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PROPOSAL

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

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

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EUROPEAN COMMISSION

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2011/0296 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on markets in financial instruments and amending Regulation [EMIR] on OTC
derivatives, central counterparties and trade repositories**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The Markets in Financial Instruments Directive (MiFID), in force since November 2007, is a core pillar in EU financial market integration. Adopted in accordance with the "Lamfalussy" process¹, it consists of a framework Directive (Directive 2004/39/EC)², an implementing Directive (Directive 2006/73/EC)³ and an implementing Regulation (Regulation No 1287/2006)⁴. MiFID establishes a regulatory framework for the provision of investment services in financial instruments (such as brokerage, advice, dealing, portfolio management, underwriting etc.) by banks and investment firms and for the operation of regulated markets by market operators. It also establishes the powers and duties of national competent authorities in relation to these activities.

The overarching objective is to further the integration, competitiveness, and efficiency of EU financial markets. In concrete terms, it abolished the possibility for Member States to require all trading in financial instruments to take place on specific exchanges and enabled Europe-wide competition between traditional exchanges and alternative venues. It also granted banks and investment firms a strengthened "passport" for providing investment services across the EU subject to compliance with both organisational and reporting requirements as well as comprehensive rules designed to ensure investor protection.

The result after 3.5 years in force is more competition between venues in the trading of financial instruments, and more choice for investors in terms of service providers and

¹ The Mifid review is based on the "Lamfalussy process" (a four-level regulatory approach recommended by the Committee of Wise Men on the Regulation of European Securities Markets, chaired by Baron Alexandre Lamfalussy and adopted by the Stockholm European Council in March 2001 aiming at more effective securities markets regulation) as developed further by Regulation (EU) No 1095/2010 of the European Parliament and of the Council, establishing a European Supervisory Authority (European Securities and Markets Authority): at Level 1, the European Parliament and the Council adopt a directive in co-decision which contains framework principles and which empowers the Commission acting at Level 2 to adopt delegated acts (Art 290 The Treaty on the Functioning of the European Union C 115/47) or implementing acts (Art 291 The Treaty on the Functioning of the European Union C 115/47). In the preparation of the delegated acts the Commission will consult with experts appointed by Member States. At the request of the Commission, ESMA can advise the Commission on the technical details to be included in level 2 legislation. In addition, Level 1 legislation may empower ESMA to develop draft regulatory or implementing technical standards according to Art 10 and 15 of the ESMA Regulation which may be adopted by the Commission (subject to a right of objection by Council and Parliament in case of regulatory technical standards). At Level 3, ESMA also works on recommendations, guidelines and compares regulatory practice by way of peer review to ensure consistent implementation and application of the rules adopted at Levels 1 and 2. Finally, the Commission checks Member States' compliance with EU legislation and may take legal action against non-compliant Member States.

² Directive 2004/39/EC (MiFID Framework Directive).

³ Directive 2006/73/EC (MiFID Implementing Directive) implementing Directive 2004/39/EC (MiFID Framework Directive).

⁴ Regulation No 1287/2006 (MiFID Implementing Regulation) implementing Directive 2004/39/EC (MiFID Framework Directive) as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 1).

available financial instruments, progress which has been compounded by technological advances. Overall, transaction costs have decreased and integration has increased⁵.

However, some problems have surfaced. First, the more competitive landscape has given rise to new challenges. The benefits from this increased competition have not flowed equally to all market participants and have not always been passed on to the end investors, retail or wholesale. The market fragmentation implied by competition has also made the trading environment more complex, especially in terms of collection of trade data. Second, market and technological developments have outpaced various provisions in MiFID. The common interest in a transparent level playing-field between trading venues and investment firms risks being undermined. Third, the financial crisis has exposed weaknesses in the regulation of instruments other than shares, traded mostly between professional investors. Previously held assumptions that minimal transparency, oversight and investor protection in relation to this trading is more conducive to market efficiency no longer hold. Finally, rapid innovation and growing complexity in financial instruments underline the importance of up-to-date, high levels of investor protection. While largely vindicated amid the experience of the financial crisis, the comprehensive rules of MiFID nonetheless exhibit the need for targeted but ambitious improvements.

The revision of MiFID therefore constitutes an integral part of the reforms aimed at establishing a safer, sounder, more transparent and more responsible financial system working for the economy and society as a whole in the aftermath of the financial crisis, as well as to ensure a more integrated, efficient and competitive EU financial market.⁶ It is also an essential vehicle for delivering on the G20⁷ commitment to tackle less regulated and more opaque parts of the financial system, and improve the organisation, transparency and oversight of various market segments, especially in those instruments traded mostly over the counter (OTC)⁸, complementing the legislative proposal on OTC derivatives, central counterparties and trade repositories⁹.

Targeted improvements are also required in order to improve oversight and transparency of commodity derivative markets in order to ensure their function for hedging and price discovery, as well as in light of developments in market structures and technology in order to ensure fair competition and efficient markets. Further, specific changes to the framework of investor protection are necessary, taking account of evolving practices and to support investor confidence.

Finally, in line with the recommendations from the de Larosière group and the conclusions of the ECOFIN Council,¹⁰ the EU has committed to minimise, where appropriate, discretions

⁵ Monitoring Prices, Costs and Volumes of Trading and Post-trading Services, Oxera, 2011.

⁶ See (COM (2010) 301 final) Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The European Central Bank: Regulating Financial Services For Sustainable Growth, June 2010.

⁷ See G-20 Leaders' statement of Pittsburgh Summit, 24-25 September 2009, <http://www.pittsburghsummit.gov/mediacenter/129639.htm>

⁸ As a result, the Commission issued (COM(2009) 563 final) Communication by the Commission on ensuring efficient, safe and sound derivatives markets: future policy actions, 20 October 2009.

⁹ See (COM (2010) 484) Proposal on Regulation on OTC derivatives, central counterparties and trade repositories, September 2010.

¹⁰ See Report, High-level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, February 2009, and Council conclusions on strengthening EU financial supervision, 10862/09, June 2009.

available to Member States across EU financial services directives. This is a common thread across all areas covered by the review of MiFID and will contribute to establishing a single rulebook for EU financial markets, help further develop a level playing field for Member States and market participants, improve supervision and enforcement, reduce costs for market participants, and improve conditions of access and enhance the global competitiveness of the EU financial industry.

As a result, the proposal amending MiFID is divided in two. A Regulation sets out requirements in relation to the disclosure of trade transparency data to the public and transaction data to competent authorities, removing barriers to non-discriminatory access to clearing facilities, the mandatory trading of derivatives on organised venues, specific supervisory actions regarding financial instruments and positions in derivatives, and the provision of services by third-country firms without a branch. A Directive amends specific requirements regarding the provision of investment services, the scope of exemptions from the current Directive, organisational and conduct of business requirements for investment firms, organisational requirements for trading venues, the authorisation and ongoing obligations applicable to providers of data services, powers available to competent authorities, sanctions, and rules applicable to third-country firms operating via a branch.

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

The initiative is the result of an extensive and continuous dialogue and consultation with all major stakeholders, including securities regulators, all types of market participants including issuers and retail investors. It takes into consideration the views expressed in a public consultation from 8 December 2010 to 2 February 2011¹¹, a large and well-attended public hearing was held over two days on 20-21 September 2010¹², and input obtained through extensive meetings with a broad range of stakeholder groups since December 2009. Finally, the proposal takes into consideration the observations and analysis contained in the documents and technical advice published by the Committee of European Securities Regulators (CESR), now the European Securities and Markets Authority (ESMA)¹³.

In addition, two studies¹⁴ have been commissioned from external consultants in order to prepare the revision of MiFID. The first one, requested from PriceWaterhouseCoopers on 10 February 2010 and received on 13 July 2010, focused on data gathering on market activities and other MiFID related issues. The second, from Europe Economics mandated on the 21 July

¹¹ See responses to public consultation on the review of MiFID: http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/financial_services/mifid_instruments&vm=detailed&sb=Title and summary in Annex 13 of the Impact Assessment Report

¹² The summary is available at http://ec.europa.eu/internal_market/securities/docs/isd/10-09-21-hearing-summary_en.pdf

¹³ See CESR Technical Advice to the European Commission in the Context of the MiFID Review and Responses to the European Commission Request for Additional Information, 29 July 2010 <http://www.esma.europa.eu/popup2.php?id=7003> and CESR second set of Technical Advice to the European Commission in the Context of the MiFID Review and Responses to the European Commission Request for Additional Information, 13 October 2010 <http://www.esma.europa.eu/popup2.php?id=7279>

¹⁴ These studies have been completed by two external consultants that were selected according to the selection process established within the rules and regulations of the European Commission. These two studies do not reflect the views or opinions of the European Commission.

2010 after an open call for tender, received on 23 June 2011 focused on a cost benefit analysis of the various policy options to be considered in the context of the revision of MiFID.

In line with its "Better Regulation" policy, the Commission conducted an impact assessment of policy alternatives. Policy options were assessed against different criteria: transparency of market operations for regulators and market participants, investor protection and confidence, level playing field for market venues and trading systems in the EU, and cost-effectiveness, i.e. the extent to which the options achieve the sought objectives and facilitate the operation of securities markets in a cost effective and efficient way. Overall, the review of MiFID is estimated to generate one-off compliance costs of between €512 and €732 million and ongoing costs of between €312 and €586 million. This represents one-off and ongoing cost impacts of respectively 0.10% to 0.15% and 0.06% to 0.12% of total operating spending of the EU banking sector. This is far less than the costs imposed at the time of the introduction of MiFID. The one-off cost impacts of the introduction of MiFID were estimated at 0.56% (retail and savings banks) and 0.68% (investment banks) of total operating spending while ongoing compliance costs were estimated at 0.11% (retail and savings banks) to 0.17% (investment banks) of total operating expenditure.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Legal basis

The proposal is based on Article 114(1) of the TFEU which provides a legal basis for a Regulation creating uniform provisions aimed at the functioning of the internal market.

While the Directive deals mainly with the access to economic activity of businesses and is based on Article 53 TFEU, a need for a uniform set of rules on how these economic activities are conducted warrants the use of a different legal basis allowing for the creation of a Regulation.

A Regulation is necessary to grant specific direct competences to ESMA in the areas of product intervention and position management powers. For the fields of trade-transparency and transaction reporting the application of rules often depends on numeric thresholds and specific identification codes. Any deviation on the national level would lead to market distortions and regulatory arbitrage, preventing the development of a level-playing field. The imposition of a Regulation ensures that those requirements will be directly applicable to investment firms and promotes a level-playing field by preventing diverging national requirements as a result of the transposition of a Directive.

The proposed Regulation would also indicate that investment firms to a large extent follow the same rules in all EU markets, stemming from a uniform legal framework which will enhance legal certainty and ease the operations of firms active in various jurisdictions considerably. A Regulation would also enable the EU to implement any future changes more quickly, as amendments can apply almost immediately after adoption. That would enable the EU to meet internationally agreed deadlines for implementation and follow significant market developments.

3.2. Subsidiarity and proportionality

According to the principle of subsidiarity (Article 5.3 of the TFEU), action on EU level should be taken only when the aims envisaged cannot be achieved sufficiently by Member

States alone and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the EU.

Most of the issues covered by the revision are already covered by the current legal MiFID framework. Further, financial markets are inherently cross-border in nature and are becoming more so. The conditions according to which firms and operators can compete in this context, whether it concerns rules on pre and post-trade transparency, investor protection or the assessment and control of risks by market participants need to be common across borders and are all at the core of MiFID today. Action is now required at European level in order to update and modify the regulatory framework laid out by MiFID in order to take into account developments in financial markets since its implementation. The improvements that the directive has already brought to the integration and efficiency of financial markets and services in Europe would thus be bolstered with appropriate adjustments to ensure the objectives of a robust regulatory framework for the single market are achieved. Because of this integration, isolated national intervention would be far less efficient and would lead to the fragmentation of the markets, resulting in regulatory arbitrage and distortion of competition. For instance, different levels of market transparency or investor protection across Member States would fragment markets, compromise liquidity and efficiency, and lead to harmful regulatory arbitrage.

The European Securities and Markets Authority (ESMA) should also play a key role in the implementation of the new legal proposals. One of the aims of the creation of the European Authority is to enhance further the functioning of the single market for security markets; new rules at Union level are necessary to give all appropriate powers to ESMA.

