



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 5 January 2011

5059/11

**Interinstitutional File:
2010/0250 (COD)**

**EF 1
ECOFIN 3
CODEC 7**

NOTE

From: General Secretariat of the Council
To: Delegations
No. Cion prop.: 13917/10 EF 117 ECOFIN 543 CODEC 879
Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL on (...) derivative **transactions**, central counterparties and trade
repositories
- Presidency Compromise

Delegations will find attached a Presidency compromise proposal, with a view to discussion at the meeting of the Working Party of Financial Services Attachés (with experts) on 11 January.

Deletions in respect of the Commission's text are denoted by (...). Additions to the Commission's text are denoted by underlining. Where a deletion is combined with an insertion of new text for the same (part of a) sentence, only the addition is evidenced.

With regard to the previous related Council document (17615/10), further additions in respect of the Commission text are also evidenced, as appropriate, in **bold underlined font**.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on (...) derivative transactions, 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 Committee¹,

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.

¹ OJ C , , p. .

- (2) The Commission Communication of 4 March 2009, "Driving European Recovery"², proposed to strengthen the Union's regulatory framework for financial services. In its Communication of 3 July 2009³, the Commission assessed the role of derivatives in the financial crisis, and in its Communication of 20 October 2009⁴, the Commission outlined the actions it intends to take to reduce the risks associated with derivatives.
- (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 1093/2010**, the European Securities and Markets Authority (ESMA) established by Regulation **EU 1095/2010**, and the European Insurance and Occupational Pensions Authority (EIOPA) established by Regulation **EU 1094/2010**.
- (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.

² "Driving European Recovery" - COM(2009) 114.

³ "Ensuring efficient, safe and sound derivatives markets" - COM(2009) 332.

⁴ "Ensuring efficient, safe and sound derivatives markets: Future policy actions" - COM(2009) 563.

- (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.

- (7a) One of the basic tasks to be carried out through the European System of Central Banks (ESCB) is to promote the smooth operation of payment systems. In this respect, the ECB and the National Central Banks of the Member States execute oversight by ensuring efficient and sound clearing and payment systems, including CCPs. The members of the ESCB are thus closely involved in [the determination of eligibility for the clearing obligation,] the authorisation and ongoing review of CCPs and recognition of third country CCPs. In the same vein, they are closely involved in respect of the setting of technical standards. The provisions of this Regulation are without prejudice to the oversight powers of the ECB and the NCBs as laid down in the Treaty and the Statute of the ESCB.
- (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/EEC⁵ that are traded over-the-counter.
- (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 **possible** 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 (...) derivatives can be considered suitable for mandatory CCP-clearing.

⁵ OJ L 145, 30.4.2004, p. 1.

- (12) This Regulation sets out the criteria for determining the eligibility to the clearing obligation. [In view of its pivotal role, ESMA] [The Commission] should decide whether a class of derivatives meets the eligibility criteria, whether an obligation should apply, and from when the clearing obligation take effect including, where appropriate, any 'phase-in' implementation. A gradual implementation of the clearing obligation **could** be either in terms of proportion of the eligible asset classes that must be cleared, or in terms of the types of market participants that must comply with the clearing obligation.
- (12a) When ESMA has determined that a (...) derivative product is standardised and suitable for clearing, but no CCP is willing to clear that product, it should investigate the reason for this. If subsequently, ESMA determines that there is insufficient justification for the lack of clearing, it should inform the Commission.
- (12b) The predominant risk in foreign exchange derivatives is cross-currency settlement risk, which is addressed through separate infrastructure arrangements. This distinguishes foreign exchange derivatives from other classes of derivative. In determining the eligibility of derivative classes for the clearing obligation, [ESMA] shall take due account of the specific nature of foreign exchange derivatives and the significantly reduced counterparty credit risk in the shorter maturities of these instruments.**
- (13) For a (...) 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) **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)⁶, insurance undertakings as defined in Directive 73/239/EEC⁷, assurance undertakings as defined in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance⁸, 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)⁹, 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 provision¹⁰ and alternative investment funds managers as defined in Directive 2011/.../EU.

⁶ OJ L 177, 30.6.2006, p. 1.

⁷ **Directive to be repealed by Directive 2009/138/EC ("Solvency II") with effect from 1 November 2012.**

⁸ OJ L 345, 19.12.2002, p. 1. **Directive to be repealed by Directive 2009/138/EC ("Solvency II") with effect from 1 November 2012.**

⁹ OJ L 302, 17.11.2009, p. 32.

¹⁰ 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 (...) 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 (...) 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 institutions¹¹ 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.

¹¹ OJ L 177, 30.6.2006, p. 1.

- (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 (...) 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 (...) derivatives that should be subject to the clearing obligation, the thresholds and **the** 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. **Reporting obligations for all other derivative contracts are regulated in separate EU legislation.**
- (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.
- (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 (...) 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 systems¹², 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. [Taking into account the oversight powers of the ECB and the NCBs and for efficiency reasons, avoiding duplication of work, the ECB and the NCB, as appropriate, shall be closely involved by the competent authority in the regular reviews of CCPs and decisions for appropriate action.]

