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From:	Presidency
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Subject:	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 - Bulgarian Presidency revised proposal for a consolidated compromise text on recognition and supervision of third-country CCPs

PRESIDENCY COMPROMISE PROPOSAL

**BG PRES revised proposal for a consolidated compromise text
on recognition and supervision of third-country CCPs**

Text underlined and in bold indicates **new** amendments comparing with the ST 10164/18 document and Presidency WD#25 in relation to requirements imposed by CBIs in exceptional situations’.

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

Recitals (1) to (22) and (47) and (50) remain to be discussed by the CWP.

- (23) The supervisory arrangements in this Regulation for third-country CCPs offering clearing services within the Union also require revision. Access to information, the ability to conduct on-site inspections and investigations, the possibility to share information on third-country CCPs between relevant Union and Member State authorities, as well as the possibility to enforce ESMA decisions applicable to third-country CCPs, needs to be improved to avoid important financial stability implications for Union entities. There is also a risk that changes to a third-country CCP rules or to a third-country regulatory framework cannot be taken into account and could negatively affect the regulatory or supervisory outcomes, leading to an unlevel playing field between Union and third-country CCPs.
- (24) A significant amount of financial instruments denominated in the currencies of the Member States are cleared by recognised third-country CCPs. This will increase substantially when the United Kingdom withdraws from the Union and the CCPs established there will no longer be governed by the requirements of this Regulation. Cooperation arrangements agreed in the supervisory colleges will no longer be subject to the safeguards and procedures of this Regulation, including the Court of Justice of the European Union. This implies significant challenges for Union and Member State authorities in safeguarding financial stability.

- (25) As part of its commitment to integrated financial markets, the Commission should continue to determine by way of equivalence decisions that the legal and supervisory frameworks of third countries fulfil the requirements of Regulation (EU) No 648/2012. In order to enhance the implementation of the current equivalence regime in relation to CCPs, the Commission should be able to, if necessary, specify further the criteria for assessing the equivalence of third-country CCP regimes. It is also necessary to empower ESMA with the monitoring of regulatory and supervisory developments in those third-country CCP regimes that have been deemed equivalent by the Commission. This is in order to ensure that the equivalence criteria and any specific conditions set for their use continue to be satisfied by third countries. ESMA should report its findings to the Commission and to the competent authorities responsible for the supervision of the clearing members established in the Union on a confidential basis.
- (26) The Commission is currently able to amend, suspend, review or revoke an equivalence decision at any time, in particular where developments occur in a third country which materially affect the elements assessed in accordance with the equivalence requirements under this Regulation. Where a third country's relevant authorities no longer cooperate with ESMA or other Union supervisors in good faith or fail to comply on a continuous basis with the applicable equivalence requirements, the Commission is also able to, inter alia, put an authority of the third country on notice or publish a specific recommendation. Where the Commission decides at any time to revoke a third country's equivalence, it is able to delay the date of application of that decision in order to address the risks to financial stability or of market disruptions. In addition to those powers currently available, the Commission should also be able to set specific conditions to ensure that the equivalence criteria continue to be fulfilled on an ongoing basis by the third country to which an equivalence decision relates. The Commission should also be able to set conditions ensuring that ESMA is able to effectively exercise its responsibilities in relation to third-country CCPs recognised under this Regulation or in relation to monitoring of regulatory and supervisory developments in third countries that are of relevance for adopted equivalence decisions.

- (27) In view of the growing cross-border dimension of CCPs and of the interlinkages in the Union financial system, it is necessary to improve the ability of the Union to identify, monitor and mitigate the potential risks related to third-country CCPs. The role of ESMA should therefore be enhanced to effectively supervise third-country CCPs that apply for recognition to provide clearing services in the Union. The involvement of the Union central banks of issue in the recognition, supervision, review of recognition and withdrawal of recognition of third country CCPs that are active in the currency they issue should also be improved. Therefore, Union central banks of issue should be consulted on certain aspects affecting their monetary policy responsibilities in relation to financial instruments denominated in Union currencies which are cleared or to be cleared ~~by a CCP~~ to a significant extent ~~in~~ **by** CCPs located outside the Union.
- (28) Once the Commission has determined the legal and supervisory framework of a third country as equivalent to the Union framework, the process to recognise CCPs from that third country should take into account the risks those CCPs present for the financial stability of the Union or **one of its** Member States.
- (29) When considering the application of a third-country CCP for recognition, ESMA should assess the degree of systemic risk that the CCP presents to the financial stability of the Union or one of its Member States on the basis of objective and transparent criteria set out in this Regulation. A Commission delegated act should further specify these criteria.

