its obligations with respect to deliveries of financial instruments, including whether it has an obligation to make or receive delivery of a financial instrument or whether it indemnifies participants for losses incurred in the delivery process.

3. Where a CCP has an obligation to make or receive deliveries of financial instruments, the CCP shall eliminate principal risk through the use of delivery-versus-payment mechanisms to the extent possible.

Title V
Interoperability arrangements

Article 48
Interoperability Arrangements

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

2. When establishing an interoperability arrangement with another CCP for the purpose of providing services to a particular trading venue, the CCP shall have non discriminatory access to the data that it needs for the performance of its functions from that particular trading venue and to the relevant settlement system.

3. Entering into an interoperability arrangement or accessing a data feed or a settlement system referred to in paragraphs 1 and 2, shall only be restricted, directly or indirectly, to control any risk arising from that arrangement or access.

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Article 49
Risk management

1. CCPs that enter into an interoperability arrangement shall:

   (a) put in place adequate policies, procedures and systems to effectively identify, monitor and manage the additional risks arising from the arrangement so that they can meet their obligations in a timely manner;

   (b) agree on their respective rights and obligations, including the applicable law governing their relationships.;

   (c) identify, monitor and effectively manage credit and liquidity risks so that a default of a clearing member of one CCP does not affect an interoperable CCP;

(d) identify, monitor and address potential interdependences and correlations that arise from an interoperability arrangement that may affect credit and liquidity risks related to clearing member concentrations, and pooled financial resources.

For the purposes of point (b), CCPs shall use the same rules concerning moment of entry of transfer orders into their respective systems and the moment of irrevocability, as set out in Directive 98/26/EC where relevant.

For the purposes of point (c), the terms of the arrangement shall outline the process for managing the consequences of the default where one of the CCPs with which an interoperability arrangement has been concluded is in default.

For the purposes of point (d), CCPs shall have robust controls over the re-hypothecation of clearing members' collateral under the arrangement, if permitted by their competent authorities. The arrangement shall outline how these risks have been addressed taking into account sufficient coverage and need to limit contagion.

2. Where the risk management models used by the CCPs to cover their exposure to their clearing members as well as their reciprocal exposures are different, the CCPs shall identify those differences, assess risks that may arise there from and take measures, including securing additional financial resources, that limit their impact on the interoperability arrangement as well as their potential consequences in terms of contagion risks and ensure that these differences do not affect each CCP's ability to manage the consequences of the default of a clearing member.

Article 50

Approval of interoperability arrangement

1. An interoperability arrangement shall be subject to the prior approval of the competent authorities of the CCPs involved. The procedure under Article 13 shall apply.

2. The competent authorities shall only grant approval of the interoperability arrangement, where the requirements set out in Article 49 are met and the technical conditions for clearing transactions under the terms of the arrangement allow for a smooth and orderly functioning of financial markets and that the arrangement does not undermine the effectiveness of supervision.

3. Where a competent authority considers that the requirements set out in paragraph 2 are not met, it shall provide explanations in writing regarding its risk considerations to the other competent authorities and the CCPs involved. It shall also notify ESMA, which shall issue an opinion on the effective validity of the risk considerations as grounds for denial of an interoperability arrangement. ESMA's opinion shall be made available to all the CCPs involved. Where ESMA's assessment differs from the assessment of the relevant competent authority, this authority shall reconsider its position, taking into account the opinion of ESMA.

4. By 30 June 2012, ESMA shall issue guidelines or recommendations with a view to establishing consistent, efficient and effective assessments of interoperability arrangements, in accordance with the procedure laid down in Article 8 of Regulation …/… [ESMA Regulation]

Title VI
Registration and surveillance of trade repositories

Chapter 1
Conditions and Procedures for Registration of a Trade Repository

Article 51
Registration of a Trade Repository

1. A trade repository shall register with ESMA for the purposes of Article 6.

2. In order to be registered, a trade repository shall be a legal person established in the Union and meet the requirements of Title VII.

3. The registration of a trade repository shall be effective for the entire territory of the Union.

4. A registered trade repository shall comply at all times with the initial conditions for registration. A trade repository shall, without undue delay, notify ESMA of any material changes to the conditions for registration.

Article 52
Application for registration

1. A trade repository shall submit an application for registration to ESMA.

2. ESMA shall assess whether the application is complete within ten working days of receipt of the application.

   Where the application is not complete, ESMA shall set a deadline by which the trade repository is to provide additional information.