¹² OJ L 166, 11.6.1998, p. 45.

- (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 Member 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 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 (...) 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. Furthermore, on 16 September 2010 the European Council agreed on the need for Europe to promote its interest and values more assertively and in a spirit of reciprocity and mutual benefit in the context of the Union's external relations and to take steps to, inter alia, secure greater market access for European business and deepen regulatory cooperation with major trade partners. The Commission will endeavour to ensure that these commitments are implemented in a similar way by our international partners.
- (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(...) 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 (...) 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.

[(40bis)To have access to adequate liquidity resources is essential for a CCP. 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.]

- (41) The "European Code of Conduct for Clearing and Settlement" of 7 November 2006¹³ 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 (...) 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.

¹³ http://ec.europa.eu/internal_market/financial-markets/docs/code/code_en.pdf

- (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, (...) fees, and risk management models 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.
- (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 on the free movement of such data.**

- (49) It is important to ensure international convergence of requirements for central counterparties and trade repositories. This Regulation follows the existing recommendations developed by CPSS-IOSCO¹⁴ and ESCB-CESR¹⁵ noting that the CPSS-IOSCO regulatory standards for financial market infrastructure, including CCPs, are currently under review. It (...) creates a Union framework in which CCPs can operate safely. ESMA should consider these existing standards and their future developments when drawing up or proposing to revise 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.

¹⁴ 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.

¹⁵ European System of Central Banks and the Committee of European Securities Regulators.

- (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 (...) 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 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 (...) requirements for derivative contracts (...) 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

(ba) the Bank for International Settlements.

Article 2

Definitions

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

- (1) 'central counterparty (CCP)' means a legal entity that (...) 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 a legal entity that centrally collects and maintains the records of OTC derivatives;
- (3) 'clearing' means the process, of establishing positions including the calculation of net obligations, and ensuring that financial instruments, cash or both are available to secure its exposures arising from these positions;
- (3a) 'derivative contracts' or 'derivatives' means financial instruments as set out in Annex I Section C numbers (4) to (10) of Directive 2004/39/EC as implemented in Article 38 and 39 of Regulation n° 1287/2006;
- (4) 'class of derivatives' means a number of (...) 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 or on a third country market considered as equivalent to a regulated market according to Article 19 (6) of Directive 2004/39/EC;

- (6) 'financial counterparty' means investment firms as defined 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 managed by alternative investment funds managers as defined in Directive 2011/.../EU;
- (7) 'non-financial counterparty' means an undertaking established in the Union other than the entities referred to in points (1) and (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 (...) cross-system (...) central counterparty clearing 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 (...) 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 market¹⁶, 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 (...) 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/EEC¹⁷;
- (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.

¹⁶ OJ L 390, 31.12.2004, p. 38.

¹⁷ OJ L 193, 18.7.1983, p. 1.

- (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 institutions¹⁸ 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 companies¹⁹ 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 its clearing members or their management;
- (22) 'senior management' means the person or persons who effectively direct the business of the CCP and the executive member or members **of** the board.

¹⁸ OJ L 372, 31.12.1986, p. 1.

¹⁹ OJ L 222, 14.8.1978, p. 11.

Title II

Clearing obligation and risk mitigation of (...) Derivatives, reporting obligation for OTC Derivatives

Article 3

Clearing obligation

1. A financial counterparty and a non financial counterparty as referred to in article 7(2) shall clear all (...) derivative contracts which are considered eligible pursuant to Article 4 and are concluded with other financial counterparties or non financial counterparties as referred to in article 7(2) in the relevant CCPs listed in the register as referred to in Article 4(4).

That clearing obligation shall also apply to the counterparties mentioned in paragraph 1 which enter into eligible (...) derivative contracts with third country entities that would be subject to the clearing obligation if they were established in the EU.

[The clearing obligation shall apply to all derivative contracts which are **entered into on and after the date from which the clearing obligation takes effect in accordance with Article 4.**]

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 derivative contracts under Article 10 or 11(...), it shall immediately notify ESMA of that authorisation(...).

- 1a. Where a CCP established in a third country has been recognised in accordance with Article 23, the relevant competent authority of the third country shall make available to ESMA, in application of the cooperative arrangements as referred to in Article 23(4), the classes of derivative contracts for which that CCP has been granted the right to provide clearing services to clearing members and/or clients established in the Union.
2. ESMA, after receiving a notification in accordance with paragraphs 1 and 1a(...) shall decide [submit to the Commission a proposal stating] the following:
- (a) whether that class of derivative contracts is eligible for the clearing obligation pursuant to Article 3;
 - (b) the date(s) from which the clearing obligation takes effect, including the timeframe in which counterparties or categories of counterparties become subject to the clearing obligation.

Before making a decision [making a proposal], ESMA shall conduct a public consultation.

