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**PROPOSAL**

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	15 June 2017
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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No. Cion doc.:	COM(2017) 331 final ANNEX 1
Subject:	ANNEX to the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs

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Delegations will find attached document COM(2017) 331 final ANNEX 1.

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Encl.: COM(2017) 331 final ANNEX 1



Brussels, 13.6.2017  
COM(2017) 331 final

ANNEX 1

## **ANNEX**

*to the Proposal for a*

### **REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs**

{SWD(2017) 246 final}  
{SWD(2017) 247 final}

## ANNEX

The following are added as Annexes III and IV to Regulation (EU) No 648/2012.

### “ANNEX III

#### List of infringements referred to in Article 25g(1)

- I. Infringements relating to capital requirements:
  - (a) a Tier 2 CCP infringes Article 16(1) by not having a permanent and available initial capital of at least EUR 7.5 million;
  - (b) a Tier 2 CCP infringes Article 16(2) by not having capital, including retained earnings and reserves, which is proportionate to the risk stemming from its activities and at all times sufficient to ensure an orderly winding-down or restructuring of that activities over an appropriate time span and an adequate protection of the CCP against credit, counterparty, market, operational, legal and business risks which are not already covered by specific financial resources as referred to in Articles 41, 42, 43 and 44.
- II. Infringements relating to organisational requirements or conflicts of interest:
  - (a) a Tier 2 CCP infringes Article 26(1) by not having robust governance arrangements which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks to which it is or might be exposed and adequate internal control mechanisms, including sound administrative and accounting procedures;
  - (b) a Tier 2 CCP infringes Article 26(2) by not adopting adequate policies and procedures which are sufficiently effective to ensure compliance, including that of its managers and employees, with all the provisions of this Regulation;
  - (c) a Tier 2 CCP infringes Article 26(3) by not maintaining or operating an organisational structure that ensures continuity and orderly functioning in the performance of its services and activities or by not employing appropriate and proportionate systems, resources or procedures;
  - (d) a Tier 2 CCP infringes Article 26(4) by not maintaining a clear separation between the reporting lines for risk management and those for other operations of the CCP;
  - (e) a Tier 2 CCP infringes Article 26(5) by not adopting, implementing or maintaining a remuneration policy which promotes sound and effective risk management and which does not create incentives to relax risk standards;
  - (f) a Tier 2 CCP infringes Article 26(6) by not maintaining information technology systems adequate to deal with the complexity, variety and type of services and activities performed to ensure high standards of security and the integrity and confidentiality of the information maintained;
  - (g) a Tier 2 CCP infringes Article 26(7) by not making its governance arrangements, the rules governing the CCP, and its admission criteria for clearing membership available publicly free of charge;
  - (h) a Tier 2 CCP infringes Article 26(8) by not being subject to frequent and independent audits or by not communicating the results of those audits to the board or by not making those results available to ESMA;

- (i) a Tier 2 CCP infringes Article 27(1) or the second subparagraph of Article 27(2) by not ensuring that its senior management and the members of the board are of sufficiently good repute and experience to ensure the sound and prudent management of the CCP;
- (j) a Tier 2 CCP infringes Article 27(2) by not ensuring that at least one third, but no less than two, of the members of that board shall be independent or by not inviting the representatives of the clients of clearing members to board meetings for matters relevant to Articles 38 and 39 or by linking the compensation of the independent and other non-executive members of the board to the business performance of the CCP;
- (k) a Tier 2 CCP infringes Article 27(3) by not clearly determining the roles and responsibilities of the board or by not making the minutes of the board meeting available to ESMA or the auditors;
- (l) a Tier 2 CCP infringes Article 28(1) by not establishing a risk committee or by not composing that risk committee of representatives of its clearing members, independent members of the board and representatives of its clients, by composing the risk committee in a way that one of these groups of representatives has a majority in the risk committee, or by not duly informing ESMA of the activities and decisions of the risk committee where ESMA has requested to be duly informed;
- (m) a Tier 2 CCP infringes Article 28(2) by not clearly determining the mandate, the governance arrangements to ensure its independence, the operational procedures, the admission criteria or the election mechanism of risk committee members or by not making those governance arrangements publicly available or by not determining that the risk committee is chaired by an independent member of the board and reports directly to the board and holds regular meetings;
- (n) a Tier 2 CCP infringes Article 28(3) by not allowing the risk committee to advise the board on any arrangements that may impact the risk management of the CCP or by not making reasonable efforts to consult the risk committee on developments impacting the risk management of the CCP in emergency situations;
- (o) a Tier 2 CCP infringes Article 28(5) by not promptly informing ESMA of any decision in which the board decides not to follow the advice of the risk committee;
- (p) a Tier 2 CCP infringes Article 29(1) by not maintaining all the records on the services and activity provided by that CCP for a period of at least ten years, which are required to enable ESMA to monitor the CCP's compliance with this Regulation;
- (q) a Tier 2 CCP infringes Article 29(2) by not maintaining, for a period of at least ten years following the termination of a contract, all information on all contracts it has processed in a way that enables the identification of the original terms of a transaction before clearing by that CCP;
- (r) a Tier 2 CCP infringes Article 29(3) by not making the records and information referred to in paragraphs 1 and 2 of Article 29, or all information on the positions of cleared contracts, irrespective of the venue where the transactions were executed, available upon request to ESMA and the relevant members of the ESCB;