The proposal take full account of the principle of proportionality, being adequate to reach the objectives and not going beyond what is necessary in doing so. It is compatible with the proportionality principle, taking into account the right balance of public interest at stake and the cost-efficiency of the measure. The requirements imposed on the different parties have been carefully calibrated. In particular, the need to balance investor protection, efficiency of the markets and costs for the industry has been transversal in laying out these requirements. For instance, regarding the new transparency rules that could be applied to bonds and derivatives markets, the revision advocates for a carefully calibrated regime that will take into consideration the specificities of each asset class and possibly each type of derivatives.

3.3. Compliance with Articles 290 and 291 TFEU

On 23 September 2009, the Commission adopted proposals for Regulations establishing EBA, EIOPA, and ESMA. In this respect the Commission wishes to recall the Statements in relation to Articles 290 and 291 TFEU it made at the adoption of the Regulations establishing the European Supervisory Authorities according to which: "As regards the process for the adoption of regulatory standards, the Commission emphasises the unique character of the financial services sector, following from the Lamfalussy structure and explicitly recognised in Declaration 39 to the TFEU. However, the Commission has serious doubts whether the restrictions on its role when adopting delegated acts and implementing measures are in line with Articles 290 and 291 TFEU."

3.4. Detailed explanation of the proposal

3.4.1. General – level-playing field

A central aim of the proposal is to ensure that all organised trading is conducted on regulated trading venues: regulated markets, multilateral trading facilities (MTFs) and organised trading facilities (OTFs). Identical pre and post trade transparency requirements will apply to all of these venues. Likewise, the requirements in terms of organisational aspects and market surveillance applicable to all three venues are nearly identical. This will ensure a level playing field where there are functionally similar activities bringing together third-party trading interests. Importantly however, the transparency requirements will be calibrated for different types of instruments, notably equity, bonds, and derivatives, and for different types of trading, notably order book and quote driven systems.

In all three venues the operator of the platform is neutral. Regulated markets and multilateral trading facilities are characterised by non-discretionary execution of transactions. This means that transactions will be executed according to predetermined rules. They also compete to offer access to a broad membership provided they meet a transparent set of criteria.

By contrast, the operator of an OTF has a degree of discretion over how a transaction will be executed. Consequently, the operator is subject to investor protection, conduct of business, and best execution requirements towards the clients using the platform. . Thus, while both the rules on access and execution methodology of an OTF have to be transparent and clear, they allow the operator to perform a service to clients which is qualitatively if not functionally different from the services provided by regulated markets and MTFs to their members and participants. Still, in order to ensure both the OTF operator's neutrality in relation to any transaction taking place and that the duties owed to clients thus brought together cannot be compromised by a possibility to profit at their expense, it is necessary to prohibit the OTF operator from trading against his own proprietary capital.

Finally, organised trading may also happen by systematic internalisation. A systematic internaliser (SI) may execute client transactions against his own proprietary capital. However, an SI may not bring together third party buying and selling interests in functionally the same way as a regulated market, MTF or OTF, and is therefore not a trading venue. Best execution and other conduct of business rules would apply, and the client would clearly know when he is trading with the investment firm and when he is trading against third parties. Specific pre-trade transparency and access requirements apply to SIs. Again, the transparency requirements will be calibrated for different types of instruments, notably equity, bonds, and derivatives and apply below specific thresholds. Any trading on own account by investment firms with clients, including other investment firms, is thus considered over-the counter (OTC). OTC trading activity which will not meet the definition of SI activity, to be made more inclusive through amendments to implementing legislation, will have to be non systematic and irregular.

3.4.2. *Extension of transparency rules to equity like instruments and actionable indications of interests (Title II, Chapter 1 – Articles 3-6)*

The key rationale for transparency is to provide investors with access to information about current trading opportunities, to facilitate price formation and assist firms to provide best execution to their clients. MiFID has established transparency rules, both pre and post trade that apply to shares admitted to trading on regulated markets, including when those shares are traded on an MTF or over the counter (OTC).

The proposed provisions first extend the transparency rules applicable by these shares to equity like instruments such as depository receipts, exchange-traded funds, certificates and other similar financial instruments issued by companies. These instruments are similar to shares and should therefore be submitted to the same transparency regime. The extension of the transparency requirements will also cover actionable indications of interests (IOIs). This will avoid that IOIs can be used to provide information to a group of market participants while excluding others.

3.4.3. *Increased consistency in the application of waivers to pre trade transparency for equities markets (Article 4)*

The proposed provisions aim at making the application of the pre trade transparency waivers more consistent and more coherent. The reasons for applying these waivers to the obligation to publish in real time current orders and quotes are still valid; the large in scale operations for instance deserve special treatment to avoid having too large a market impact when executed. However, the calibration, actual content and consistent application need to be improved. Therefore, the proposed provisions will oblige the competent authorities to inform ESMA about the use of the waivers in their markets and ESMA will issue an opinion on the compatibility of the waiver with the requirements established in this Regulation and prospective delegated acts.

3.4.4. *Extension of transparency rules to bonds, structured finance products and derivatives (Title II, Chapter 2 – Articles 7-10)*

The provisions extend the principles of transparency rules up to now only applicable to equity markets to bonds, structured finance products, emission allowances and derivatives. This extension is justified by the fact that the existing level of transparency of these products which are, in most cases, traded OTC is not always considered sufficient.

The provisions lay out new requirements for both pre and post trade transparency on these four groups of instruments. The transparency requirements will be identical across the three trading venues, Regulated Market, MTF and OTF, but they will be calibrated according to the instruments traded. Waivers will be defined in delegated acts.

For regulated markets, the transparency requirements will extend to bonds, structured finance products, emission allowances and derivatives admitted to trading. For MTFs and OTFs they will extend to bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published and to emission allowances and derivatives traded on MTFs and OTFs.

Regarding the pre trade transparency requirements, competent authorities will first be able to use a waiver for specific type of instruments based on market model, liquidity or other relevant criteria. They will also be able to apply a set of different waivers to exempt some transactions from the transparency requirements. In both cases, as for equities, competent authorities will have to notify to ESMA the intended use of the waivers and ESMA will issue an opinion on the compatibility of the waiver with the legal requirements. The format and level of detail of the pre trade information to be provided as well as the exception and waivers to these requirements will be defined in delegated acts.

As for post trade transparency, the proposed provisions set the possibility for deferred publication in certain cases, depending on the size or type of transactions. Similarly to pre trade, the scope of the information as well as the conditions for deferred publication will be set by delegated acts.

3.4.5. Increased and more efficient data consolidation (Title II, Chapter 3 – Articles 11, 12)

The area of market data in terms of quality, format, cost and ability to consolidate is key to sustain the overarching principle of MiFID as regards transparency, competition and investor protection. In this area, the proposed provisions in the Regulation and the Directive bring in a number of fundamental changes.

In the Regulation,, they will contribute to reducing the cost of data by requesting trading venues, that is regulated markets, MTFs or OTFs to make post trade information available free of charge 15 minutes after the execution of the transaction, to offer pre- and post-trade data separately, and by giving the possibility to the Commission to clarify by delegated acts what constitutes a reasonable commercial basis.

This Regulation also requires investment firms to make public trades executed outside trading venues via Approved Publication Arrangements which will themselves be regulated in the Directive. This should significantly improve the quality of OTC data and consequently facilitate its consolidation.

3.4.6. Transparency for investment firms trading OTC including systematic internalisers (Title III – Articles 13-20)

In order to sustain a level playing-field, support market-wide price discovery, and protect retail investors, specific transparency rules for investment firms acting as a systematic internaliser are proposed. The existing transparency rules for systematic internalisers will apply to shares and equity-like instruments, while new provisions would be introduced for bonds, structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and derivatives which are clearing-eligible or are admitted to trading on a regulated market or are traded on an MTF or an OTF. In addition, for shares and equity-like instruments, a minimum quote size is introduced, and two-way quotes are required. Post-trade transparency rules identical to those applicable to on-venue trades are proposed to apply to all shares including equity-like instruments, as well as to bonds and structured finance products for which a prospectus has been published, to emission allowances and to derivatives which are admitted to trading on a regulated

market or traded on an MTF or OTF, as well as derivatives which are clearing-eligible or are reported to a trade repository.

3.4.7. Transaction reporting (Title IV – Articles 21-23)

Transaction reporting under MiFID enables supervisors to monitor the activities of investment firms and ensure compliance with MiFID and to monitor for abuses under the Market Abuse Directive (MAD). Transaction reporting is also useful for general market monitoring. The provisions which are put forward will improve the quality of transaction reporting in a number of aspects.

All transactions in financial instruments will need to be reported to competent authorities, except for transactions in financial instruments which are not traded in an organised way and are not susceptible to market abuse and cannot be used for abusive purposes. Competent authorities will have full access to records at all stages in the order execution process, from the initial decision to trade, through to its execution.

First, the amendments create a new obligation for regulated markets, MTFs and OTFs to store order data in a manner accessible to supervisors for at least 5 years. This will allow competent authorities to monitor for attempted market abuse as well as order book manipulation. The stored information will need to contain all information also required for the reported transactions, notably including identification of the client, and of the persons responsible for the execution of the transaction, for instance the traders, or computer algorithms.

Second, the scope of transaction reporting which was up to now limited to financial instruments admitted to trading on a regulated market, including transactions in such instrument executed outside the market, will be substantially extended and thus aligned with the scope of market abuse rules. The only instruments escaping the requirement will be (i) the instruments not admitted to trading nor traded on an MTF or OTF, (ii) the instruments whose value does not depend on that of a financial instrument admitted to trading or traded on an MTF or OTF, (iii) the instruments the trading of which cannot have an impact on an instrument admitted to trading nor traded on an MTF or OTF.

Third, the provisions will improve the quality of the reporting by on the one hand, providing for better identification of the clients on whose behalf the investment firm has executed the transaction and the persons responsible for its execution, and on the other hand, requesting regulated markets, MTFs and OTFs to report details of transactions executed by firms which are not subject to the general reporting obligations. Furthermore, in terms of quality, the proposed provisions will require the reporting to be done through reporting mechanisms approved, pursuant to the Directive, by competent authorities.

In order for transaction reports and stored order information to identify the client and those responsible for the transaction's execution, including computer algorithms, investment firms will need to pass this information on when sending an order to another firm. They will also have the option to report an order as if it were a transaction in case they do not wish to pass this information to other firms.

Fourth, for cost and efficiency purposes, double reporting of trades under MiFID and the recently proposed reporting requirements to trade repositories (EMIR) should be avoided. Therefore, trade repositories will be required to transmit reports to the competent authorities.

Last, if these changes should prove to be insufficient to achieve a complete and accurate overview of trading activity and individual positions, a review clause stipulates that 2 years after the entry into force of the regulation the Commission may introduce measures to require reporting by investment firms to go directly to a system appointed by ESMA.

3.4.8. Trading of derivatives (Title V - Articles 24-27)

As part of the significant efforts underway to improve the stability, transparency and oversight of OTC derivatives markets, the G20 has agreed that trading in standardised OTC derivatives should move to exchanges or electronic trading platforms where appropriate.

Consistent with the requirements already proposed by the Commission (EMIR) to increase central clearing of OTC derivatives, the proposed provisions in this Regulation will require trading in suitably developed derivatives to occur only on eligible platforms, that is regulated markets, MTFs or OTFs. This obligation will be imposed on both financial and non financial counterparties exceeding the clearing threshold in EMIR. The provisions leave to the Commission and to ESMA through technical standards the task of defining the list of derivatives eligible to such obligation, taking into consideration the liquidity of the specific instruments.

3.4.9. Non-discriminatory clearing access (Title VI – Articles 28-30)

In addition to requirements in Directive 2004/39/EC that prevent Member States from unduly restricting access to post trade infrastructure such as central counterparty (CCP) and settlement arrangements, it is necessary that this Regulation removes various other commercial barriers that can be used to prevent competition in the clearing of financial instruments. Barriers may arise from central counterparties not providing clearing services to certain trading venues, trading venues not providing data streams to potential new clearers or information about benchmarks or indices not being provided to clearers or trading venues.

The proposed provisions will prohibit discriminatory practices and prevent barriers that may prevent competition for the clearing of financial instruments. This will increase competition for clearing of financial instruments in order to lower investment and borrowing costs, eliminate inefficiencies and foster innovation in European markets.

3.4.10. Supervision of products and positions (Title VII, Articles 31-35)

Further to the Council conclusions on strengthening EU Financial supervision (10 June 2009), there has been widespread agreement that the effectiveness of supervision and enforcement needs to be increased and competent authorities need to be equipped with specific new powers in the wake of the crisis, especially in terms of being able to scrutinise products and services being offered.