ESMA [The Commission] shall consult with the European Systemic Risk Board (ESRB), and, where appropriate, the competent authorities of third countries.

ESMA [The Commission] shall publish its decisions on its website.

- 2a. ESMA shall, on its own initiative, in accordance with the criteria set out in paragraph 3 and after conducting a public consultation and consulting with the European Systemic Risk Board (ESRB), and, where appropriate, the competent authorities of third countries, identify and notify to the Commission the classes of derivative contracts that should be considered eligible for the clearing obligation, but for which no CCP has yet received authorisation.

After identifying such a class of derivative contracts, ESMA shall publish a call for development of proposals for the clearing of that class of derivative contracts.

(...)

3. With the aim of reducing systemic risk in the financial system, [on the proposal of] ESMA [the Commission] shall base its decision as referred to in paragraph 2(a) on the basis of the following criteria:

(aa) the impact on the level of counterparty credit risk in the market, within the relevant class of derivatives and between classes of derivatives, as a result of applying an obligation to the relevant class of derivative contracts;

(a) the degree of standardisation of the relevant class of derivative contracts' contractual terms and operational processes;

(b) the volume and the liquidity of the relevant class of derivative contracts;

(c) the availability of pricing information in the relevant class of derivative contracts;

(d) deleted

(da) whether more than one CCP could offer clearing services in the relevant class of derivative contracts;

(e) deleted

(...)

3a. [On the proposal of] ESMA [the Commission] shall base its decision as referred to in paragraph 2(b), on the basis of the following criteria:

(a) the expected volume of the relevant class of derivative contracts;

(b) the ability of the relevant CCPs to handle the expected volume and to manage the risk arising from the clearing of relevant class of derivative contracts;

(c) the type and number of counterparties active, and expected to be active within the market for the relevant class of derivative contracts;

(d) the period of time a counterparty subject to the clearing obligation needs to put in place arrangements to clear its derivative contracts through a CCP.

(e) the risk management, legal and operational capacity of the range of counterparties that are active in the market for the relevant class of derivative contracts and that would be captured by the clearing obligation pursuant to Article 3;

(f) the interconnectedness of the relevant class of derivative contracts in the financial markets;

4. Where ESMA [the Commission] decides that a class of derivative contracts, for which a CCP has already received authorisation, is eligible for mandatory clearing, ESMA shall add that class of derivatives, the CCPs authorised to clear them(...) the dates from which the clearing obligation takes effect and any phased-in implementation in a public register. ESMA shall maintain that register on a continuous basis.
5. ESMA shall regularly review the public register and, where necessary, [propose to the Commission] amend[ements], suspend [suspension] or revoke[ation] its decisions. ESMA [The Commission] shall decide in accordance with paragraphs 3 and 3a.
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 and 3a;
 - (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 derivative contracts subject to the clearing obligation.

The draft regulatory standards referred to in the first subparagraph shall be adopted in accordance with Articles **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

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

Article 5

Access to a CCP

1. A CCP that has been authorised to clear eligible (...) derivative contracts shall accept clearing such contracts on a non-discriminatory, **transparent and objective** basis, regardless of the venue of execution.

[1a. The CCP shall establish policies and procedures sufficient to ensure compliance with these obligations under paragraph 1, including:

- a) **Using or accommodating for trading venues communication protocols consistent with Article 32a;**
- b) **Offering the venue the right to designate a technology provider for the purposes of accessing the system and purchase an unbundled service;**
- c) **Publishing full and transparent clearing costs for all market users sufficient to enable customers to understand the services with which they will be provided and the prices they will have to pay for these services, including discount schemes;**
- d) **Accounting separately for the costs and revenues relating to the provision of CCP services and disclosing such information to their Competent Authorities on the basis of accounting standards adopted under Regulation (EC) No 1606/2002.]**

2. When a request to access a CCP has been formally submitted to a CCP by a venue of execution, the venue shall receive a response to the request within three months.

[2a. Without prejudice to approval by competent authorities of the trading venue and the CCP, access shall be made possible by the CCP within three months of a positive response to a request for access.

- 2b. When a trading venue has been denied access to a CCP and seeks to resubmit its request, the CCP must take a new decision within three months of the formal submission for access.**
- 2c. The CCP and home competent authorities of the requesting trading venue and CCP may only deny the trading venue access to the CCP where such access would threaten the smooth and orderly functioning of markets. ESMA shall facilitate the adoption of a joint opinion between relevant competent authorities in accordance with its settlement of disagreement powers under Article 19 of Regulation EU 1095/2010 (ESMA Regulation).]**
3. Where access is refused by a CCP, it shall provide full reasons and notify the venue of execution accordingly.
- 3a. When a request to access a venue of execution has been formally submitted to a venue of execution by a CCP, the CCP shall receive a response to the request within [three] months.**
- 3b. Where access is refused by a venue of execution, it shall provide full reasons and notify the CCP accordingly.**

Article 6

Reporting obligation

1. Counterparties and CCPs shall ensure that the trade is reported to a trade repository registered in accordance with Article 51 or recognised in accordance with Article 63 the details of any OTC derivative contract **the counterparties** have concluded and any modification, or termination of the contract. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.