- (s) a Tier 2 CCP infringes Article 30(1) by not, or by falsely or incompletely, informing ESMA of the identities of its shareholders or members, whether direct or indirect, national or legal, persons that have qualifying holdings or of the amounts of those holdings;
- (t) a Tier 2 CCP infringes Article 30(4) by allowing the persons referred to in Article 30(1) exercise an influence which is likely to be prejudicial to the sound and prudent management of the CCP;
- (u) a Tier 2 CCP infringes Article 31(1) by not, or by falsely or by incompletely, notifying ESMA of any change to its management or not providing ESMA with all information necessary to assess compliance with Article 27(1) or the second subparagraph of Article 27(2);
- (v) a Tier 2 CCP infringes Article 33(1) by not maintaining or operating effective written organisational and administrative arrangements to identify or manage any potential conflict of interest between itself, including its managers, employees or any person with direct or indirect control or close links, and its clearing members or their clients known to the CCP or by not maintaining or implementing adequate procedures aiming at resolving possible conflicts of interest;
- (w) a Tier 2 CCP infringes Article 33(2) by not clearly disclosing the general nature or sources of conflicts of interest, before accepting new transactions from the clearing member concerned, to the clearing member or to a concerned client of that clearing member who is known to the CCP where the organisational or administrative arrangements of that CCP to manage a conflict of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interest of a clearing member or client are prevented;
- (x) a Tier 2 CCP infringes Article 33(3) by not taking into account in its written arrangements any circumstances, of which it is or should be aware, which may give rise to a conflict of interest arising as a result of the structure and business activities of other undertakings with which it has a parent undertaking or a subsidiary relationship;
- (y) a Tier 2 CCP infringes Article 33(5) by not taking all reasonable steps to prevent any misuse of the information held in its systems or preventing the use of that information for other business activities, or by a natural person who has a close link to a CCP or a legal person that has a parent undertaking or a subsidiary relationship with the CCP using confidential information recorded in that CCP for any commercial purposes without the prior consent of the client to whom such confidential information belongs;
- (z) a Tier 2 CCP infringes Article 36(1) by not acting fairly and professionally in accordance with the best interests of its clearing members and their clients;
- (aa) a Tier 2 CCP infringes Article 36(2) by not having accessible, transparent and fair rules for the prompt handling of complaints;
- (bb) a Tier 2 CCP infringes Article 37(1) or (2) by using, on an ongoing basis, discriminatory, opaque or subjective admission criteria, or by otherwise failing to ensure fair and open access to that CCP on an ongoing basis or by failing to ensure on an ongoing basis that its clearing members have sufficient financial resources and operational capacity to meet the obligations arising

from the participation in that CCP, or by failing to conduct a comprehensive review of compliance by its clearing members on an annual basis;

(cc) a Tier 2 CCP infringes Article 37(4) by failing to have objective and transparent procedures for the suspension and the orderly exit of clearing members that no longer meet the criteria referred to in Article 37(1);

(dd) a Tier 2 CCP infringes Article 37(5) by denying access to a clearing member meeting the criteria referred to in Article 37(1) where such denial of access is not duly justified in writing and based on a comprehensive risk analysis;

(ee) a Tier 2 CCP infringes Article 38(1) by not allowing the clients of its clearing members separate access to the specific services provided;

(ff) a Tier 2 CCP infringes Article 39(7) by not offering the different levels of segregation referred to in that paragraph on reasonable commercial terms;