First, the proposed amendments will greatly increase the supervision of products and services by introducing the possibilities on the one hand, for competent authorities to set permanent bans on financial products or activities or practices with coordination by ESMA, and on the other hand, for ESMA to also temporarily ban products, practices and services. The ban could consist of a prohibition or restriction on the marketing or sale of financial instruments or on a certain practice or on persons engaged in the specific activity. The provisions set specific conditions for the activation of both of these bans, which can notably happen when there are concerns on investor protection, or threats to the orderly functioning of financial markets or stability of the financial system.

Second, in complement to the powers proposed in the revised Directive that give the possibility to competent authorities to manage positions including setting up position limits, the proposed provisions in the Regulation introduce a role for ESMA to coordinate the measures taken at national level. It also gives ESMA specific powers to manage or limit positions for market participants. The proposed provisions set precise conditions for this to happen notably in terms of a threat to the orderly functioning of markets or delivery arrangements for physical commodities, or to the stability of the financial system in the Union.

3.4.11. Emission allowances (Article 1)

Unlike trading in derivatives, spot secondary markets in EU emission allowances (EUAs) are largely unregulated. A range of fraudulent practices have occurred in spot markets which could undermine trust in the emissions trading scheme (ETS), set up by the EU ETS Directive¹⁵. In parallel to measures within the EU ETS Directive to reinforce the system of EUA registries and conditions for opening an account to trade EUAs, the proposal would render the entire EUA market subject to financial market regulation. Both spot and derivative markets would be under a single supervisor. MiFID and the Directive 2003/6/EC on market abuse would apply, thereby comprehensively upgrading the security of the market without interfering with its purpose, which remains emissions reduction. Moreover, this will ensure coherence with the rules already applying to EUA derivatives and lead to greater security as banks and investment firms, entities obliged to monitor trading activity for fraud, abuse or money laundering, would assume a bigger role in vetting prospective spot traders.

3.4.12. Provision of investment services by third country firms without a branch (Title VIII – Articles 36-39)

The proposal creates a harmonised framework for granting access to EU markets for firms and market operators based in third countries in order to overcome the current fragmentation into national third country regimes and to ensure a level playing field for all financial services actors in the EU territory. The proposal introduces a regime based on a preliminary equivalence assessment of third country jurisdictions by the Commission. Third country firms from third countries for which an equivalence

¹⁵ Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, as last amended by Directive 2009/29/EC, OJ L 140, p. 63.

decision has been adopted would be able to request to provide services in the Union. The provision of services to retail clients would require the establishment of a branch; the third country firm should be authorised in the Member State where the branch is established and the branch would be subject to EU requirements in some areas (organisational requirements, conduct of business rules, conflicts of interest, transparency and others). Services provided to eligible counterparties would not require the establishment of a branch; third country firms could provide them subject to ESMA registration. They would be supervised in their country. Appropriate cooperation agreement between the supervisors in third countries and national competent authorities and ESMA would be necessary

4. BUDGETARY IMPLICATION

The specific budget implications of the proposal relate to task allocated to ESMA as specified in the legislative financial statements accompanying this proposal. Specific budgetary implications for the Commission are also assessed in the financial statement accompanying this proposal.

The proposal has implications for the Community budget.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories

(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 Committee¹⁶,

Having regard to the opinion of the European Data Protection Supervisor,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The financial crisis has exposed weaknesses in the transparency of financial markets. Strengthening transparency is therefore one of the shared principles to strengthen the financial system as confirmed by the G20 declaration in London on 2 April 2009. In order to strengthen the transparency and improve the functioning of the internal market for financial instruments, a new framework establishing uniform requirements for the transparency of transactions in markets for financial instruments should be put in place. The framework should establish comprehensive rules for a broad range of financial instruments. It should complement requirements for the transparency of orders and transactions in respect of shares established in Directive 2004/39/EC of the European Parliament and the Council of 21 April 2004.
- (2) The High Level Group on Financial Supervision in the EU chaired by Jacques de Larosière invited the Union to develop a more harmonised set of financial regulation. In the context of the future European supervision architecture, the European Council of 18 and 19 June 2009 also stressed the need to establish a European single rule book applicable to all financial institutions in the Single Market.

¹⁶ OJ C , , p. .

- (3) The new legislation should as a consequence consist of two different legal instruments, a Directive and this Regulation. Together, both legal instruments should form the legal framework governing the requirements applicable to investment firms, regulated markets and data reporting services providers. This Regulation should therefore be read together with the Directive. The need to establish a single set of rules for all institutions in respect of certain requirements and to avoid potential regulatory arbitrage as well as to provide more legal certainty and less regulatory complexity for market participants warrants the use of a legal basis allowing for the creation of a Regulation. In order to remove the remaining obstacles to trade and significant distortions of competition resulting from divergences between national laws and to prevent any further likely obstacles to trade and significant distortions of competition from arising, it is therefore necessary to adopt a Regulation establishing uniform rules applicable in all Member States. This directly applicable legal act aims at contributing in a determining manner to the smooth functioning of the internal market and should, consequently, be based on the provisions of Article 114 TFEU, as interpreted in accordance with the consistent case-law of the Court of Justice of the European Union.
- (4) Directive 2004/39/EC of the European Parliament and the Council of 21 April 2004 established rules for making the trading in shares admitted to trading on a regulated market pre- and post-trade transparent and for reporting transactions in financial instruments admitted to trading on a regulated market to competent authorities; the Directive needs to be recast in order to appropriately reflect developments in financial markets and to address weaknesses and to close loopholes that were inter alia exposed in the financial market crisis.
- (5) Provisions in respect of trade and regulatory transparency requirements needs to take the form of directly applicable law applied to all investment firms that should follow uniform rules in all Union markets, in order to provide for a uniform application of a single regulatory framework, to strengthen confidence in the transparency of markets across the Union, reduce regulatory complexity and firms' compliance costs, especially for financial institutions operating on a cross-border basis, and contribute to the elimination of distortions of competition. The adoption of a Regulation ensuring direct applicability is best suited to accomplish these regulatory goals and ensure uniform conditions by preventing diverging national requirements as a result of the transposition of a directive.
- (6) Definitions of regulated market and MTF should be introduced and closely aligned with each other to reflect the fact that they represent the same organised trading functionality. The definitions should exclude bilateral systems where an investment firm enters into every trade on own account, even as a riskless counterparty interposed between the buyer and seller. The term 'system' encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules. Regulated markets and MTFs are not obliged to operate a 'technical' system for matching orders. A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this Directive and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. The term 'buying and selling interests' is to be understood in a broad sense and includes orders, quotes and indications of interest. The requirement that the interests be brought together in the system by means of non-

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

- (7) In order to make European markets more transparent and to level the playing field between various venues offering trading services it is necessary to introduce a new category of organised trading facility (OTF). This new category is broadly defined so that now and in the future it should be able to capture all types of organised execution and arranging of trading which do not correspond to the functionalities or regulatory specifications of existing venues. Consequently appropriate organisational requirements and transparency rules which support efficient price discovery need to be applied. The new category includes broker crossing systems, which can be described as internal electronic matching systems operated by an investment firm which execute client orders against other client orders. The new category also encompasses systems eligible for trading clearing-eligible and sufficiently liquid derivatives. It shall not include facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests, other entities aggregating or pooling potential buying or selling interests, or electronic post-trade confirmation services.
- (8) This new category of organised trading facility will complement the existing types of trading venues. While regulated markets and multilateral trading facilities are characterised by non-discretionary execution of transactions, the operator of an organised trading facility should have discretion over how a transaction is to be executed. Consequently, conduct of business rules, best execution and client order handling obligations should apply to the transactions concluded on an OTF operated by an investment firm or a market operator. However, because an OTF constitutes a genuine trading platform, the platform operator should be neutral. Therefore, the operator of an OTF should not be allowed to execute in the OTF any transaction between multiple third-party buying and selling interests including client orders brought together in the system against his own proprietary capital. This also excludes them from acting as systematic internalisers in the OTF operated by them.
- (9) All organised trading should be conducted on regulated venues and be fully transparent, both pre and post trade. Transparency requirements therefore need to apply to all types of trading venues, and to all financial instruments traded thereon.
- (10) Trading in depositary receipts, exchange-traded funds, certificates, similar financial instruments and shares other than those admitted to trading on a regulated market takes place in largely the same fashion, and fulfils a nearly-identical economic purpose, as trading in shares admitted to trading on a regulated market. Transparency provisions applicable to shares admitted to trading on regulated markets should thus be extended to these instruments.
- (11) While, in principle, acknowledging the need for a regime of waivers from pre-trade transparency to support the efficient functioning of markets, the actual waiver

provisions for shares currently applicable on the basis of Directive 2004/39/EC and Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive¹⁷, need to be scrutinised as to their continued appropriateness in terms of scope and conditions applicable. In order to ensure a uniform application of the waivers from pre-trade transparency in shares and eventually other similar instruments and non-equity products for specific market models and types and sizes of orders, the European Securities and Markets Authority (ESMA) should assess the compatibility of individual requests for applying a waiver with this Regulation and future delegated acts. ESMA's assessment should take the form of an opinion in accordance with Article 29 of Regulation (EU) No 1095/2010. In addition, the already existing waivers for shares should be reviewed by ESMA within an appropriate timeframe and an assessment be made, following the same procedure, whether they are still in compliance with the rules in this Regulation and future delegated acts.

- (12) The financial crisis exposed specific weaknesses in the way information on trading opportunities and prices in financial instruments other than shares is available to market participants, namely in terms of timing, granularity, equal access, and reliability. Pre- and post-trade transparency requirements taking account of the different characteristics and market structures of specific types of instruments other than shares should thus be introduced. In order to provide a sound transparency framework for all relevant instruments, these should apply to bonds and structured finance products with a prospectus or which are admitted to trading either on a regulated market or are traded on a multilateral trading facility (MTF) or an organised trading facility (OTF), to derivatives which are traded or admitted to trading on regulated markets, MTFs and OTFs or considered eligible for central clearing, as well as, in the case of post-trade transparency, to derivatives reported to trade repositories. Therefore only those financial instruments traded purely OTC which are deemed particularly illiquid or are bespoke in their design would be outside the scope of the transparency obligations.
- (13) It is necessary to introduce an appropriate level of trade transparency in markets for bonds, structured finance products and derivatives in order to help the valuation of products as well as the efficiency of price formation. Structured finance products should notably include asset backed securities as defined in Article 2(5) of Regulation (EC) No 809/2004, comprising among others collateralised debt obligations.
- (14) In order to ensure uniform applicable conditions between trading venues, the same pre- and post-trade transparency requirements should apply to the different types of venues. The transparency requirements should be calibrated for different types of instruments, including equity, bonds, and derivatives, and for different types of trading, including order-book and quote-driven systems as well as hybrid and voice broking systems, and take account of issuance, transaction size and characteristics of national markets.

¹⁷ OJ L 241, 2.9.2006, p. 1

- (15) In order to ensure that trading carried out OTC does not jeopardise efficient price discovery or a transparent level-playing field between means of trading, appropriate pre-trade transparency requirements should apply to investment firms dealing on own account in financial instruments OTC insofar as it is carried out in their capacity as systematic internalisers in relation to shares, depositary receipts, exchange-traded funds, certificates or other similar financial instruments, and bonds, structured finance products, and clearing-eligible derivatives.
- (16) An investment firm executing client orders against own proprietary capital should be deemed a systematic internaliser, unless the transactions are carried out outside regulated markets, MTFs and OTFs on an occasional, ad hoc and irregular basis. Systematic internalisers should be defined as investment firms which, on an organised, frequent and systematic basis, deal on own account by executing client orders outside a regulated market, an MTF or an OTF. In order to ensure the objective and effective application of this definition to investment firms, any bilateral trading carried out with clients should be relevant and quantitative criteria should complement the qualitative criteria for the identification of investment firms required to register as systematic internalisers, laid down in Article 21 of Commission Regulation No 1287/2006 implementing Directive 2004/39/EC. While an OTF is any system or facility in which multiple third party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third party buying and selling interests.
- (17) Systematic internalisers may decide to give access to their quotes only to retail clients, only to professional clients, or to both. They should not be allowed to discriminate within those categories of clients. Systematic internalisers are not obliged to publish firm quotes in relation to transactions above standard market size. The standard market size for any class of financial instrument should not be significantly disproportionate to any financial instrument included in that class.
- (18) It is not the intention of this Regulation to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, the characteristics of which include that they are ad-hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is itself characterised by dealings above standard market size, and where the deals are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser.
- (19) Market data should be easily and readily available to users in a format as disaggregated as possible to allow investors, and data service providers serving their needs, to customise data solutions to the furthest possible degree. Therefore, pre- and post-trade transparency data should be made available to the public in an "unbundled" fashion in order to reduce costs for market participants when purchasing data.
- (20) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹⁸ and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals

¹⁸ OJ L 281, 23.11.1995, p. 31.

with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data¹⁹ should be fully applicable to the exchange, transmission and processing of personal data for the purposes of this Regulation, particularly Title IV, by Member States and ESMA.