- (30) CCPs that are not systemically important to the financial stability of the Union or one of its Member States should be considered as 'Tier 1' CCPs. CCPs that are systemically important, or likely to become systemically important, to the financial stability of the Union or one of its Member States should be considered as 'Tier 2' CCPs. ESMA should determine if a CCP is systemically-important or likely to become systemically important for the financial stability of the Union or one of its Member States taking into account five defined criteria. Where ESMA determines that a third-country CCP is not systemically important to the financial stability of the Union or one of its Member States, the existing recognition conditions under Regulation (EU) No 648/2012 should apply to that CCP. Where ESMA determines that a third-country CCP is systemically important, additional requirements **for that** CCP should be established. ESMA should only recognise such a CCP where that CCP complies with these requirements.
- (31) The additional requirements should include certain prudential requirements set out in Regulation (EU) No 648/2012 that aim to increase the safety and efficiency of a CCP. ESMA should be directly responsible for ensuring that a systemically-important third-country CCP complies with those requirements. Related requirements should also enable ESMA to carry **out** full and effective supervision of that CCP.
- (32) In order to ensure the proper involvement of the central bank(s) of issue of all Union currencies of the financial instruments cleared or to be cleared by third country CCPs in the recognition process for, systemically important third country CCPs, these CCPs should also fulfil additional requirements, related to the submission of information to the central bank of issue upon its reasoned request, cooperation of the CCPs with the central bank of issue in the context of **stress tests carried out by ESMA** ~~ESMA stress testing~~, opening of an overnight deposit account [and requirements in exceptional situations], that the central bank(s) of issue considers necessary. The access criteria and requirements of central bank of issue for opening an overnight deposit account should not amount to an obligation to relocate all or part of the clearing services of the CCP. The central bank(s) of issue should provide ESMA with confirmation whether or not the CCP complies with any additional requirements as quickly as possible and in any case **within** 150 working days from the CCP's application to ESMA.

(32 a) | The transmission of monetary policy or the smooth functioning of payment systems may be affected by developments in centrally cleared markets in exceptional situations, such as stresses in the markets (especially the money and repurchase markets) on which the CCP relies to obtain liquidity; situations where CCPs' operations contribute to the drying up of liquidity in the market; serious malfunctions of payment or settlement arrangements that impede the CCP's ability to meet its payment obligations or increase its liquidity needs. ~~Such~~ **The determination of such** exceptional situations **depends solely on monetary policy considerations and need not coincide with any emergency situation relating to the CCP.** ~~are impossible to predict and t~~ **The prudential framework may therefore** not fully mitigate the ensuing risks, in which case direct action by the central banks of issue to ensure the transmission of monetary policy or the smooth functioning of payment systems may be necessary.

(32 b) In such exceptional situations, central banks of issue may need, to the extent allowed under their respective institutional frameworks, to impose requirements relating to liquidity risks, settlement arrangements, margin requirements, collateral or interoperability arrangements. Non-compliance with such requirements ~~may~~ **might** trigger the withdrawal by ESMA of the recognition of the Tier 2 CCP. ~~These~~ **Those** requirements ~~may~~ **could** include, in particular, temporary enhancements to the liquidity risk management of a Tier 2 CCP, such as increase in liquidity buffer, increase in the frequency of the collection of intraday margins, and limits to cross-currency exposures, or specific modalities for depositing cash and settling payments in the currency of the central bank. **The requirements should not extend to other areas of prudential supervision or amount to withdrawal of recognition.** ~~In such situations, central banks of issue and ESMA should cooperate and share information, in particular the assessment of systemic liquidity risks, as well as the envisaged effects of the requirements to be imposed on the soundness and financial safety of the CCP.~~

(32 c) Before the application of the requirements or before their possible extension a central bank of issue should provide ESMA, the other central banks of issue referred to point (f) of paragraph (3), the members of the college for third-country CCP with an explanation of how the requirements they intend to impose preserve the soundness and **financial** safety of **the CCPs and the financial stability of the Union or one of its Member States** and a justification of why the requirements are necessary and proportionate to ensure the transmission of monetary policy or the smooth functioning of payment systems. In order to avoid duplication and to promote consistency **with prudential requirements**, the central bank of issue should cooperate **and share information on a continuous basis** with ESMA and the other central banks of issue, referred to **in** point (f) of paragraph 3 in relation to the temporary requirements applicable in exceptional situations **on a continuous basis.**]