A counterparty or a CCP which is subject to the reporting obligation may delegate the reporting of the details of the OTC derivative contract.

Counterparties and CCPs shall ensure that the details of their OTC derivative contract are reported without duplication.

2. Where a trade repository is not available to record the details of an OTC derivative contract, (...) counterparties and CCPs shall report the details of their positions in those contracts to ESMA.

In this case ESMA shall ensure that all relevant authorities will have direct and immediate access to all the details of OTC derivatives contracts they need to fulfil their respective responsibilities and mandates.

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

3. (...) An entity that reports the full details of an OTC derivative contract to a trade repository on behalf of a 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 (...);
- (b) the main characteristics of the contract, including the type, underlying, maturity and notional value (...).

The draft regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles **10 to 14** of Regulation **EU 1095/2010** [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 **15** of Regulation **EU 1095/2010** [ESMA Regulation].

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

Article 7

Non-financial counterparties

1. *deleted*
2. Where a non-financial counterparty takes positions in (...) 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 (...) derivative contracts **entered into and after the date it exceeds the threshold.**

The competent authority designated in accordance with Article 48 of Directive 2004/39/EC and ESMA shall be notified by the non-financial counterparty that it exceeds the clearing threshold.

The obligation under the first subparagraph must be met within [X] months from the date when the obligation becomes effective.

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

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

(a) *deleted*

(b) the clearing thresholds;

(ba) criteria for establishing which derivative contracts are objectively measurable as reducing risks directly related to the commercial activity.

Those clearing thresholds shall be determined taking into account the systemic relevance of the sum of net positions and exposures by counterparty per class of derivatives over a specified time period.

The regulatory standards referred to in the first subparagraph shall be adopted in accordance with Articles **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

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

4. *deleted*

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

Article 8

Risk mitigation techniques for (...) derivative contracts not cleared by a CCP

1. Financial counterparties and the non-financial counterparties (...) that enter into an (...) 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) (...) the timely confirmation of the terms of the (...) derivative contract, where available via electronic means;
 - (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.

Risk management procedures shall set-up by financial or non-financial counterparties require the timely, (...) accurate and appropriate exchange of collateral or the appropriate and proportionate holding of capital. Where market conditions prevents marking-to-market, reliable and prudent marking-to-model shall be used.

- 1a.** Each financial counterparty or a non-financial counterparty (...) if requested by the other party, shall segregate in accordance with their agreement collateral provided [as initial margin] by the other party in circumstances where ownership of or entitlement to the collateral remains with the other party.
2. Powers are delegated to the Commission to adopt regulatory technical standards specifying the maximum time lag between the conclusion of **a** 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 **10 to 14** of Regulation **EU 1095/2010** (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, the market conditions that prevents marking-to-market and the criteria for using marking-to-model as referred to in 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 **10 to 14** of Regulation EU **1093/2010** [EBA], Articles **10 to 14** of Regulation EU **1095/2010** [ESMA] or Articles **10 to 14** of Regulation EU **1094/2010** [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 (...) legal person established in the Union (...) intends to provide clearing services as a CCP, it shall apply for authorisation to the competent authority of the Member State where it is established in accordance with the procedure set out in Article 13.
2. Once the authorisation granted in accordance with Article 13 has taken effect, it 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 authorisation.

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

5. *deleted*

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 to the competent authority of the Member State where it is established. The offering of clearing services in a different currency, or to a new trading platform, 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 defined 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 **and** available (...) 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 be proportional to the **risk stemming from the** activities of the CCP. It 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. **As regards counterparty credit risk, capital, together with retained earnings and reserves of a CCP shall be augmented by the amount determined in accordance with [referred to in] article 42(3a).**
3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the requirements regarding 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 **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

ESMA shall, in **close cooperation with the ESCB and 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 applicant CCP shall submit an application for authorisation to its competent authority.
 - 1a. 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 authorisation, all the necessary arrangements to meet its obligations set out in this Regulation.
 - 1b. Within [20 working days] of receipt of the application, the competent authority shall assess whether the application is complete. If the application is not complete, the competent authority shall set a deadline by which the applicant CCP has to provide additional information. After assessing an application is complete, the competent authority shall notify the applicant CCP, the members of the College established in accordance with Article 14 (1) and ESMA accordingly.
2. The competent authority of the Member State where the CCP is established shall only grant authorisation where the college in its joint opinion that is reached in accordance with article 15 is fully satisfied that the applicant CCP complies with all the requirements set out in this Regulation and where the CCP is notified as a system pursuant to Directive 98/26/EC (...).

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

Article 14

Colleges

1. **Where relevant** within one month of the submission of a complete application as referred to in Article 13, the competent authority of the Member State of establishment of a CCP shall establish, manage and chair a college to facilitate the exercise of the tasks referred to in Articles, 11, 13, [46] and 50.