- (21) Considering the agreement reached by the parties to the G20 Pittsburgh summit on 25 September 2009 to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms where appropriate, a formal regulatory procedure should be defined for mandating trading between financial counterparties and large non-financial counterparties in all derivatives which have been considered to be clearing-eligible and which are sufficiently liquid to take place on a range of trading venues subject to comparable regulation and enabling participants to trade with multiple counterparties. The assessment of sufficient liquidity should take account of market characteristics at national level including elements such as the number and type of market participants in a given market, and of transaction characteristics, such as the size and frequency of transactions in that market.
- (22) Considering the agreement reached by the parties to the G20 in Pittsburgh on 25 September 2009 to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms where appropriate on the one hand, and the relatively lower liquidity of various OTC derivatives on the other, it is appropriate to provide for a suitable range of eligible venues on which trading pursuant to this commitment can take place. All eligible venues should be subject to closely aligned regulatory requirements in terms of organisational and operational aspects, arrangements to mitigate conflicts of interest, surveillance of all trading activity, pre- and post-trade transparency calibrated by financial instrument, and for multiple third-party trading interests to be able to interact with one another. The possibility for operators of venues to arrange transactions pursuant to this commitment between multiple third parties in a discretionary fashion should however be foreseen in order to improve the conditions for execution and liquidity.
- (23) The trading obligation established for these derivatives should allow for efficient competition between eligible trading venues. Therefore those trading venues should not be able to claim exclusive rights in relation to any derivatives subject to this trading obligation preventing other trading venues from offering trading in these instruments. For effective competition between trading venues for derivatives, it is essential that trading venues have non-discriminatory and transparent access to central counterparties (CCPs). Non-discriminatory access to a CCP should mean that a trading venue has the right to non-discriminatory treatment in terms of how contracts traded on its platform are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP, and non-discriminatory clearing fees.
- (24) Competent authorities' powers should be complemented with an explicit mechanism for prohibiting or restricting the marketing, distribution and sale of any financial instrument giving rise to serious concerns regarding investor protection, orderly functioning and integrity of financial markets, or the stability of the whole or part of the financial system, together with appropriate coordination and contingency powers

¹⁹ OJ L 8, 12.1.2001, p. 1

for ESMA. The exercise of such powers should be subject to the need to fulfil a number of specific conditions.

- (25) Competent authorities should notify ESMA of the details of any of their requests to reduce a position in relation to a derivative contract, of any one-off limits, as well as of any ex-ante position limits in order to improve coordination and convergence in how these powers are applied. The essential details of any ex-ante position limits applied by a competent authority should be published on ESMA's website.
- (26) ESMA should be able to request information from any person regarding their position in relation to a derivative contract, to request that position to be reduced, as well as to limit the ability of persons to undertake individual transactions in relation to commodity derivatives. ESMA should then notify relevant competent authorities of measures it proposes to undertake and should also publish these measures.
- (27) The details of transactions in financial instruments should be reported to competent authorities to enable them to detect and investigate potential cases of market abuse, to monitor the fair and orderly functioning of markets, as well as the activities of investment firms. The scope of this oversight includes all instruments which are admitted to trading on a regulated market, MTF or OTF, as well as all instruments the value of which depends on or influences the value of those instruments. In order to avoid an unnecessary administrative burden on investment firms, financial instruments not traded in an organised way and that are not susceptible to market abuse should be excluded from the reporting obligation.
- (28) In order to serve their purpose as a tool for market monitoring, transaction reports should identify the person who has made the investment decision, as well as those responsible for its execution. Competent authorities also need to have full access to records at all stages in the order execution process, from the initial decision to trade, through to its execution. Therefore, investment firms are required to keep records of all their transactions in financial instruments, and operators of platforms are required to keep records of all orders submitted to their systems. ESMA should coordinate the exchange of information among competent authorities to ensure that they have access to all records of transactions and orders, including those entered on platforms that operate outside their territory, in financial instruments under their supervision.
- (29) Double reporting of the same information should be avoided. Reports submitted to trade repositories registered or recognised in accordance with Regulation [EMIR] for the relevant instruments which contain all the required information for transaction reporting purposes should not need to be reported to competent authorities, but should be transmitted to them by the trade repositories. Regulation [EMIR] should be amended to this effect.
- (30) Any exchange or transmission of information by competent authorities should be in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data²⁰. Any exchange or transmission of information by ESMA

²⁰ OJ L 281, 23.11.1995, p. 31.

should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data²¹, which should be fully applicable to the processing of personal data for the purposes of this Regulation.

- (31) Regulation [EMIR] sets out the criteria according to which classes of OTC derivatives should be subject to the clearing obligation. It also prevents competitive distortions by requiring non-discriminatory access to central counterparties (CCPs) offering clearing of OTC derivatives to trading venues and non-discriminatory access to the trade feeds of trading venues to CCPs offering clearing of OTC derivatives. As OTC derivatives are defined as derivatives contracts whose execution does not take place on a regulated market, there is a need to introduce similar requirements for regulated markets under this Regulation. Provided that ESMA has declared them subject to it, derivatives traded on regulated markets should also be subject to a clearing obligation.
- (32) In addition to requirements in Directive 2004/39/EC that prevent Member States from unduly restricting access to post-trade infrastructure such as CCP and settlement arrangements, it is necessary that this Regulation removes various other commercial barriers that can be used to prevent competition in the clearing of financial instruments. To avoid any discriminatory practices, CCPs should accept to clear transactions executed in different trading venues, to the extent that those venues comply with the operational and technical requirements established by the CCP. Access should only be denied if certain access criteria specified in delegated acts are not met.
- (33) Trading venues should also be required to provide access including data feeds on a transparent and non-discriminatory basis to CCPs that wish to clear transactions executed on the trading venue. Licensing and access to information about indices and other benchmarks that are used to determine the value of financial instruments should also be provided to CCPs and other trading venues on a non-discriminatory basis. The removal of barriers and discriminatory practices is intended to increase competition for clearing and trading of financial instruments in order to lower investment and borrowing costs, eliminate inefficiencies and foster innovation in Union markets. The Commission should continue to closely monitor the evolution of post-trade infrastructure and should, where necessary, intervene in order to prevent competitive distortions from occurring in the internal market.
- (34) The provision of services by third country firms in the Union is subject to national regimes and requirements. These regimes are highly differentiated and the firms authorised in accordance with them do not enjoy the freedom to provide services and the right of establishment in Member States other than the one where they are established. It is appropriate to introduce a common regulatory framework at Union level. The regime should harmonize the existing fragmented framework, ensure certainty and uniform treatment of third country firms accessing the Union, ensure that and equivalence assessment has been carried out by the Commission in relation to the regulatory and supervisory framework of third countries and should provide for a

²¹ OJ L 8, 12.1.2001, p. 1.

comparable level of protections to investors in the EU receiving services by third country firms.

- (35) The provision of services to retail clients should always require the establishment of a branch in the Union. The establishment of the branch shall be subject to authorisation and supervision in the Union. Proper cooperation arrangements should be in place between the competent authority concerned and the competent authority in the third country. The provision of services without branches should be limited to eligible counterparties. It should be subject to registration by ESMA and to supervision in the third country. Proper cooperation arrangements should be in place between ESMA and the competent authorities in the third country.
- (36) The provisions of this regulation regulating the provision of services by third country firms in the Union should not affect the possibility for persons established in the Union to receive investment services by a third country firm at their own exclusive initiative. When a third country firm provides services at own exclusive initiative of a person established in the Union, the services should not be deemed as provided in the territory of the Union. In case a third country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.
- (37) A range of fraudulent practices have occurred in spot secondary markets in emission allowances (EUA) which could undermine trust in the emissions trading schemes, set up by Directive 2003/87/EC, and measures are being taken to strengthen the system of EUA registries and conditions for opening an account to trade EUAs. In order to reinforce the integrity and safeguard the efficient functioning of those markets, including comprehensive supervision of trading activity, it is appropriate to complement measures taken under Directive 2003/87/EC by bringing emission allowances fully into the scope of this Directive and of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), by classifying them as financial instruments.
- (38) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty. In particular, the delegated acts should be adopted in respect of specific details concerning definitions; the precise characteristics of trade transparency requirements; detailed conditions for waivers from pre-trade transparency; deferred post-trade publication arrangements; criteria for the application of the pre-trade transparency obligations for systematic internalisers, specific cost-related provisions related to the availability of market data; the criteria for granting or refusing access between trading venues and CCPs; and the further determination of conditions under which threats to investor protection, the orderly functioning and integrity of financial markets, or the stability of the whole or part of the financial system of the Union may warrant ESMA action.
- (39) The implementing powers relating to the adoption of the equivalence decision concerning third country legal and supervisory frameworks for the provision of services by third country firms should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011

laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers²².

- (40) Although national competent authorities are better placed to monitor market developments, the overall impact of the problems related to trade transparency, transaction reporting, derivatives trading, and bans of products and practices can only be fully perceived in a Union-wide context. For this reason, the objectives of this Regulation can be better achieved at the Union level; the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (41) Technical standards in financial services should ensure adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA, with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.
- (42) The Commission should adopt the draft regulatory technical standards developed by ESMA according to Article 23 regarding the content and specifications of transaction reports, Article 26 regarding the liquidity criteria for derivatives to be considered subject to an obligation to trade on organised trading venues, and Article 36 concerning the information that the applicant third country firm shall provide to ESMA in its application for registration by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.
- (43) The Commission should also be empowered to adopt implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010. ESMA should be entrusted with drafting implementing technical standards for submission to the Commission with regard to Article 26 specifying whether a class of derivatives declared subject to the clearing obligation under Regulation [] (EMIR) or a relevant subset thereof should only be traded on organised trading venues.
- (44) The application of the requirements in this Regulation should be deferred in order to align applicability with the application of the transposed rules of the recast Directive and to establish all essential implementing measures. The entire regulatory package should then be applied from the same point in time. Only the application of the empowerments for implementing measures should not be deferred so that the necessary steps to draft and adopt these implementing measures can start as early as possible.
- (45) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the right to the protection of personal data (Article 8), the freedom to conduct a business (Article 16), the right to consumer protection (Article 38), the right to an effective

²² OJ L 55, 28.2.2011, p. 13.

remedy and to a fair trial (Article 47), and the right not to be tried or punished twice for the same offence (Article 50), and has to be applied in accordance with those rights and principles.

HAVE ADOPTED THIS REGULATION:

TITLE I

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter and scope

1. This Regulation establishes uniform requirements in relation to the following:
 - (a) disclosure of trade data to the public;
 - (b) reporting of transactions to the competent authorities;
 - (c) trading of derivatives on organised venues;
 - (d) non-discriminatory access to clearing and non-discriminatory access to trading in benchmarks;
 - (e) product intervention powers of competent authorities and ESMA and powers of ESMA on position management and position limits;
 - (f) provision of investment services or activities without a branch by third country firms.
2. This Regulation applies to investment firms, credit institutions authorised under Directive [new MiFID] when providing one or more investment services and/or performing investment activities and regulated markets.
3. Title V of this Regulation also applies to all financial counterparties as defined in Article [2(6)] and all non-financial counterparties falling under Article [5(1b)] of Regulation [] (EMIR).
4. Title VI of this Regulation also applies to CCPs and persons with proprietary rights to benchmarks.