### III. Infringements relating to operational requirements:

(a) a Tier 2 CCP infringes Article 34(1) by not establishing, implementing or maintaining an adequate business continuity policy and disaster recovery plan aimed at ensuring the preservation of its functions, the timely recovery of operations and the fulfilment of the CCP's obligations, which at least allows for the recovery of all transactions at the time of disruption to allow the CCP to continue to operate with certainty and to complete settlement on the scheduled date;

(b) a Tier 2 CCP infringes Article 34(2) by not establishing, implementing or maintaining an adequate procedure aimed at ensuring the timely and orderly settlement or transfer of the assets and positions of clients and clearing members in the event of withdrawal of recognition pursuant to a decision under Article 25;

(c) a Tier 2 CCP infringes the second subparagraph of Article 35(1) by outsourcing major activities linked to the risk management of that CCP;

(d) a Tier 2 CCP infringes Article 39(1) by not keeping separate records and accounts that enable it, at any time and without delay, to distinguish in accounts with the CCP the assets and positions held for the account of one clearing member from the assets and positions held for the account of any other clearing member and from its own assets;

(e) a Tier 2 CCP infringes Article 39(2) by not offering to keep and not keeping where so requested separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions of that clearing member from those held for the account of its clearing members;

(f) a Tier 2 CCP infringes Article 39(3) by not offering to keep and not keeping where so requested separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from those held for the account of other clients, or by not offering its clearing members the possibility to open more accounts in their own name for the account of their clients where so requested;

(g) a Tier 2 CCP infringes Article 40 by not measuring and assessing its liquidity and credit exposures to each clearing member and, where relevant, to another CCP with which it has concluded an interoperability arrangement on a near to real-time basis or by not having access to the relevant pricing sources to effectively measure its exposures on a reasonable cost basis;

(h) a Tier 2 CCP infringes Article 41(1) by not imposing, calling or collecting margins to limit its credit exposures from its clearing members or, where relevant, from CCPs with which it has concluded an interoperability arrangement, or by imposing, calling or collecting margins which are not sufficient to cover potential exposures that the CCP estimates to occur until the liquidation of the relevant positions or to cover losses that result at least 99% of the exposures movements over an appropriate time horizon or sufficient to ensure that the CCP fully collateralises its exposures with all its clearing members and, where relevant, with all CCPs with which it has concluded an interoperability arrangement, at least on a daily basis, or, if necessary, to take into account any potentially procyclical effects;

(i) a Tier 2 CCP infringes Article 41(2) by failing to adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared taking into account the interval between margin collections, market liquidity and the possibility of changes over the duration of the transaction;

(j) a Tier 2 CCP infringes Article 41(3) by not calling and collecting margins on an intraday basis, at least when predefined thresholds are exceeded;

(k) a Tier 2 CCP infringes Article 42(3) by not maintaining a default fund which at least enables it to withstand, under extreme but plausible market conditions, the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members if the sum of their exposures are larger, or by developing scenarios that do not include the most volatile periods that have been experienced by the markets for which the CCP provides its services and a range of potential future scenarios, which take into account sudden sales of financial resources and rapid reductions in market liquidity;

(l) a Tier 2 CCP infringes Article 43(2) where its default fund referred to in Article 42 and its other financial resources referred to in Article 43(1) do not enable it to withstand the default of the two clearing members to which it has the largest exposures under extreme but plausible market conditions;

(m) a Tier 2 CCP infringes Article 44(1) by not having access at all times to adequate liquidity to perform its services and activities or by not measuring on a daily basis its potential liquidity needs;

(o) a Tier 2 CCP infringes Article 45(1), (2) and (3) by not using the margins posted by a defaulting clearing member prior to other financial resources in covering losses;

(p) a Tier 2 CCP infringes Article 45(4) by not using dedicated own resources before using the default fund contributions of non-defaulting clearing members;

(q) a Tier 2 CCP infringes Article 46(1) by accepting anything other than highly liquid collateral with minimal credit and market risk to cover its initial and ongoing exposure to its clearing members where other collateral is not