Where appropriate, 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 over a one-year period;
- (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
- (fa) (...) the central banks of issue of the most relevant EU 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 coordination of supervisory examination programmes based on a risk assessment of the CCP;
 - (e) *deleted*
 - (f) *deleted*
 - (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 within four months of the submission of a complete application by the CCP.

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 **19** of Regulation **EU 1095/2010** [ESMA Regulation] and its general coordination function under Article 16 of the same Regulation, thereby ensuring the consistency in the application of supervisory practices among the colleges [in accordance with Article **21** of Regulation **EU 1095/2010** [ESMA Regulation]]. It shall have no voting rights on joint opinions of the college.

Article 16

Withdrawal of authorisation

1. Without prejudice to Article 18 (3), the competent authority of the Member State where the CCP is established 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 and has not taken the remedial actions requested by the competent authority within a set time frame;
 - (d) has seriously and systematically infringed the requirements set out in this Regulation;
- 1a. Where the competent authority considers that one of the **circumstances** referred to in paragraph 1 has been met, it shall [within 5 working days] notify ESMA and the members of college as defined in Article 14.
- 1b. The members of the college shall be consulted on the necessity to withdraw the authorisation of the CCP, **except** where such a decision is required urgently.

2. Any 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.
- 3a. The competent authority shall notify ESMA and the members of the college of its fully reasoned decision and take into account the reservations of the members of the college.
- 3b. The decision on the withdrawal of authorisation shall take effect throughout the Union.

Chapter 2

Supervision and oversight of CCPs

Article 17

Review and evaluation

1. The competent authority referred to in Article 18, and without prejudice to the role of the college as defined in Article 14, shall review the arrangements, strategies, processes and mechanisms implemented by the CCPs to comply with this Regulation and evaluate the risks to which the CCPs are or might be, exposed.
2. The scope of the review and evaluation referred to in paragraph 1 shall be that of the requirements of this Regulation.
3. The competent authority shall establish the frequency and depth of the review and evaluation referred to in paragraph 1 having regard to the size, systemic importance, nature, scale and complexity of the activities of the CCP concerned. The review and evaluation shall be updated at least on an annual basis.
The CCP shall be subject to on-site inspections.
4. The competent authority shall regularly inform the college as defined in Article 14, and at least once a year, of the results, including any remedial actions or penalties, of the review and evaluation as referred to in paragraph 1.
5. The competent authority shall require the CCP that does not meet the requirements of this Regulation to take the necessary actions or steps at an early stage to address the situation.

Article 18

Competent authorities

1. Without prejudice to the oversight competence of the ECB and the NCBs as laid down in the Treaty on the Functioning of the European Union and the Statute of the ESCB, each Member State shall designate the competent authority responsible for carrying out the duties resulting from this Regulation for the authorisation and supervision (...) 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, and EBA and ESCB where relevant.

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, (...) 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 and may include requesting remedial actions within a set time frame.

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

Article 18a

Professional secrecy

1. The obligation of professional secrecy shall apply to all persons who work 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. Confidential information they may receive in the course of their duties shall not 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.

Chapter 3

Cooperation

Article 19

Cooperation between authorities

1. Competent authorities shall cooperate closely with each other and with ESMA, [andESCB where relevant].
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

deleted

Article 21

Exchange of information

1. Competent authorities and other relevant authorities shall without undue delay provide ESMA and one another with the information required for the purposes of carrying out their duties under this Regulation.
2. Competent authorities, other relevant authorities, ESMA 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. *deleted*

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 clearing members and their clients established in the Union only where that CCP is recognised by ESMA.
2. ESMA, [in consultation with the relevant EU central banks of issue ...], shall recognise a CCP established in a third country that has applied for recognition, 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 **ensuring a full compliance with the prudential requirements applicable** in that third country;
 - (c) co-operation arrangements have been established pursuant to paragraph 4.

[2a. The CCP referred to in paragraph 1 shall submit its application to ESMA.

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

The recognition decision shall be based on the criteria set out in points (a) to (c) of paragraph 1.

ESMA shall consult with ... prior to taking its decision.

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

3. The Commission may, [in consultation with ...] 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 set out in 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, including access to all information regarding the CCPs authorised in third countries that is requested by ESMA;
 - (b) the procedures concerning the coordination of supervisory activities including, where appropriate, onsite inspections.

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 **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

ESMA [in close cooperation with the members of the ESCB,] 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 it has processed, all information on that contract. That information shall at a minimum enable the identification of the original terms of a transaction submitted to the CCP 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 (...).
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 **10 to 14** of Regulation **EU 1095/2010** [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 **15** of Regulation **1095/2010** [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 the Member State where the CCP is established 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 2011/.../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. The college referred to in Article 14 shall be duly notified. 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/EC²⁰ is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

²⁰ OJ L 309, 25.11.2005, p.15.