Article 2

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:
 - (1) 'investment firm' means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis;

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

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

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

- (a) the ownership rights of third parties in instruments and funds must be safeguarded, especially in the event of the insolvency of the firm or of its proprietors, seizure, set-off or any other action by creditors of the firm or of its proprietors;
 - (b) the firm must be subject to rules designed to monitor the firm's solvency and that of its proprietors;
 - (c) the firm's annual accounts must be audited by one or more persons empowered, under national law, to audit accounts;
 - (d) where the firm has only one proprietor, he must make provision for the protection of investors in the event of the firm's cessation of business following his death, his incapacity or any other such event;
- (2) 'credit institutions' means credit institutions as defined under Directive 2006/48/EC;
 - (3) 'systematic internaliser' means an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF or an OTF;
 - (4) 'market operator' means a person or persons who manages and/or operates the business of a regulated market. The market operator may be the regulated market itself;
 - (5) 'regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III of Directive [new MiFID];
 - (6) 'multilateral trading facility (MTF)' means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and

in accordance with non-discretionary rules – in a way that results in a contract in accordance with the provisions of Title II of Directive [new MiFID];

- (7) ‘organised trading facility (OTF)’ means any system or facility, which is not a regulated market or MTF, operated by an investment firm or a market operator, in which multiple third-party buying and selling interests in financial instruments are able to interact in the system in a way that results in a contract in accordance with the provisions of Title II of Directive [new MiFID];
- (8) ‘financial instrument’ means those instruments specified in Section C of Annex I of Directive [new MiFID];
- (9) ‘transferable securities’ means those those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:
 - (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
 - (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
 - (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;
- (10) ‘depositary receipts’ means those securities which are negotiable on the capital market and which represent ownership of the securities of a non-domiciled issuer while being able to be admitted to trading on a regulated market and traded independently of the securities of the non-domiciled issuer;
- (11) ‘exchange-traded funds’ means units in those open-ended collective investment schemes which are freely negotiable on the capital markets and in most cases track the performance of an index;
- (12) ‘certificates’ means those securities which are negotiable on the capital market and which in case of a repayment of investment by the issuer are ranked above shares but below unsecured bond instruments and other similar instruments;
- (13) ‘structured finance products’ means those securities created to securitise and transfer credit risk associated with a pool of financial assets entitling the security holder to receive regular payments that depend on the cash flow from the underlying assets;
- (14) ‘derivatives’ means those financial instruments defined in paragraph 9(c) and referred to in Annex I Section C (4) to (10) of Directive [new MiFID];
- (15) ‘commodity derivatives’ means those financial instruments defined in paragraph 9(c) relating to a commodity or an underlying mentioned in Section C(10) of Annex I to Directive [new MiFID], or within points (5), (6), (7) and (10) of Section C of Annex I to Directive [new MiFID];

- (16) 'actionable indication of interest' means a message from one participants to another in a trading system about available trading interest that contains all necessary information to agree on a trade;
- (17) 'competent authority' means the authority, designated by each Member State in accordance with Article 48 of Directive [new MiFID], unless otherwise specified in that Directive;
- (18) 'approved publication arrangement (APA)' means a person authorised under the provisions established in Directive [new MiFID] to provide the service of publishing trade reports on behalf of investment firms pursuant to Articles [11 and 12] of this Regulation;
- (19) 'consolidated tape provider (CTP)' means a person authorised under the provisions established in Directive [new MiFID] to provide the service of collecting trade reports for financial instruments listed in Articles [5, 6, 11 and 12] of this Regulation from regulated markets, MTFs, OTFs and APAs and consolidating them into a continuous electronic live data stream providing real-time price and volume data per financial instrument;
- (20) 'approved reporting mechanism (ARM)' means a person authorised under the provisions established in Directive [new MiFID] to provide the service of reporting details of transactions to competent authorities or ESMA on behalf of investment firms;
- (21) 'management body' means the governing body of a data reporting services provider, comprising the supervisory and the managerial functions, which has the ultimate decision-making authority and is empowered to set the entity's strategy, objectives and overall direction. The management body shall include persons who effectively direct the business of the entity;
- (22) 'supervisory function' means the management body acting in its supervisory function of overseeing and monitoring management decision-making;
- (23) 'senior management' means those individuals who exercise executive functions within a data reporting services provider and who are responsible and accountable for the day-to-day management.
- (24) 'benchmark' means any commercial index or published figure calculated by the application of a formula to the value of one or more underlying assets or prices by reference to which the amount payable under a financial instrument is determined.
- (25) 'trading venue' means any regulated market, MTF or OTF.
- (26) 'central counterparty' means a central counterparty as defined under Article 2(1) of Regulation [] (EMIR).
- (27) 'investment services and activities' means the services and activities defined in Article 4(1)(2) of Directive [new MiFID].
- (28) 'third country financial institution' means an entity, the head office of which is established in a third country, that is authorised or licensed under the law of that third

country to carry on any of the activities listed in Directive 2006/48/EC, Directive [new MiFID], Directive 2009/138/EC, Directive 2009/65/EC, Directive 2003/41/EC or Directive 2011/61/EU.

- (29) 'wholesale energy product' means those contracts and derivatives defined in Article 2(4) of Regulation [REMIT].
2. The definitions provided in paragraph 1 also apply to Directive [new MiFID].
 3. The Commission may adopt, by means of delegated acts in accordance with Article 41, measures specifying some technical elements of the definitions laid down in paragraph 1 to adjust them to market development.

TITLE II

TRANSPARENCY FOR TRADING VENUES

Chapter 1

Transparency for equity instruments

Article 3

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

1. Regulated markets and investment firms and market operators operating an MTF or an OTF shall make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments admitted to trading or which are traded on an MTF or an OTF. This requirement shall also apply to actionable indications of interests. Regulated markets and investment firms and market operators operating an MTF or an OTF shall make this information available to the public on a continuous basis during normal trading hours.
2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under the first paragraph to investment firms which are obliged to publish their quotes in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments pursuant to Article 13.

Article 4
Granting of waivers

1. Competent authorities shall be able to waive the obligation for regulated markets and investment firms and market operators operating an MTF or an OTF to make public the information referred to in Article 3(1) based on the market model or the type and size of orders in the cases defined in accordance with paragraph 3. In particular, the competent authorities shall be able to waive the obligation in respect of orders that are large in scale compared with normal market size for the share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument or type of share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument in question.
2. Before granting a waiver in accordance with paragraph 1, competent authorities shall notify ESMA and other competent authorities of the intended use of each individual waiver request and provide an explanation regarding their functioning. Notification of the intention to grant a waiver shall be made not less than 6 months before the waiver is intended to take effect. Within 3 months following receipt of the notification, ESMA shall issue an opinion to the competent authority in question assessing the compatibility of each waiver with the requirements established in paragraph 1 and specified in the delegated act adopted pursuant to paragraphs 3(b) and (c). Where that competent authority grants a waiver and a competent authority of another Member State disagrees with this, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010. ESMA shall monitor the application of the waivers and shall submit an annual report to the Commission on how they are applied in practice.
3. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:
 - (a) the range of bid and offers or designated market-maker quotes, and the depth of trading interest at those prices, to be made public for each class of financial instrument concerned;
 - (b) the size or type of orders for which pre-trade disclosure may be waived under paragraph 1 for each class of financial instrument concerned;
 - (c) the market model for which pre-trade disclosure may be waived under paragraph 1, and in particular, the applicability of the obligation to trading methods operated by regulated markets which conclude transactions under their rules by reference to prices established outside the regulated market or by periodic auction for each class of financial instrument concerned.
4. Waivers granted by competent authorities in accordance with Articles 29 (2) and 44 (2) of Directive 2004/39/EC and Articles 18 to 20 of Commission Regulation (EC) No 1287/2006 before the date of application of this Regulation shall be reviewed by ESMA by [2 years following the date of application of this Regulation]. ESMA shall issue an opinion to the competent authority in question assessing the continued compatibility of each of those waivers with the requirements established in this Regulation and any delegated act based on this Regulation.

Article 5

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

1. Regulated markets and investment firms and market operators operating an MTF or an OTF shall make public the price, volume and time of the transactions executed in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments admitted to trading or which are traded on an MTF or an OTF. Regulated markets and investment firms and market operators operating an MTF or an OTF shall make details of all such transactions public as close to real-time as is technically possible.
2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under paragraph 1 to investment firms which are obliged to publish the details of their transactions in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments pursuant to Article 19.

Article 6

Authorisation of deferred publication

1. Competent authorities shall be able to authorise regulated markets to provide for deferred publication of the details of transactions based on their type or size. In particular, the competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument or that class of share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument. Regulated markets and investment firms and market operators operating an MTF or an OTF shall obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication, and shall clearly disclose these arrangements to market participants and the public. ESMA shall monitor the application of these arrangements for deferred trade-publication and shall submit an annual report to the Commission on how they are applied in practice.
2. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:
 - (a) the details that need to be specified by regulated markets, investment firms, including systematic internalisers and investment firms and regulated markets operating a MTF or an OTF in the information to be made available to the public for each class of financial instrument concerned;
 - (b) the conditions for authorising a regulated market, an investment firm, including a systematic internaliser or an investment firm or market operator operating an MTF or an OTF for a deferred publication of trades and the criteria to be applied when deciding the transactions for which, due to their size or the type of share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument

involved, deferred publication is allowed for each class of financial instrument concerned.

Chapter 2

Transparency for non-equity instruments

Article 7

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

1. Regulated markets and investment firms and market operators operating an MTF or an OTF based on the trading system operated shall make public prices and the depth of trading interests at those prices for orders or quotes advertised through their systems for bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and for derivatives admitted to trading or which are traded on an MTF or an OTF. This requirement shall also apply to actionable indications of interests. Regulated markets and investment firms and market operators operating an MTF or an OTF shall make this information available to the public on a continuous basis during normal trading hours.
2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information referred to in the first paragraph to investment firms which are obliged to publish their quotes in bonds, structured finance products, emission allowances and derivatives pursuant to Article 17.

Article 8

Granting of waivers

1. Competent authorities shall be able to waive the obligation for regulated markets and investment firms and market operators operating an MTF or an OTF to make public the information referred to in Article 7(1) for specific sets of products based on the market model, the specific characteristics of trading activity in a product and the liquidity in the cases defined in accordance with paragraph 4.
2. Competent authorities shall be able to waive the obligation for regulated markets and investment firms and market operators operating an MTF or an OTF to make public the information referred to in paragraph 1 of Article 7 based on the type and size of orders and method of trading in accordance with paragraph 4. In particular, the competent authorities shall be able to waive the obligation in respect of orders that are large in scale compared with normal market size for the bond, structured finance product, emission allowance or derivative or type of bond, structured finance product, emission allowance or derivative in question.
3. Before granting a waiver in accordance with paragraphs 1 and 2, competent authorities shall notify ESMA and other competent authorities of the intended use of

waivers and provide an explanation regarding their functioning. Notification of the intention to grant a waiver shall be made not less than 6 months before the waiver is intended to take effect. Within 3 months following receipt of the notification, ESMA shall issue an opinion to the competent authority in question assessing the compatibility of each individual waiver request with the requirements established in paragraphs 1 and 2 and specified in the delegated act adopted pursuant to paragraph 4(b). Where that competent authority grants a waiver and a competent authority of another Member State disagrees with this, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010. ESMA shall monitor the application of the waivers and shall submit an annual report to the Commission on how they are applied in practice.

4. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:
 - (a) the range of orders or quotes, the prices and the depth of trading interest at those prices, to be made public for each class of financial instrument concerned in accordance with paragraph 1 of Article 7;
 - (b) the conditions under which pre-trade disclosure may be waived for each class of financial instrument concerned in accordance with paragraphs 1 and 2, based on the following:
 - (i) the market model;
 - (ii) the specific characteristics of trading activity in a product;
 - (iii) the liquidity profile, including the number and type of market participants in a given market and any other relevant criteria for assessing liquidity;
 - (iv) the size or type of orders and the size and type of an issue of a financial instrument.
5. Waivers granted by competent authorities in accordance with Articles 29 (2) and 44 (2) of Directive 2004/39/EC and Articles 18 to 20 of Commission Regulation (EC) No 1287/2006 before the date of application of this Regulation shall be reviewed by ESMA by [2 years following the date of application of this Regulation]. ESMA shall issue an opinion to the competent authority in question assessing the continued compatibility of each of those waivers with the requirements established in this Regulation and any delegated act based on this Regulation.

Article 9

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

1. Regulated markets and investment firms and market operators operating an MTF or an OTF shall make public the price, volume and time of the transactions executed in respect of bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and for derivatives admitted to trading or which are traded on an MTF or an OTF. Regulated

markets and investment firms and market operators operating an MTF or an OTF shall make details of all such transactions public as close to real-time as is technically possible.

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

Article 10
Authorisation of deferred publication

1. Competent authorities shall be able to authorise regulated markets and investment firms and market operators operating an MTF or an OTF to provide for deferred publication of the details of transactions based on their type or size. In particular, the competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that bond, structured finance product, emission allowance or derivative or that class of bond, structured finance product, emission allowance or derivative.