(33) The degree of risk posed by a systemically-important CCP to the financial system and stability of the Union varies. The requirements for systemically-important CCPs should therefore be applied in a manner proportionate to the risks that the CCP may present to the Union. Where ESMA, after consulting the ESRB, and in agreement with the central bank(s) of issue of all Union currencies of the financial instruments cleared or to be cleared by a third country CCP, concludes, on the basis of a fully reasoned assessment, including a quantitative technical assessment of the costs and benefits, that a third-country CCP, or some of its clearing services, are of such systemic importance that compliance with the additional requirements set out in this Regulation does not sufficiently address the financial stability risk ESMA, as a measures of last resort, should be able to recommend to the Commission that that CCP or some of its clearing services should not be recognised. The Commission should be able to adopt an implementing act specifying that the third country CCP in question should not be able to provide some or all clearing services to clearing members and trading venues established in the Union unless that CCP is authorised in any Member State to do so in accordance ~~to~~ **with** this Regulation. This implementing act should also set up appropriate adaptation period not exceeding two years, which ~~may~~ **might** be extended once to ~~on~~ **an** additional six months.

- (34) ESMA should regularly review the recognition of third-country CCPs as well as their classification as Tier 1 or Tier 2 CCPs. In this regard, ESMA should consider amongst others, the changes in the nature, size and complexity of the third-country CCP's business. Such reviews should take place at least every two years and more frequently where necessary. Where, following that review, ESMA determines that a Tier 1 CCP should be recognised as a Tier 2 CCP, ESMA should set an appropriate adaptation period not exceeding 18 months within which the CCP should comply with the requirements applicable to Tier 2 CCPs.
- (35) At the request of a Tier 2 CCP, ESMA should also be able to take into account the extent to which the compliance of a systemically-important third-country CCP with the requirements applicable in that third country can be compared to the compliance of that CCP with the requirements of Regulation (EU) No 648/2012. The Commission should adopt a delegated act specifying further the modalities and conditions to assess such comparable compliance.
- (36) ESMA should have all the powers necessary to supervise recognised third country CCPs ~~on~~ to ensure their ongoing compliance with the requirements of Regulation (EU) No 648/2012.
- (36a) In order to ensure an effective and swift decision-making process as regards third country CCPs, ESMA should establish a permanent internal committee for third country CCPs ('CCP Supervisory Committee'). The final decision-making power should remain with ESMA's Board of Supervisors. The CCP Supervisory Committee should be composed of its full-time Chair and the competent authorities of [seven] Member States appointed on the basis of objective criteria laid down in this Regulation. In preparation of decisions in relation to Tier 2 CCPs, the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the third-country CCPs should be granted, upon request, a non-voting membership in the CCP Supervisory Committee.

- (36b) The Chair of the CCP Supervisory Committee should be an independent professional appointed by the Board of Supervisors on the basis of merit, skills, knowledge of clearing, post-trading, prudential supervision and financial matters, as well as of experience relevant to CCP supervision and regulation. ~~His or her~~ **The Chair's** term of office should be three years for the first appointment following the entry into force of this Regulation and five years for the subsequent ~~chairs~~ **appointments**, with the possibility of extension once for another five years.
- (36c) The CCP Supervisory Committee should take its decisions by a simple majority of its voting members. Each member should have one vote. In case of a draw, the Chair should have the casting vote.
- (36d) The central banks of issues should be involved in the preparation of the decisions by the CCP Supervisory Committee, in order to ensure the proper exercise of their tasks related to the monetary policy and the smooth operation of payment systems. As ESMA decisions in relation to Tier 2 CCPs on margin requirements, liquidity risk control, collateral, settlement and approval of interoperability arrangements could be of particular relevance for those central banks' tasks, the CCP Supervisory Committee should consult the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the third country CCPs on the basis of a 'comply-or explain' mechanism. As regards ESMA decisions recommending to the Commission that a third country CCP, ~~due to its~~ **is of such** substantial systemic importance, **that it** should not be recognised, the CCP Supervisory Committee should seek the agreement of the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by that CCP.
- (36e) The ESMA Board of Supervisors should adopt the draft decisions submitted by the CCP Supervisory Committee, acting in accordance with the decision-making process set out in Regulation (EU) No 1095/2010. In order to ensure an effective and swift decision-making process, certain decisions which do not relate to the recognition, classification of third country CCPs, additional requirements imposed on Tier 2 CCPs; review or withdrawal of recognition, or to the essential elements of the ongoing supervision of the third-country CCPs, where consultation with the central banks of issues is required, should be adopted by the Board of Supervisors within 3 working days.