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.
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 or, via the clearing member, to the client before accepting new transactions from that clearing member or client. Where the client is known to the CCP, the CCP shall inform the client and 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. Confidential 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 and requirements of the business continuity plan and of the disaster recovery plan (...).

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

ESMA [,in close cooperation with the members of the ESCB,] shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.

Article 32a

Communication procedures with clearing members and market infrastructure

With the aim of promoting straight-through processing (STP) across the entire transaction flow, CCPs shall use or accommodate in their systems, in their communication procedures with participants and with the market infrastructures they interface with, the relevant international communication procedures and standards for messaging and reference data in order to facilitate efficient clearing and settlement across systems.

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 and resources 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 (...) confidential information relating to the CCP and its clearing members and clients and is established in a jurisdiction with an equivalent legal regime for data protection.
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, honestly 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, where relevant per type of product cleared, the categories of admissible clearing members and the admission criteria, upon the advice of the risk committee pursuant to Article 26 (3). 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 each service and function 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, on a daily basis, the volumes of the cleared transactions for each class of instruments.

3a. A CCP shall publicly disclose the operational and technical requirements related to the communication protocols covering content and message formats it uses, including those referred to in Article 5.

Article 37

Segregation (...)

1 A CCP shall keep records and accounts that shall enable it, at any time and without delay, to distinguish the assets and positions of one clearing member from the assets and positions of any other clearing member and from its own assets, including, where relevant, the assets provided via a title transfer financial collateral arrangement.

2. A CCP shall keep records and accounts enabling each clearing member to distinguish (...) in accounts with the CCP, the assets and positions of that clearing member from those of its clients.

3. A CCP may offer to keep records and accounts enabling each clearing member to distinguish, in accounts held by the CCP, the assets and positions held for the account of a client from those held for the account of other clients (“full segregation”).

Clearing members shall offer full segregation to their clients.

3a. The CCP and clearing member shall publicly disclose the levels of protection (...) associated with the different levels of segregation **they provide.**

4. Provided that the client has selected full segregation and is thus protected under paragraph 3a, Annex III, Part 2, point 6 of Directive 2006/48/EC shall apply.

5. ***Deleted***

Article 37a

Provision of margins and default fund contributions

A CCP shall offer clearing members and, where relevant, clients the possibility to provide, at their discretion, their margins or default fund contributions either via a title transfer financial collateral arrangement or via a security financial collateral arrangement. Clearing members shall offer corresponding possibilities to their clients.

The CCP shall have a right of use related to the margins or default fund contributions collected via a security financial collateral arrangement provided that this is agreed with the clearing member or the client. The CCP shall publicly disclose this right of use.

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 (...)

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. (...)
3. A CCP shall call and collect margins, on an intraday basis, at minimum when pre-defined thresholds are breached.
4. *deleted*
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 **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

ESMA, [in close cooperation with the members of the ESCB, and] in consultation with EBA, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.

Article 40

Default fund (...)

1. To further limit its credit exposures to its clearing members, a CCP shall maintain a default fund to cover losses that exceed the losses to be covered by margin requirements as referred to in Article 39, arising from the default, including the opening of an insolvency procedure, of one or more clearing members.

The CCP shall establish a **minimum amount** for the size of the default fund.

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 (...).

2a. The default fund shall at least enable the CCP to withstand, under extreme but plausible market conditions, the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members, if the sum of their exposures is larger.

A CCP shall develop scenarios of extreme but plausible market conditions. The scenarios shall include the most volatile periods that have been experienced by the markets for which the CCP provides its services and a range of potential future scenarios. They shall take into account sudden sales of financial resources and rapid reductions in market liquidity.

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

3a. Powers are delegated to the Commission to adopt regulatory technical standards specifying the framework that a CCP should use when defining extreme but plausible market conditions referred to in paragraph 2a, including governance, methodology and types of extreme but plausible market conditions.

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles 10 to 14 of Regulation EU 1095/2010 [EBA Regulation].

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

Article 41

Other available financial resources

1. A CCP shall maintain sufficient available pre-funded financial resources to cover potential losses that exceed the losses to be covered by margin requirements as referred to in Article 39 and the default fund as referred to in Article 40. Such resources may include any other funds provided by clearing members or other parties, loss sharing arrangements, (...) parental guarantees or similar provisions. Such financial resources shall be freely available to the CCP (...).

2. (...) 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 (...) under extreme but plausible market conditions.
3. *deleted (and moved to new Article 41a (1))*
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. *deleted (and moved with adaptations to new Article 41a (2))*

Article 41a

Liquidity risk controls

1. A CCP shall at all times have access to adequate liquidity to perform its services and activities. To that end, it 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.
A CCP shall measure on a daily basis its potential liquidity needs. It shall take into account the liquidity risk generated by the default of the two clearing members to which it has the largest exposures, whether a clearing member acts as a settlement agent for the CCP or for other clearing members, and the liquidity risk generated by its investment activity mentioned under Art. 44. (simply moved down from first subparagraph in 16020/10)
2. Powers are delegated to the Commission to adopt regulatory technical standards specifying the framework for managing the CCP's liquidity risk referred to in paragraph 1 that the CCP shall withstand.