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

2. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:
 - (a) the details that need to be specified by regulated markets, investment firms, including systematic internalisers and investment firms and regulated markets operating a MTF or an OTF in the information to be made available to the public for each class of financial instrument concerned;
 - (b) the conditions for authorising for each class of financial instrument concerned a deferred publication of trades for a regulated market, an investment firm, including a systematic internaliser or an investment firm or market operator operating an MTF or an OTF and the criteria to be applied when deciding the transactions for which, due to their size or the type of bond, structured finance product, emission allowance or derivative involved, deferred publication and/or the omission of the volume of the transaction is allowed.

Chapter 3

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

Article 11

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

1. Regulated markets and market operators and investment firms operating MTFs and OTFs shall make the information published in accordance with Articles 3 to 10 available to the public by offering pre- and post-trade transparency data separately.
2. The Commission may adopt, by means of delegated acts in accordance with Article 41, measures specifying the offering pre- and post-trade transparency data, including the level of disaggregation of the data to be made available to the public as referred to in paragraph 1.

Article 12

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

1. Regulated markets, MTFs and OTFs shall make the information published in accordance with Articles 3 to 10 available to the public on a reasonable commercial basis. The information shall be made available free of charge 15 minutes after the publication of a transaction.
2. The Commission may adopt, by means of delegated acts in accordance with Article 41, measures clarifying what constitutes a reasonable commercial basis to make information public as referred to in paragraph 1.

TITLE III

TRANSPARENCY FOR INVESTMENT FIRMS TRADING OTC INCLUDING SYSTEMATIC INTERNALISERS

Article 13

Obligation for investment firms to make public firm quotes

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

and other similar financial instruments for which there is not a liquid market, systematic internalisers shall disclose quotes to their clients on request.

2. This Article and Articles 14, 15 and 16 shall apply to systematic internalisers when dealing for sizes up to standard market size. Systematic internalisers that only deal in sizes above standard market size shall not be subject to the provisions of this Article.
3. Systematic internalisers may decide the size or sizes at which they will quote. The minimum quote size shall at least be the equivalent of 10% of the standard market size of a share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument. For a particular share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument each quote shall include a firm bid and offer price or prices for a size or sizes which could be up to standard market size for the class of shares, depositary receipts, exchange-traded funds, certificates or other similar financial instruments to which the financial instrument belongs. The price or prices shall also reflect the prevailing market conditions for that share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument.
4. Shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments shall be grouped in classes on the basis of the arithmetic average value of the orders executed in the market for that financial instrument. The standard market size for each class of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments shall be a size representative of the arithmetic average value of the orders executed in the market for the financial instruments included in each class.
5. The market for each share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument shall be comprised of all orders executed in the European Union in respect of that financial instrument excluding those large in scale compared to normal market size.
6. The competent authority of the most relevant market in terms of liquidity as defined in Article 23 for each share, depositary receipt, exchange-traded fund, certificate and other similar financial instrument shall determine at least annually, on the basis of the arithmetic average value of the orders executed in the market in respect of that financial instrument, the class to which it belongs. This information shall be made public to all market participants.
7. In order to ensure the efficient valuation of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and maximises the possibility of investment firms of obtaining the best deal for their clients the Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying the elements related to the publication of a firm quote as referred to in paragraph 1 and to the standard market size as referred to in paragraph 2.

Article 14
Execution of client orders

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

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

2. Systematic internalisers shall, while complying with the provisions set down in Article 27 of Directive [new MiFID], execute the orders they receive from their clients in relation to the shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments for which they are systematic internalisers at the quoted prices at the time of reception of the order.

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

3. Systematic internalisers may also execute orders they receive from their professional clients at prices different than their quoted ones without having to comply with the requirements established in paragraph 2, in respect of transactions where execution in several securities is part of one transaction or in respect of orders that are subject to conditions other than the current market price.
4. Where a systematic internaliser quoting only one quote or whose highest quote is lower than the standard market size receives an order from a client of a size bigger than its quotation size, but lower than the standard market size, it may decide to execute that part of the order which exceeds its quotation size, provided that it is executed at the quoted price, except where otherwise permitted under the conditions of the previous two paragraphs. Where the systematic internaliser is quoting in different sizes and receives an order between those sizes, which it chooses to execute, it shall execute the order at one of the quoted prices in compliance with the provisions of Article 28 of Directive [new MiFID], except where otherwise permitted under the conditions of the previous two subparagraphs.
5. In order to ensure the efficient valuation of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and maximises the possibility of investment firms of obtaining the best deal for their clients the Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying the criteria specifying when prices fall within a public range close to market conditions as referred to in paragraph 2.
6. The Commission may adopt, by means of delegated acts in accordance with Article 41, measures clarifying what constitutes a reasonable commercial basis to make quotes public as referred to in paragraph 1.

Article 15
Obligations of competent authorities

The competent authorities shall check the following:

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

Article 16
Access to quotes

1. Systematic internalisers shall be allowed to decide, on the basis of their commercial policy and in an objective non-discriminatory way, the investors to whom they give access to their quotes. To that end there shall be clear standards for governing access to their quotes. Systematic internalisers may refuse to enter into or discontinue business relationships with investors on the basis of commercial considerations such as the investor credit status, the counterparty risk and the final settlement of the transaction.
2. In order to limit the risk of being exposed to multiple transactions from the same client systematic internalisers shall be allowed to limit in a non-discriminatory way the number of transactions from the same client which they undertake to enter at the published conditions. They shall also be allowed, in a non-discriminatory way and in accordance with the provisions of Article 28 of Directive [new MiFID], to limit the total number of transactions from different clients at the same time provided that this is allowable only where the number and/or volume of orders sought by clients considerably exceeds the norm.
3. In order to ensure the efficient valuation of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and maximises the possibility of investment firms of obtaining the best deal for their clients the Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying:
 - (a) the criteria specifying when a quote is published on a regular and continuous basis and is easily accessible as well as the means by which investment firms may comply with their obligation to make public their quotes, which shall include the following possibilities:
 - (i) through the facilities of any regulated market which has admitted the instrument in question to trading;
 - (ii) through an approved publication arrangement;
 - (iii) through proprietary arrangements;

- (b) the criteria specifying those transactions where execution in several securities is part of one transaction or orders that are subject to conditions other than current market price;
- (c) the criteria specifying what can be considered as exceptional market circumstances that allow for the withdrawal of quotes as well as conditions for updating quotes;
- (d) the criteria specifying when the number and/or volume of orders sought by clients considerably exceeds the norm as referred to in paragraph 2;
- (e) the criteria specifying when prices fall within a public range close to market conditions as referred to in Article 14(2).

Article 17

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

1. Systematic internalisers shall provide firm quotes in bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and derivatives which are clearing-eligible or are admitted to trading on a regulated market or are traded on an MTF or an OTF when the following conditions are fulfilled:
 - (a) they are prompted for a quote by a client of the systematic internaliser;
 - (b) they agree to provide a quote.
2. Systematic internalisers shall make the firm quotes provided pursuant to paragraph 1 available to other clients of the investment firm in an objective non-discriminatory way on the basis of their commercial policy.
3. They shall undertake to enter into transactions with any other client to whom the quote is made available under the published conditions when the quoted size is at or below a size specific to the instrument.
4. Systematic internalisers shall be allowed to establish non-discriminatory and transparent limits on the number of transactions they undertake to enter into with clients pursuant to any given quote.
5. The quotes made pursuant to paragraph 1 and at or below the size mentioned in paragraph 3 shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.
6. The quotes shall be such as to ensure that the firm complies with its obligations under Article 27 of Directive [new MiFID], and shall reflect prevailing market conditions in relation to prices at which transactions are concluded for the same or similar instruments on regulated markets, MTFs or OTFs.

Article 18
Monitoring by ESMA

1. Competent authorities and ESMA shall monitor the application of this Article regarding the sizes at which quotes are made available to clients of the investment firm and made available to other market participants relative to other trading activity of the firm, and the degree to which the quotes reflect prevailing market conditions in relation to transactions in the same or similar instruments taking place on regulated markets, MTFs, or OTFs. Within 2 years from the date of entry into force, ESMA shall report to the Commission on the application of this Article. In case of significant quoting and trading activity just beyond the threshold mentioned in paragraph 3 of Article 17 or outside prevailing market conditions, they shall report to the Commission before this deadline.
2. The Commission shall adopt, by means of delegated acts in accordance with Article 41, measures specifying the sizes mentioned in Article 17(3) at which firm shall enter into transactions with any other client to whom the quote is made available.
3. The Commission may adopt, by means of delegated acts in accordance with Article 41, measures clarifying what constitutes a reasonable commercial basis to make quotes public as referred to in Article 17(5).

Article 19

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

1. Investment firms which, either on own account or on behalf of clients, conclude transactions in shares, depositary receipts, exchange-traded funds, certificates or other similar financial instruments admitted to trading on a regulated market or which are traded on an MTF or an OTF, shall make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public through an APA.
2. The information which is made public in accordance with paragraph 1 and the time-limits within which it is published shall comply with the requirements adopted pursuant to Article 6. Where the measures adopted pursuant to Article 6 provide for deferred reporting for certain categories of transaction in shares, depositary receipts, exchange-traded funds, certificates or other similar financial instruments, this possibility shall also apply to those transactions when undertaken outside regulated markets, MTFs or OTFs.
3. The Commission may adopt, by means of delegated acts in accordance with Article 41, measures specifying the following:
 - (a) identifiers for the different types of trades published under this Article, distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;
 - (b) elements of the obligation under paragraph 1 to transactions involving the use of those financial instruments for collateral, lending or other purposes where the exchange of

financial instruments is determined by factors other than the current market valuation of the instrument.

Article 20

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

1. Investment firms which, either on own account or on behalf of clients, conclude transactions in bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and derivatives which are clearing-eligible or are reported to trade repositories in accordance with Article [6] of Regulation [EMIR] or are admitted to trading on a regulated market or are traded on an MTF or an OTF shall make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public through an APA.
2. The information which is made public in accordance with paragraph 1 and the time-limits within which it is published shall comply with the requirements adopted pursuant to Article 10. Where the measures adopted pursuant to Article 10 provide for deferred reporting for certain categories of transaction in bonds, structured finance products, emission allowances or derivatives, this possibility shall also apply to those transactions when undertaken outside regulated markets, MTFs or OTFs.
3. The Commission may adopt, by means of delegated acts in accordance with Article 41, measures specifying the following:
 - (a) identifiers for the different types of trades published under this Article, distinguishing between those determined by factors linked primarily to the valuation of the instruments and those determined by other factors;
 - (b) the criteria specifying the obligation under paragraph 1 to transactions involving the use of those financial instruments for collateral, lending or other purposes where the exchange of financial instruments is determined by factors other than the current market valuation of the instrument.

TITLE IV

TRANSACTION REPORTING

Article 21

Obligation to uphold integrity of markets

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

Article 22
Obligation to maintain records

1. Investment firms shall keep at the disposal of the competent authority, for at least 5 years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Directive 2005/60/EC²³. ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No 1095/2010.
2. The operator of a regulated market, MTF or OTF shall keep at the disposal of the competent authority, for at least five years, the relevant data relating to all orders in financial instruments which are advertised through their systems. The records shall contain all the details required for the purposes of Article 23(1) and (2). ESMA shall perform a facilitation and coordination role in relation to competent authorities' accessing information under the provisions of this paragraph.

Article 23
Obligation to report transactions

1. Investment firms which execute transactions in financial instruments shall report details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day. The competent authorities shall, in accordance with Article 89 of Directive [new MiFID], establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives this information.
2. The obligation laid down in paragraph 1 shall not apply to financial instruments which are not admitted to trading or traded on an MTF or an OTF, to financial instruments whose value does not depend on that of a financial instrument admitted to trading or traded on an MTF or an OTF, nor to financial instruments which do not or are not likely to have an effect on a financial instrument admitted to trading or traded on an MTF or an OTF.
3. The reports shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, and means of identifying the investment firms concerned. For transactions not carried out on a regulated market, MTF or OTF, the reports shall also include a designation identifying the

²³ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance) (OJ L 309, 25.11.2005, p. 15).

types of transactions in accordance with the measures to be adopted pursuant to Article 19(3)(a) and Article 20(3)(a).