   After assessing an application as complete, ESMA shall notify the trade repository accordingly.

3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of the application for registration to ESMA referred to in paragraph 1.

   The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

   ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.

4. In order to ensure uniform application of paragraph 1, powers are conferred to the Commission to adopt implementing standards determining the format of the application for registration to ESMA.

The implementing standards referred to in the first subparagraph shall be adopted in accordance with Article 7e of Regulation …/… [ESMA Regulation].

ESMA shall submit drafts for those standards to the Commission by 30 June 2012.

Article 53

Examination of the application

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

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

Article 54

Notification of the Decision

1. Where ESMA adopts a Decision to register, refuse registration or withdraw registration, it shall notify the trade repository within 5 working days with a fully reasoned explanation of its Decision.

2. ESMA shall communicate any Decision referred to in paragraph 1 to the Commission.

3. ESMA shall publish on its website a list of trade repositories registered in accordance with this Regulation. That list shall be updated within 5 working days following the adoption of a Decision referred to in paragraph 1.

Article 55

Fines

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

2. The fines referred to in paragraph 1 shall be dissuasive and proportionate to the nature and seriousness of the breach, the duration of the breach and the economic capacity of the trade repository concerned. The amount of the fine shall not exceed 20 per cent of the annual income or turnover of the trade repository of the preceding business year.

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

4. Powers are delegated to the Commission to adopt regulatory technical standards concerning:

   (a) detailed criteria for establishing the amount of the fine;

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

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation …/… [ESMA Regulation].

ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012 at the latest.

Article 56

Periodic penalty payments

1. At the request of ESMA, the Commission may, by decision, impose periodic penalty payments on any persons employed by or for a trade repository or related to it, in order to compel them:

(a) to put an end to an infringement;

(b) to supply complete and correct information which ESMA has been requested pursuant to Article 61(2);

(c) to submit to an investigation and in particular to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by ESMA pursuant to Article 61(2);

(d) to submit to an on-site inspection ordered by ESMA pursuant to Article 61(2).

2. The periodic penalty payments provided for shall be effective and proportionate. The amount of the periodic penalty payments shall be imposed for each day of delay. It shall not exceed 5% of the average daily turnover in the preceding business year and shall be calculated from the date stipulated in the decision.

Article 57

Hearing of the persons concerned

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

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

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

Those persons shall be entitled to have access to the Commission's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission.

Article 58
Provisions common to fines and periodic penalty payments

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

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

Article 59
Review by the Court of Justice

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

Article 60
Withdrawal of registration

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

   (a) the trade repository expressly renounces the registration or has provided no services for the preceding six months;

   (b) the trade repository has obtained the registration by making false statements or by any other irregular means;

   (c) the trade repository no longer meets the conditions under which it was registered;

   (d) the trade repository has seriously or repeatedly infringed the provisions of this Regulation.

2. The competent authority of a Member State in which the trade repository services performs its services and activities and which considers that one of the conditions referred to in paragraph 1 has been met, may request ESMA to examine whether the conditions for withdrawal of registration are met. Where ESMA decides not to withdraw the registration of the trade repository concerned, it shall provide full reasons.

Article 61
Surveillance of Trade Repositories

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

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

   (a) to access any document in any form and to receive or take a copy thereof;

(b) demand information from any person and, if necessary, to summon and question a person with a view to obtaining information;

(c) to carry out on-site inspections with or without announcement;

(d) to require records of telephone and data traffic.

Chapter 2
Relations with third countries

Article 62
International agreements

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

Article 63
Equivalence and recognition

1. A trade repository established in a third country may provide its services and activities to entities established in the Union for the purposes of Article 6 only where that trade repository is recognised by ESMA.

2. ESMA shall recognise a trade repository from a third country, where the following conditions are met:

   (a) the trade repository is authorised in and is subject to effective surveillance in that third country;

   (b) the Commission has adopted a Decision in accordance with paragraph 3;

   (c) the Union has entered into an international agreement with that third country, as referred to in Article 62;

   (d) co-operation arrangements have been established pursuant to paragraph 4 to ensure that Union authorities have immediate and continuous access to all the necessary information.

3. The Commission may adopt a Decision in accordance with the procedure referred to in Article 69(2), determining that the legal and supervisory arrangements of a third country ensure that trade repositories authorised in that third country comply with legally binding requirements which are equivalent to the requirements set out in this Regulation and that these trade repositories are subject to effective supervision and enforcement in that third country on an ongoing basis.

4. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been considered equivalent to this Regulation in accordance with paragraph 3. Such arrangements shall ensure that Union authorities have immediate and continuous access to all the information needed for the exercise of their duties. Those arrangements shall specify at least:

(a) the mechanism for the exchange of information between ESMA, any other Union authorities that exercise responsibilities in accordance with this Regulation and the competent authorities of third countries concerned;

(b) the procedures concerning the coordination of supervisory activities.

Title VII
Requirements for trade repositories

Article 64

General requirements

1. A trade repository shall have robust governance arrangements, which include a clear organisational structure with well defined, transparent and consistent lines of responsibility and adequate internal control mechanisms, including sound administrative and accounting procedures, which prevent the disclosure of confidential information.

2. A trade repository shall establish adequate policies and procedures sufficient to ensure its compliance, including of its managers and employees with all the provisions of this Regulation.

3. A trade repository shall maintain and operate an adequate organisational structure to ensure continuity and orderly functioning of the trade repository in the performance of its services and activities. It shall employ appropriate and proportionate systems, resources and procedures.

4. The senior management and members of the board of a trade repository shall be of sufficiently good repute and experience so as to ensure the sound and prudent management of the trade repository.

5. A trade repository shall have objective, non-discriminatory and publicly disclosed requirements for access and participation. Criteria that restrict access shall only be permitted to the extent that their objective is to control the risk to the data maintained by a trade repository.

6. A trade repository shall publicly disclose the prices and fees associated with services provided. It shall disclose the prices and fees of single services and functions provided separately, including discounts and rebates and the conditions to benefit from those reductions. It shall allow reporting entities to access specific services separately. The prices and fees charged by a trade repository shall be cost-related.

Article 65
Operational reliability

1. A trade repository shall identify sources of operational risk and minimise them through the development of appropriate systems, controls and procedures. Such systems shall be reliable and secure, and have adequate capacity to handle the information received.

2. A trade repository shall establish, implement and maintain an adequate business continuity policy and disaster recovery plan aiming at ensuring the preservation of its functions, the timely recovery of operations and the fulfilment of the trade repository's obligations. Such a plan shall at at least provide for the establishment of backup facilities.

Article 66
Safeguarding and recording

1. A trade repository shall ensure the confidentiality, integrity and protection of the information received under Article 6.

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

3. A trade repository shall calculate the positions by class of derivatives and by reporting entity based on the details of the derivative contracts reported in accordance with Article 6.

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

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

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

Article 67
Transparency and data availability

1. A trade repository shall publish aggregate positions by class of derivatives on the contracts reported to it.

2. A trade repository shall make the necessary information available to the following entities:

   (a) ESMA;

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

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

(d) the relevant central banks of the ESCB.

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

4. Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of the information referred to in paragraphs (1) and (2).

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d]of Regulation …/… [ESMA Regulation].

ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012 at the latest.

Title VIII
Transitional and final provisions

Article 68

Reports and Review

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

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

2. ESMA shall submit reports to the Commission on the application of the clearing obligation under Title II and on the extension of the scope of interoperability arrangements under Title V to other transactions in classes of financial instruments than transferable securities and money-market instruments.

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

3. The Commission shall, in cooperation with the Member States and ESMA, and after requesting the assessment of the ESCB, draw up an annual report assessing any possible systemic risk and cost implications of interoperability arrangements.

The report shall focus at least on the number and complexity of such arrangements, and the adequacy of risk management systems and models. The Commission shall submit the report to the European Parliament and the Council, together with any appropriate proposals.

The ESCB shall provide the Commission with its assessment of any possible systemic risk and cost implications of interoperability arrangements

Article 69
Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC[37].

2. Where reference is made to this paragraph, Article 5 and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

Article 70
Amendment to Directive 98/26/EC

In Article 9(1), the following subparagraph is added:

"Where a system operator has provided collateral security to another system operator in connection with an interoperable system, the rights of the providing system operator to that collateral security shall not be affected by insolvency proceedings against the receiving system operator."

Article 71
Transitional provisions

1. A CCP that has been authorised in its Member State of establishment to provide services before the date of entry into force of this Regulation shall seek authorisation for the purposes of this Regulation by [*2 years after entry into force*] at the latest.

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

Article 72
Entry into Force

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

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

[37] OJ L 191, 13.7.2001, p.45.

Done at […],

For the European Parliament
The President

For the Council
The President