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

ESMA, [in close cooperation with the members of the ESCB, and] 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 any other financial resources or arrangements referred to in Article 41(1) only after having exhausted the contributions of the defaulting clearing member(...).
- 3a. A CCP shall use (...) its own funds up to an amount proportionate to the total default fund contributions before depleting the default fund or using any other financial resources or arrangements 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.
- 4a. Powers are delegated to the Commission to adopt regulatory technical standards specifying the methodology for calculation and maintenance of the amount of the CCP's own funds to be used in accordance to paragraph 3a.

The regulatory standards referred to in the first subparagraph shall be adopted in accordance with Articles 10 to 14 of Regulation EU 1095/2010 [ESMA Regulation].
- 4b. ESMA, in close cooperation with the ESCB shall submit drafts for those regulatory standards to the Commission by 30 June 2012 at the latest.

Article 43

Collateral requirements

1. A CCP, when collecting margins and default fund contributions, shall only accept as collateral cash or highly liquid financial instruments 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 shall be able to satisfy the competent authority that when it accepts as collateral the underlying of the derivative contract or of the financial instrument that originate the CCP exposure, such practice is operated in an appropriate and sufficiently prudent manner.
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 **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

ESMA, [in close cooperation with the members of the ESCB, and] in consultation with (...) 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 cash or 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.

1a. The amount of capital, together with retained earnings and reserves of a CCP, which are not invested according to paragraph 1, shall not be considered for the purposes of Article 12(2).

2. Financial instruments posted as margins or as default fund contributions shall, where available, be deposited with operators of securities settlement systems that ensure [non-discriminatory access to CCPs and] the full protection of those instruments. Alternatively, other highly secure arrangements with authorised financial institutions may be used.

- 2a. The CCP shall ensure that the assets of clearing members that are deposited in accordance with paragraph 2, are identifiable separately from the assets belonging to the CCP and from assets belonging to the operator of a securities settlement system or an authorised financial institution, by means of differently titled accounts on the books of the third party or other any equivalent measures that achieve the same level of protection.

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, 41 or 41a 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 **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

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

Article 45

Default procedures and portability

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.

- 4a. Where assets and positions are held by a defaulting clearing member for the account of its clients in accordance with Article 37(2), the CCP shall be entitled and shall contractually commit itself to transfer on request of the clients, without the consent of the defaulting clearing member and within a pre-defined transfer period, the clients' assets and positions to another clearing member designated by the clients. That other clearing member shall only be obliged to accept these assets and positions where it has previously entered into a contractual relationship with the clients by which it has committed itself to do so. If this acceptance has not been obtained within a predefined transfer period, the CCP may actively manage its risk and liquidate defaulting clearing member's clients' positions
- 4b. Where assets and positions are held by a defaulting clearing member for the account of a client in accordance with Article 37(3) ("full segregation"), the CCP shall be entitled and shall contractually commit itself to transfer on request of the client, without the consent of the defaulting clearing member and within a pre-defined transfer period, the client's assets and positions to another clearing member designated by the client. That other clearing member shall only be obliged to accept these assets and positions where it has previously entered into a contractual relationship with the client by which it has committed itself to do so. If this acceptance has not been obtained within a predefined transfer period, the CCP may actively manage its risk and liquidate defaulting clearing member's clients' positions.
- 4c. Provided that the client has selected full segregation and is thus protected under paragraph 3a, Annex III, Part 2, point 6 of Directive 2006/48/EC shall apply.

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. It shall obtain independent validation and subject any significant change to the models and parameters to review by the competent authority before adopting the change. [The models and parameters, including any significant change thereto, shall be subject to a joint opinion of the college referred to in Article 15.]
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 **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

ESMA, [in close cooperation with the members of the ESCB, and] 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 practicable and available, use central bank money to settle its transactions. Where central bank money is not used, 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.

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 (...) 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 its 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 or 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 49a

Provision of margins between CCPs

- 1. A CCP shall segregate the collateral received by CCPs with whom it has entered into an interoperability arrangement.**
2. A CCP that enters into an interoperable arrangement with another CCP shall only provide initial margins to that CCP under a security financial collateral arrangement, without any right of use for the receiving CCP related to the margins.
- 3. Collateral received in the form of financial instruments shall be segregated in accounts with operators of securities settlement systems [central securities depositories].**
- 4. Member States shall ensure that the collateral segregated under paragraphs 1 and 2 shall be available to the receiving CCP only in case of default of the CCP which has provided the collateral in the context of an interoperability arrangement.**
- 5. In case of default of the CCP which has received the collateral in the context of an interoperability arrangement, Member States shall ensure that the collateral segregated under paragraphs 1 and 2 shall be readily returned to the providing CCP.**