4. Investment firms which transmit orders shall include in the transmission of that order all the details required for the purposes of paragraphs 1 and 3. Instead of including a designation to identify the clients on whose behalf the investment firm has transmitted that order or a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, an investment firm may also choose to report the transmitted order in accordance with the requirements under paragraph 1.
5. The operator of a regulated market, MTF or OTF shall report details of transactions in instruments traded on their platform which are executed through their systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3.
6. The reports shall be made to the competent authority either by the investment firm itself, an ARM acting on its behalf or by the regulated market or MTF or OTF through whose systems the transaction was completed. Trade-matching or reporting systems, including trade repositories registered or recognised in accordance with Title VI of Regulation [] (EMIR), may be approved by the competent authority as an ARM. In cases where transactions are reported directly to the competent authority by a regulated market, an MTF, an OTF or an ARM, the obligation on the investment firm laid down in paragraph 1 may be waived. In cases where transactions have been reported to a trade repository in accordance with article [7] of Regulation [] (EMIR) and where these reports contain the details required under paragraphs 1 and 3, the obligation on the investment firm laid down in paragraph 1 shall be considered to have been complied with.
7. When, in accordance with Article 37(8) of Directive [new MiFID], reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide that they do not want to receive this information.
8. ESMA shall develop draft regulatory technical standards to determine:
 - (a) data standards and formats for the information to be published in accordance with paragraphs 1 and 3, including the methods and arrangements for reporting financial transactions and the form and content of such reports;
 - (b) the criteria for defining a relevant market in accordance with paragraph 1;
 - (c) the references of the instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, the information and details of the identity of the client, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, means of identifying the investment firms concerned, the way in which the transaction was executed, and data fields necessary for the processing and analysis of the transaction reports in accordance with paragraph 3.

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

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

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

TITLE V

DERIVATIVES

Article 24

Obligation to trade on regulated markets, MTFs or OTFs

1. Financial counterparties as defined in Article 2(6) and non financial counterparties that meet the conditions referred to in Article [5(1b)] of Regulation [] (EMIR) shall conclude transactions which are not intragroup transactions as defined in Article [2a] of Regulation [] (EMIR) with other financial counterparties as defined in Article 2(6) or non financial counterparties that meet the conditions referred to in Article [5(1b)] of Regulation [] (EMIR) in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 26 and listed in the register referred to in Article 27 only on:
 - (a) regulated markets;
 - (b) MTFs;
 - (c) OTFs; or
 - (d) third country trading venues, provided that the Commission has adopted a decision in accordance with paragraph 4 and provided that the third country provides an equivalent reciprocal recognition of trading venues authorised under Directive [new MiFID] to admit to trading or trade derivatives declared subject to a trading obligation in that third country on a non-exclusive basis.
2. The trading obligation shall also apply to counterparties referred to in paragraph 1 which enter into derivatives transactions pertaining to derivatives declared subject to the trading obligation with third country financial institutions or other third country entities that would be subject to the clearing obligation if they were established in the

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

3. Derivatives declared subject to the trading obligation shall be eligible to be admitted to trading or to trade on any trading venue as referred to in paragraph 1 on a non-exclusive and non-discriminatory basis.
4. The Commission may, in accordance with the procedure referred to in Article 42, adopt decisions determining that the legal and supervisory framework of a third country ensures that a trading venue authorised in that third country complies with legally binding requirements which are equivalent to the requirements for the trading venues referred to in subparagraphs (a) to (c) of paragraph 1 resulting from this Regulation, Directive [new MiFID], and Regulation [new MAR], and which are subject to effective supervision and enforcement in that third country.

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

- (a) trading venues in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
 - (b) trading venues have clear and transparent rules regarding admission of financial instruments to trading so that such financial instruments are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;
 - (c) issuers of financial instruments are subject to periodic and ongoing information requirements ensuring a high level of investor protection;
 - (d) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.
5. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying the types of contracts referred to in paragraph 2 which have a direct, substantial and foreseeable effect within the Union and the cases where the trading obligation is necessary or appropriate to prevent the evasion of any provision of this Regulation.

Article 25

Clearing obligation for derivatives traded on regulated markets

The operator of a regulated market shall ensure that all transactions in derivatives pertaining to a class of derivatives declared subject to the clearing obligation pursuant to Article 4(3) of Regulation [EMIR] that are concluded on the regulated market are cleared by a CCP.

Article 26
Trading obligation procedure

1. ESMA shall develop draft implementing technical standards to determine the following:
 - (a) which of the class of derivatives declared subject to the clearing obligation in accordance with Article 4 paragraphs 2 and 4 of Regulation [] (EMIR) or a relevant subset thereof shall be traded on the venues referred to in Article 24(1);
 - (b) the date from which the trading obligation takes effect.

ESMA shall submit the draft implementing technical standards referred to in the first subparagraph to the Commission within three months after the implementing technical standards in accordance with Article 4(3) of Regulation [] (EMIR) are adopted by the Commission.

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

2. In order for the trading obligation to take effect:
 - (a) the class of derivatives or a relevant subset thereof has to be admitted to trading or traded on at least one regulated market, MTF or OTF referred to in Article 24(1), and
 - (b) the class of derivatives or a relevant subset thereof are considered sufficiently liquid to trade only on the venues referred to in Article 24(1).
3. In developing the draft implementing technical standards, ESMA shall consider the class of derivatives or a relevant subset thereof as sufficiently liquid pursuant to the following criteria:
 - (a) the average frequency of trades;
 - (b) the average size of trades;
 - (c) the number and type of active market participants;

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

4. ESMA shall, on its own initiative, in accordance with the criteria set out in paragraph 2 and after conducting a public consultation, identify and notify to the Commission the classes of derivatives or individual derivative contracts that should be subject to the obligation to trade on the venues referred to in Article 24(1), but for which no CCP has yet received authorisation under Article 10 or 11 of Regulation ----/---- (EMIR) or which is not admitted to trading or traded on a venue referred to in Article 24(1).

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

5. ESMA shall in accordance with paragraph 1, submit to the Commission new draft implementing technical standards to amend, suspend or revoke existing implementing technical standards whenever there is a material change in the criteria set out in paragraph 2. Before doing so, ESMA may consult, where appropriate, the competent authorities of third countries. Power is conferred to the Commission to amend, suspend and revoke the existing implementing technical standards in accordance with Article 15 of Regulation (EU) No 1095/2010.
6. Powers are delegated to the Commission to adopt regulatory technical standards specifying the criteria referred to in paragraph 2(b), to be adopted in accordance with Articles 10 to 14 of Regulation EU 1095/2010. ESMA shall submit drafts for those regulatory technical standards to the Commission by --/--/--.

Article 27

Register of derivatives subject to the trading obligation

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

TITLE VI

NON-DISCRIMINATORY CLEARING ACCESS FOR FINANCIAL INSTRUMENTS

Article 28

Non-discriminatory access to a CCP

1. Without prejudice to Article 8 of Regulation [] (EMIR), a CCP shall accept to clear financial instruments on a non-discriminatory and transparent basis, including as regards collateral requirements and fees related to access, regardless of the trading venue on which a transaction is executed. This in particular should ensure that a trading venue has the right to non-discriminatory treatment in terms of how contracts traded on its platforms are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP. A CCP may require that the trading venue comply with the reasonable operational and technical requirements established by the CCP. This requirement does not apply to any derivative contract that is already subject to the access obligations under Article 8 of Regulation [EMIR].
2. A request to access a central counterparty shall be formally submitted to a central counterparty and its relevant competent authority by a trading venue.

3. The CCP shall provide a written response to the trading venue within three months either permitting access, under the condition that the relevant competent authority has not denied access pursuant to paragraph 4, or denying access. The CCP may only deny a request for access under the conditions specified in paragraph 6. If a CCP refuses access it shall provide full reasons in its response and inform its competent authority in writing of the decision. The CCP shall make access possible within three months of providing a positive response to the access request.
4. The competent authority of the CCP may only deny a trading venue access to a CCP where such access would threaten the smooth or orderly functioning of financial markets. If a competent authority denies access on that basis it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons to the CCP and the trading venue including the evidence on which the decision is based.
5. A trading venue established in a third country may request access to a CCP established in the Union only if the Commission has adopted a decision in accordance with Article 24(4) relating to that third country and provided that the legal framework of that third country provides for an effective equivalent recognition of trading venues authorised under Directive [new MiFID] to request access to CCPs established in that third country.
6. The Commission shall adopt by means of delegated acts in accordance with Article 41, measures specifying:
 - (a) the conditions under which access could be denied by a CCP, including conditions based on the volume of transactions, the number and type of users or other factors creating undue risks.
 - (b) the conditions under which access is granted, including confidentiality of information provided regarding financial instruments during the development phase, the non-discriminatory and transparent basis as regards clearing fees, collateral requirements and operational requirements regarding margining.

Article 29

Non-discriminatory access to a trading venue

1. Without prejudice to Article 8a of Regulation [] (EMIR), a trading venue shall provide trade feeds on a non-discriminatory and transparent basis, including as regards fees related to access, on request to any CCP authorised or recognised by Regulation [] (EMIR) that wishes to clear financial transactions executed on that trading venue. This requirement does not apply to any derivative contract that is already subject to the access obligations under Article 8a of Regulation [EMIR].
2. A request to access a trading venue shall be formally submitted to a trading venue and its relevant competent authority by a CCP.
3. The trading venue shall provide a written response to the CCP within three months either permitting access, under the condition that the relevant competent authority has not denied access pursuant to paragraph 4, or denying access. The trading venue may only deny access under the conditions specified under paragraph 6. When access

is refused the trading venue shall provide full reasons in its response to the trading venue and inform its competent authority in writing of the decision. The trading venue shall make access possible within three months of providing a positive response to the access request.

4. The competent authority of the trading venue may only deny a CCP access to a trading venue where such access would threaten the smooth or orderly functioning of markets. If a competent authority denies access on that basis it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons to the trading venue and the CCP including the evidence on which its decision is based.
5. A CCP established in a third country may request access to a trading venue in the Union subject to that CCP being recognised under Article 23 of Regulation [EMIR] and provided that the legal framework of that third country provides for an effective equivalent recognition of a CCP authorised under Regulation [EMIR] to trading venues established in that third country.
6. The Commission shall adopt by means of delegated acts in accordance with Article 41, measures specifying:
 - (a) the conditions under which access could be denied by a trading venue, including conditions based on the volume of transactions, the number of users or other factors creating undue risks.
 - (b) the conditions under which access is granted, including confidentiality of information provided regarding financial instruments during the development phase and the non-discriminatory and transparent basis as regards fees related to access.

Article 30

Non-discriminatory access to and obligation to licence benchmarks

1. Where the value of any financial instrument is calculated by reference to a benchmark, a person with proprietary rights to the benchmark shall ensure that CCPs and trading venues are permitted, for the purposes of trading and clearing, non-discriminatory access to:
 - (a) relevant price and data feeds and information on the composition, methodology and pricing of that benchmark; and to
 - (b) licences.

Access to that information shall be granted on a reasonable commercial basis within three months following the request by a CCP or a trading venue, and in any event at a price no higher than the lowest price at which access to the benchmark is granted or the intellectual property rights are licensed to another CCP, trading venue or any related person for clearing and trading purposes.

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

- (a) to prevent any other CCP or trading venue from obtaining access to such information or rights as referred to in paragraph 1; or
 - (b) to prevent any other CCP or trading venue from obtaining access to such information or rights on terms any less advantageous than those conferred on that CCP or trading venue.
3. The Commission shall adopt by means of delegated acts in accordance with Article 41, measures specifying:
- (a) the information to be made available under paragraph 1(a);
 - (b) the conditions under which access is granted, including confidentiality of information provided.

TITLE VII

SUPERVISORY MEASURES ON PRODUCT INTERVENTION AND POSITIONS

Chapter 1

Product Intervention

Article 31

ESMA powers to temporarily intervene

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may where it is satisfied on reasonable grounds that the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:
- (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or
 - (b) a type of financial activity or practice.
- A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by ESMA.
2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled:
- (a) the proposed action addresses a threat to investor protection or to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union;
 - (b) regulatory requirements under Union legislation that are applicable to the relevant financial instrument or activity do not address the threat;

- (c) a competent authority or competent authorities have not taken action to address the threat or actions that have been taken do not adequately address the threat.
3. When taking action under this Article ESMA shall take into account the extent to which the action:
 - (a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action; and
 - (b) does not create a risk of regulatory arbitrage.

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

4. Before deciding to take any action under this Article, ESMA shall notify competent authorities of the action it proposes.
5. ESMA shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect.
6. ESMA shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three month period it shall expire.
7. Action adopted by ESMA under this Article shall prevail over any previous action taken by a competent authority.
8. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by ESMA in determining when the threats to investor protection or to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a) arise.