- allowed under the delegated act adopted by the Commission under Article 46(3);
- (r) a Tier 2 CCP infringes Article 47(1) by investing its financial resources other than in cash or highly liquid financial instruments with minimum market and credit risk and capable of being liquidated rapidly with minimal adverse price effect;
  - (s) a Tier 2 CCP infringes Article 47(3) by not depositing financial instruments posted as margins or as default fund contributions with operators of securities settlement systems that ensure the full protection of those financial instruments where these are available or by not using other highly secure arrangements with authorised financial institutions;
  - (t) a Tier 2 CCP infringes Article 47(4) by performing cash deposits other than through highly secure arrangements with authorised financial institutions or through the use of standing deposit facilities of central banks or other comparable means provided by central banks;
  - (u) a Tier 2 CCP infringes Article 47(5) by depositing assets with a third party without ensuring that the assets belonging to the clearing members are identifiable separately from the assets belonging to the CCP and from assets belonging to that third party by means of differently titled accounts on the books of the third party or any other equivalent measures that achieve the same level of protection or by not having prompt access to the financial instruments when required;
  - (v) a Tier 2 CCP infringes Article 47(6) by investing its capital or the sums arising from the requirements laid down in Articles 41, 42, 43 or 44 in its own securities or those of its parent undertaking or its subsidiary;
  - (w) a Tier 2 CCP infringes Article 48(1) by not having detailed procedures in place to be followed where a clearing member does not comply with the participation requirements laid down in Article 37 within the time limit and in accordance with the procedures established by the CCP, or by not setting out in detail the procedures to be followed in the event the default of a clearing member is not declared by the CCP, or by not reviewing those procedures annually;
  - (x) a Tier 2 CCP infringes Article 48(2) by failing to take prompt action to contain losses and liquidity pressures resulting from clearing member defaults and to ensure that the closing out of any clearing member's positions does not disrupt its operations or expose the non-defaulting clearing members to losses they cannot anticipate or control;
  - (y) a Tier 2 CCP infringes Article 48(3) by failing to promptly inform ESMA before the default procedure is declared or triggered;
  - (z) a Tier 2 CCP infringes Article 48(4) by not verifying that its default procedures are enforceable and not taking all reasonable steps to ensure that it has the legal powers to liquidate the proprietary positions of the defaulting clearing member and to transfer or liquidate the clients' positions of the defaulting clearing member;
  - (aa) a Tier 2 CCP infringes Article 49(1) by not regularly reviewing its models and parameters adopted to calculate its margin requirements, default fund contributions, collateral requirements or other risk control mechanisms, and by



not subjecting those models to rigorous and frequent stress tests to assess their resilience in extreme but plausible market conditions or performing back tests to assess the reliability of the methodology adopted, or by failing to obtain independent validation, or by failing to inform ESMA of the results of the tests performed or obtaining ESMA's validation before adopting any significant change to the models and parameters;

(bb) a Tier 2 CCP infringes Article 49(2) by not regularly testing the key aspects of its default procedures or by failing to take all reasonable steps to ensure that all clearing members understand them and have appropriate arrangements in place to respond to a default event;

(cc) a Tier 2 CCP infringes Article 49(1a) by adopting any significant change to the models and parameters referred to in Article 49(1) before obtaining ESMA's validation of that change;

(dd) a Tier 2 CCP infringes Article 50(1) by not using, where practical and available, central bank money to settle its transactions or by not taking steps to strictly limit cash settlement risks where central bank money is not used;

(ee) a Tier 2 CCP infringes Article 50(3) by not eliminating principal risks through the use of delivery-versus-payment mechanisms to the extent possible, where that CCP has an obligation to make or receive deliveries of financial instruments;

(ff) a Tier 2 CCP infringes Article 50a or Article 50b by not calculating  $K_{CCP}$  as specified in that Article or by not following the rules for the calculation of  $K_{CCP}$  set out in Articles 50a(2), 50b and 50d;

(gg) a Tier 2 CCP infringes Article 50a(3) by calculating  $K_{CCP}$  less than quarterly or less frequently than required by ESMA in accordance with Article 50a(3);

(hh) a Tier 2 CCP infringes Article 51(2) by not having non-discriminatory access both to the data that it needs for the performance of its functions from a trading venue to the extent that the CCP complies with the operational and technical requirements established by that trading venue and to the relevant settlement system;

(ii) a Tier 2 CCP infringes Article 52(1) by entering into an interoperability arrangement without fulfilling any of the requirements set out in point (a), point (b), point (c) and point (d) of that paragraph;

(jj) a Tier 2 CCP infringes Article 53(1) by not distinguishing in accounts the assets and positions held for the account of another CCP with whom it has entered into an interoperability arrangement;

(kk) a Tier 2 CCP infringes Article 54(1) by entering an interoperability arrangement without the prior approval of ESMA;