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 Articles 49 and 49a 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. Prior to making a decision, a competent authority evaluating whether the requirements set out in paragraph 2 are (...) met, (...) shall provide explanations in writing regarding its risk considerations to the other competent authorities and the CCPs involved. It shall also notify ESMA. ESMA shall facilitate the adoption of an agreement between the competent authorities in accordance with its settlement of disagreement powers under Article 19 of Regulation EU 1095/2010 [ESMA Regulation].
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 16 of Regulation EU 1095/2010 [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 (...) 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 ESMA.
2. ESMA shall assess whether the application is complete within thirty 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 **10 to 14** of Regulation **EU 1095/2010** [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 **15** of Regulation **1095/2010** [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 **10 to 14** of Regulation **EU 1095/2010** [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 has not made use of the registration within 12 months, expressly renounces the registration or has provided no services or performed no activity 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(...);
 - (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 established in a third country that has applied for recognition in accordance with paragraph 2a, 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.

2a. The trade repository referred to in paragraph 1 shall submit its application to ESMA.

The applicant trade repository shall provide ESMA with all information deemed necessary for its recognition. Within **30 working days** of receipt of the application, ESMA shall assess whether the application is complete. If the application is not complete, ESMA shall set a deadline by which the applicant **trade repository** has to provide additional information.

ESMA shall consult with [...] prior to taking its decision.

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

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; including, where appropriate, onsite inspections;
 - (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.
- 1a A TR 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.
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.
- 3a. Should a trade repository offer any ancillary services, such as but not limited to, trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression services, those ancillary services will be operationally separate from the trade repository's function of centrally collecting and maintaining records of OTC derivatives.

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 by third party services providers and undertakings subject to the reporting obligation under Article 6. 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 under this Regulation. It shall disclose the prices and fees of each service and function 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 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.
 - 1a A trade repository may only use the data it receives under this Regulation for commercial purposes if the entity providing the data has provided its consent.
 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 in a timely manner.
 5. A trade repository shall take all reasonable steps to prevent any misuse of the information maintained in its systems (...).
- (...)

Article 67

Transparency and data availability

1. A trade repository shall regularly publish aggregate positions by class of derivatives on the contracts reported to it. **The trade repository shall ensure that all relevant authorities will have direct and immediate access to all the details of OTC derivatives contracts they need to fulfil their respective responsibilities and mandates.**

2. A trade repository shall make the necessary information available to the following entities:
 - (a) ESMA;
 - (aa) the ESRB
 - (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;
 - (daa) the relevant EU securities and market authorities;
 - (da) the relevant authorities of a third country that has entered into a international agreement with the Union as referred to in Article 62;
3. ESMA shall share the information necessary for the exercise of their duties with other EU relevant authorities.
4. Powers are delegated to the Commission to adopt regulatory technical standards specifying the frequency and 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 **10 to 14** of Regulation **EU 1095/2010** [ESMA Regulation].

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

Article 67a

Communication procedures

With the aim of promoting straight-through processing (STP) across the entire transaction flow, TRs shall use or accommodate in their systems, in their communication procedures with participants and with the market infrastructures they interface with, the relevant international communication procedures and standards for messaging and reference data.

Title VIII

Transitional and final provisions

Article 68

Reports and Review

1. By 31 December 2014 at the latest, the Commission shall review **and prepare a general report** on **this Regulation**. 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 (...) 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 31 December 2014 at the latest.

3. The Commission shall, in cooperation with the Member States and ESMA, and after requesting the assessment of the [ESRB], 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 [ESRB] shall provide the Commission with its assessment of any possible systemic risk (...) 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/EC²¹.
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."

²¹ OJ L 191, 13.7.2001, p.45.

Article 71

Transitional provisions

1. A CCP that has been authorised in its Member State of establishment **to provide clearing services before the date of entry into force of this Regulation**, or a CCP established in a third country which is **allowed to provide clearing services in a Member State in accordance with the national law of that Member State (...)** before the date of entry into force of this Regulation, shall seek authorisation under Article 12 or recognition under Article 23 for the purposes of this Regulation within [2 years of the entry into force] of this Regulation.
- 1a. A trade repository that has been authorised in its Member States of establishment **to collect and maintain the records of OTC derivatives before the entry into force of this Regulation**, or a trade repository established in a third country which is **allowed to collect and maintain the records of OTC derivatives transacted in a Member State in accordance with the national law of that Member State (...)** before the entry into force of this Regulation, shall seek registration under Article 51 or recognition under Article 63 within [two] years of the entry into force of this Regulation.
2. The reporting requirement under Article 6 shall apply [six months] after the date that the technical standards have been approved by the Commission, including for the outstanding derivative contracts that have been concluded prior to that date (...).
- 2a. Notwithstanding Article 67,(2), da, where no international agreement is in place between a third country and the Union as referred to in Article 62, a trade repository shall make the necessary information available to the relevant authorities of that third country until **one year** after the entry into force of this Regulation.

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.

Done at [...],

For the European Parliament

The President

For the Council

The President

(...)