Article 32

Product intervention by competent authorities

1. A competent authority may prohibit or restrict in or from that Member State:
 - (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or
 - (b) a type of financial activity or practice.
2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that:

- (a) a financial instrument or activity or practice gives rise to significant investor protection concerns or poses a serious threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system;
- (b) existing regulatory requirements under Union legislation applicable to the financial instrument or activity or practice do not sufficiently address the risks referred to in paragraph (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements;
- (c) the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument or activity;
- (d) it has properly consulted with competent authorities in other Member States that may be significantly affected by the action; and
- (e) the action does not have a discriminatory effect on services or activities provided from another Member State.

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

3. The competent authority shall not take action under this Article unless, not less than one month before it takes the action, it has notified all other competent authorities and ESMA in writing of details of:
 - (a) the financial instrument or activity or practice to which the proposed action relates;
 - (b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and
 - (c) the evidence upon which it has based its decision and upon which is satisfied that each of the conditions in paragraph 1 are met.
4. The competent authority shall publish on its website notice of any decision to impose any prohibition or restriction referred to in paragraph 1. The notice shall specify details of the prohibition or restriction, a time after the publication of the notice from which the measures will take effect and the evidence upon which it is satisfied each of the conditions in paragraph 1 are met. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice.
5. The competent authority shall revoke a prohibition or restriction if the conditions in paragraph 1 no longer apply.
6. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by competent authorities in determining when the threats to investor protection or to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a) arise.

Article 33
Coordination by ESMA

1. ESMA shall perform a facilitation and coordination role in relation to action taken by competent authorities under Article 32. In particular ESMA shall ensure that action taken by a competent authority is justified and proportionate and that where appropriate a consistent approach is taken by competent authorities.
2. After receiving notification under Article 32 of any action that is to be imposed under that Article, ESMA shall adopt an opinion on whether it considers the prohibition or restriction is justified and proportionate. If ESMA considers that the taking of a measure by other competent authorities is necessary to address the risk, it shall also state this in the opinion. The opinion shall be published on ESMA's website.
3. Where a competent authority proposes to take, or takes, action contrary to an ESMA opinion under paragraph 2 or declines to take action contrary to an ESMA opinion under that paragraph, it shall immediately publish on its website a notice fully explaining its reasons for doing so.

Chapter 2

Positions

Article 34
Coordination of national position management measures and position limits by ESMA

1. ESMA shall perform a facilitation and coordination role in relation to measures taken by competent authorities pursuant to Article 71(2) subparagraph (i) and Article 72(1) subparagraphs (f) and (g) of Directive [new MiFID]. In particular ESMA shall ensure that a consistent approach is taken by competent authorities with regard to when these powers are exercised, the nature and scope of the measures imposed, and the duration and follow-up of any measures.
2. After receiving notification of any measure under Article 83(5) of Directive [new MiFID] ESMA shall record the measure and the reasons thereof. In relation to measures pursuant to Article 72(1) subparagraph (f) and (g) of Directive [new MiFID], it shall maintain and publish on its website a database with summaries of the measures in force including details on the person or class of persons concerned, the applicable financial instruments, any quantitative measures or thresholds such as the maximum number of contracts persons can enter into before a limit is reached, any exemptions thereto, and the reasons thereof.

Article 35
Position management powers of ESMA

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

- (a) request from any person information including all relevant documentation regarding the size and purpose of a position or exposure entered into via a derivative];
- (b) after analysing the information obtained, require any such person to take steps to reduce the size of the position or exposure;
- (c) limit the ability of a person from entering into a commodity derivative.

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

- (a) the measures listed in points (a) to (c) of paragraph 1 address a threat to the orderly functioning and integrity of financial markets including in relation to delivery arrangements for physical commodities, or the stability of the whole or part of the financial system in the Union;
- (b) a competent authority or competent authorities have not taken measures to address the threat or measures that have been taken do not sufficiently address the threat;

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

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

- (a) does significantly address the threat to the orderly functioning and integrity of financial markets or of delivery arrangements for physical commodities, or the stability of the whole or part of the financial system in the Union or significantly improve the ability of competent authorities to monitor the threat;
- (b) does not create a risk of regulatory arbitrage;
- (c) does not have a detrimental effect on the efficiency of financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure.

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

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

6. ESMA shall publish on its website notice of any decision to impose or renew any measure referred to in subparagraph (c) of paragraph 1. The notice shall include details on the person or class of persons concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum number of contracts the person or class of persons in question can enter into, and the reasons thereof.
7. A measure shall take effect when the notice is published or at a time specified in the notice that is after its publication and shall only apply in relation to a transaction entered into after the measure takes effect.
8. ESMA shall review its measures referred to in subparagraph (c) of paragraph 1 at appropriate intervals and at least every three months. If a measure is not renewed after that three month period, it shall automatically expire. Paragraphs 2 to 8 shall apply to a renewal of measures.
9. A measure adopted by ESMA under this Article shall prevail over any previous measure taken by a competent authority under Section 1.
10. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by ESMA in determining when a threat to the orderly functioning and integrity of financial markets including in relation to delivery arrangements for physical commodities, or the stability of the whole or part of the financial system in the Union referred to in paragraph 2(a) arise.

TITLE VIII

PROVISION OF SERVICES WITHOUT A BRANCH BY THIRD COUNTRY FIRMS

Article 36

General provisions

1. A third country firm may provide the services listed in Article 30 of Directive [new MiFID] to eligible counterparties established in the Union without the establishment of a branch only where it is registered in the register of third country firms kept by ESMA in accordance with Article 37.
2. ESMA can register a third country firm that has applied for the provision of investment services and activities in the Union in accordance with paragraph 1 only where the following conditions are met:
 - (a) the Commission has adopted a decision in accordance with Article 37, paragraph 1;
 - (b) the firm is authorised in the jurisdiction where it is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country;

(c) co-operation arrangements have been established pursuant to Article 37, paragraph 2.

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

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

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

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

4. Third country firms providing services in accordance with this Article shall inform clients established in the Union, before the provision of any investment services, that they are not allowed to provide services to clients other than eligible counterparties and that they are not subject to supervision in the Union. They shall indicate the name and the address of the competent authority responsible for supervision in the third country.

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

Persons established in the Union shall be allowed to receive investment services by a third country firm not registered in accordance with paragraph 1 only at their own exclusive initiative.

5. Any disputes between the third country firms and EU investors shall be settled in accordance with the law of and subject to the jurisdiction of a Member State.

6. Powers are delegated to the Commission to adopt regulatory technical standards specifying the information that the applicant third country firm shall provide to ESMA in its application for registration in accordance with paragraph 3 and the format of information to be provided in accordance with paragraph 4.

The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Article 10 to 14 of Regulation (EU) No 1095/2010.

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

Article 37
Equivalence decision

1. The Commission may adopt a decision in accordance with the procedure referred to in Article 42 in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding requirements which have equivalent effect to the requirements set out in Directive No [MiFID], in this Regulation and in Directive 2006/49/EC [Capital Adequacy Directive] and in their implementing measures and that third country provides for equivalent reciprocal recognition of the prudential framework applicable to investment firms authorised in accordance with this directive.

The prudential framework of a third country may be considered equivalent where that framework fulfils all the following conditions:

- (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
 - (b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body;
 - (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions;
 - (d) firms providing investment services and activities are subject to appropriate conduct of business rules;
 - (e) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.
2. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent in accordance with paragraph 1. Such arrangements shall specify at least:
 - (a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned, including access to all information regarding the non-EU firms authorised in third countries that is requested by ESMA;
 - (b) the mechanism for prompt notification to ESMA where a third country competent authority deems that a third country firm that it is supervising and ESMA has registered in the register provided for in Article 38 is in breach of the conditions of its authorisation or other legislation to which it is obliged to adhere;
 - (c) the procedures concerning the coordination of supervisory activities including, where appropriate, on-site inspections.

Article 38
Register

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

Article 39
Withdrawal of registration

1. ESMA shall withdraw, if the conditions in paragraph 2 are fulfilled, the registration of a non-EU firm in the register established in accordance with Article 38 when:
 - (a) ESMA has well-founded reasons based on documented evidence to believe that, in the provision of investment services and activities in the Union, the non-EU firm is acting in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of markets, or
 - (b) ESMA has well-founded reasons based on documented evidence to believe that, in the provision of investment services and activities in the Union, the non-EU firm has seriously infringed the provisions applicable to it in the third country and on the basis of which the Commission has adopted the Decision in accordance with Article 37, paragraph 1.
2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled:
 - (a) ESMA has referred the matter to the competent authority of the third country and that competent authority has not taken the appropriate measures needed to protect investors and the proper functioning of the markets in the Union or has failed to demonstrate that the third country firm concerned complies with the requirements applicable to it in the third country; and
 - (b) ESMA has informed the competent authority of the third country of its intention to withdraw the registration of the third country firm, at least 30 days before the withdrawal.
3. ESMA shall inform the Commission of any measure adopted in accordance with paragraph 1 without delay and shall publish its decision on its website.
4. The Commission shall assess whether the conditions under which a Decision in accordance with Article 37, paragraph 1, has been adopted continue to persist in relation to the third country concerned.

TITLE IX

DELEGATED AND IMPLEMENTING ACTS

Chapter 1

Delegated Acts

Article 40
Delegated acts

The Commission shall be empowered to adopt delegated acts in accordance with Article 41 concerning Articles 2(3), 4(3), 6(2), 8(4), 10(2), 11(2), 12(2), 13(7), 14(5), 14(6), 16(3), 18(2), 18(3), 19(3), 20(3), 28(6), 29(6), 30(3), 31(8), 32(6), 35(10) and 45(2).

Article 41
Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power shall be conferred for an indeterminate period of time from the date referred to in Article 41 paragraph 1.
3. The delegation of powers may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.

Chapter 2

Implementing acts

Article 42 *Committee procedure*

1. For the adoption of implementing acts under Articles 24, 26 and 37, the Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC²⁴. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011²⁵.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply, having regard to the provisions of Article 8 thereof.

TITLE X

FINAL PROVISIONS

Article 43 *Reports and review*

1. Before [2 years following application of MiFIR as specified in Article 41(2)], the Commission after consulting ESMA shall present a report to the European Parliament and to the Council on the impact in practice of the transparency obligations established pursuant to Articles 3 to 6 and 9 to 12, in particular on the application and continued appropriateness of the waivers to pre-trade transparency obligations established pursuant to Articles 3(2) and 4(2) and (3).
2. Before [2 years following application of MiFIR as specified in Article 41(2)], the Commission, after consulting ESMA shall present a report to the Council and the Parliament on the functioning of Article 13, including whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enable to monitor the activities of investment firms in accordance with Article 13(1). The Commission may make any appropriate proposals, including providing for transactions to be reported to a system appointed by ESMA instead of to competent authorities, which allows relevant competent authorities to access all the information reported pursuant to this Article.
3. Before [2 years following application of MiFIR as specified in Article 41(2)], the Commission after consulting ESMA shall present a report to the European Parliament and to the Council on the on the progress made in moving trading in

²⁴ OJ L 191, 13.7.2001, p. 45.

²⁵ OJ L 55, 28.2.2011, p. 13.

standardised OTC derivatives to exchanges or electronic trading platforms pursuant to Articles 22 and 24.

Article 44
Amendment of EMIR

The following subparagraph shall be added to Article 67(2) of Regulation [EMIR]: " A trade repository shall transmit data to competent authorities in accordance with the requirements under Article 23 of Regulation [MiFIR]."

Article 45
Transitional provision

1. Existing third country firms shall be able to continue to provide services and activities in Member States, in accordance with national regimes until [4 years after the entry into force of this regulation].
2. The Commission may adopt by means of delegated acts in accordance with Article 41 measures specifying an extension to the period of application of paragraph 2, taking into account the equivalence decisions already adopted by the Commission in accordance with Article 37 and expected developments in the regulatory and supervisory framework of third countries.

Article 46
Entry into force and application

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

This Regulation shall apply from [24 months after the entry into force of this Regulation], except for Articles 2(3), 4(3), 6(2), 8(4), 10(2), 11(2), 12(2), 13(7), 14(5), 14(6), 16(3), 18(2), 18(3), 19(3), 20(3), 23(8), 24(5), 26, 28(6), 29(6), 30(3), 31, 32, 33, 34 and 35, which shall apply immediately following the entry into force of this Regulation.

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

Done at Brussels,

For the European Parliament
The President

For the Council
The President