#### IV. Infringements relating to transparency and the availability of information:

(a) a Tier 2 CCP infringes Article 38(1) by not publicly disclosing the prices and fees of each service provided separately including discounts and rebates and the conditions to benefit from those reductions;

(b) a Tier 2 CCP infringes Article 38(1) by not disclosing the information on costs and revenues of its services to ESMA;

- (c) a Tier 2 CCP infringes Article 38(2) by not disclosing to its clearing members and their clients the risks associated with the services provided;
- (d) a Tier 2 CCP infringes Article 38(3) by not disclosing to its clearing members or ESMA the price information used to calculate its end-of-day exposures to its clearing members or by not publicly disclosing the volume of cleared transactions for each instrument cleared by the CCP on an aggregated basis;
- (f) a Tier 2 CCP infringes Article 38(4) by not publicly disclosing the operational and technical requirements relating to the communication protocols covering content and message formats it uses to interact with third parties including the operational and technical requirements referred to in Article 7;
- (g) a Tier 2 CCP infringes Article 38(5) by not publicly disclosing any breaches by clearing members of the criteria referred to in Article 37(1) or the requirements laid down in Article 38(5) except where ESMA considered that such a disclosure would constitute a threat to financial stability or to market confidence or would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved;
- (h) a Tier 2 CCP infringes Article 39(7) by not publicly disclosing the levels of protection and the costs associated with the different levels of segregation that it provides;
- (i) a Tier 2 CCP infringes Article 49(3) by not publicly disclosing key aspects on its risk management model or assumptions adopted to perform the stress test referred to in Article 49(1);
- (j) a Tier 2 CCP infringes Article 50(2) by not clearly stating its obligations with respect to deliveries of financial instruments, including whether it has an obligation to make or receive delivery of a financial instrument or whether it indemnifies participants for losses incurred in the delivery process.
- (k) a Tier 2 CCP infringes Article 50c(1) by not reporting the information referred in points (a), (b), (c), (d) and (e) of Article 50c(1) to those of its clearing members which are institutions or to their competent authorities;
- (l) a Tier 2 CCP infringes Article 50c(2) by notifying those of its clearing members which are institutions less than quarterly or less frequently than required by ESMA in accordance with Article 50c(2).

V. Infringements relating to obstacles to the supervisory activities:

- (a) a CCP infringes Article 25c by providing incorrect or misleading information in response to a simple request for information by ESMA in accordance with Article 25c or in response to a decision by ESMA requiring information in accordance with Article 25n;
- (b) a CCP provides incorrect or misleading answers to questions asked pursuant to Article 25d(1)(d);
- (c) a Tier 2 CCP does not comply in due time with a supervisory measure required by a decision adopted by ESMA pursuant to Article 25n;
- (d) a Tier 2 CCP does not submit to an on-site inspection required by an investigation decision adopted by ESMA taken pursuant to Article 25e”.

1. The following Annex IV is inserted:

“ANNEX IV

List of the coefficients linked to aggravating and mitigating factors for the application of Article 25g(3)

The following coefficients shall be applicable, cumulatively, to the basic amounts referred to in Article 25g(2):

I. Adjustment coefficients linked to aggravating factors:

- (a) if the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1.1 shall apply;
- (b) if the infringement has been committed for more than six months, a coefficient of 1.5 shall apply;
- (c) if the infringement has revealed systemic weaknesses in the organisation of the CCP, in particular in its procedures, management systems or internal controls, a coefficient of 2.2 shall apply;
- (d) if the infringement has a negative impact on the quality of the activities and services of the CCP, a coefficient of 1.5 shall apply;
- (e) if the infringement has been committed intentionally, a coefficient of 2 shall apply;
- (f) if no remedial action has been taken since the breach has been identified, a coefficient of 1.7 shall apply;
- (g) if the CCP's senior management has not cooperated with ESMA in carrying out its investigations, a coefficient of 1.5 shall apply.

II. Adjustment coefficients linked to mitigating factors:

- (a) if the infringement has been committed for less than 10 working days, a coefficient of 0.9 shall apply;
- (b) if the CCP's senior management can demonstrate to have taken all the necessary measures to prevent the infringement, a coefficient of 0.7 shall apply;
- (c) if the CCP has brought quickly, effectively and completely the infringement to ESMA's attention, a coefficient of 0.4 shall apply;
- (d) if the CCP has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future, a coefficient of 0.6 shall apply."