- (36f) ESMA should be able to conduct investigations and on-site inspections of Tier 2 CCPs and related third parties to whom those CCPs have outsourced operational functions, services or activities. Where relevant, the competent authorities responsible for the supervision of the clearing members established in the Union should be informed of the findings of such investigations and on-site inspections. Where relevant for the carrying out of their monetary policy tasks, the central banks of issue of the financial instruments cleared or to be cleared by the CCP should be able to request participation in such on-site inspections.
- (36g) In order to facilitate the information sharing and cooperation between ESMA, the Member States competent authorities responsible for CCP supervision and the competent authorities responsible for supervision of entities on which the operations of the third country CCPs might have an impact, ESMA should establish a college for third country CCPs. The college should consist of the Chair of the CCP Supervisory Committee, the competent authorities supervising the CCPs established in the Union, the supervisors of the clearing members established in the Union, the trading venues served or to be served by the third country CCPs, the linked or to be linked central securities depositories, as well as the members of the ESCB. While the main task of the college is to facilitate information sharing, the college may also request any specific matters in relation to third country CCPs to be discussed by ESMA.
- (37) ESMA should be able to impose periodic penalty payments to compel third-country CCPs to end an infringement, to supply complete and correct information required by ESMA or to submit to an investigation or an on-site inspection.

- (38) ESMA should be able to impose fines on both Tier 1 and Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of this Regulation by providing incorrect or misleading information to ESMA. In addition, ESMA should be able to impose fines on Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of the additional requirements applicable to them in this Regulation. In case ESMA has assessed in accordance with Article 25a(1) the compliance of systemically-important third country CCPs with requirements that are comparable to the requirements referred to in Article 25(2b)(a) and set out in Article 16 and Titles IV and V the acts of those CCPs should not be considered an infringement of this Regulation to the extent that they comply with these comparable requirements.
- (39) Fines should be imposed according to the level of seriousness of the infringement. Infringements should be divided into different groups for which specific fines should be allocated. In order to calculate the fine relating to a particular infringement, ESMA should apply a two-step methodology consisting of setting a basic amount and adjusting that basic amount, if necessary, by certain coefficients. The basic amount should be established by taking into account the annual turnover of the third-country CCPs concerned and the adjustments should be made by increasing or decreasing the basic amount through the application of the relevant coefficients in accordance with this Regulation.
- (40) This Regulation should establish coefficients linked to aggravating and mitigating circumstances in order to give the necessary tools to ESMA to decide on a fine which is proportionate to the seriousness of the infringement committed by a third country CCP, taking into account the circumstances under which that infringement has been committed.
- (41) The decision to impose fines or periodic penalty payments should be based on an independent investigation.
- (42) Before deciding whether to impose fines or periodic penalty payments, ESMA should give the persons subject to the proceedings the opportunity to be heard in order to respect their rights of defence.

- (43) ESMA should refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or from facts which are substantially the same, has acquired the force of res judicata as a result of criminal proceedings under national law.
- (44) ESMA's decisions imposing fines and periodic penalty payments should be enforceable and their enforcement should be subject to the rules of civil procedure which are in force in the State in the territory of which it is carried out. Rules of civil procedure should not include criminal procedural rules but could include administrative procedural rules.
- (45) In the case of an infringement committed by a Tier 2 CCP, ESMA should be empowered to apply a range of supervisory measures, including requiring a Tier 2 CCP to bring the infringement to an end, and, as a last resort, withdrawing the recognition where a Tier 2 CCP has seriously or repeatedly infringed this Regulation. The supervisory measures should be applied by ESMA taking into account the nature and seriousness of the infringement and should respect the principle of proportionality. Before taking a decision on supervisory measures, ESMA should give the persons subject to the proceedings an opportunity to be heard in order to comply with their rights of defence. When ESMA decides to withdraw recognition, ESMA should limit a potential market disruption by defining an appropriate adaptation period not exceeding 2 years.
- (47) [to be discussed]

- (48) The power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of the further specification of the type of fees, the matters for which fees are due, the amount of the fees to be paid and the manner in which they are to be paid; specifying the conditions under which the criteria are specified to determine if a third-country CCP is, or is likely to become, systemically important for financial stability of the Union or for one or more of its Member States; the further specification of the criteria to be used in its equivalence assessments of third countries; specify how and under what conditions certain requirements shall be complied with by third-country CCPs; further rules of procedure relating to the imposition of fines or periodic penalty payments, including provisions on the rights of defence, time limits, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalty payments or fines; measures to amend Annex IV in order to take account of developments in the financial markets.
- (49) To ensure uniform conditions for the implementation of this Regulation, and in particular with regard to the recognition of third-country CCPs and the equivalence of third countries' legal frameworks, implementing powers should be conferred on the Commission.
- (50) [to be discussed]
- (51) The use by ESMA of its power to recognise a third-country CCP as a Tier 1 or a Tier 2 CCP should be deferred until the criteria to allow the assessment of whether or not a third-country CCP is systemically important, or likely to become, for the financial system of the EU or one or more of its Member States are further specified.
- (52) Regulation (EU) No 1095/2010 and Regulation (EU) No 648/2012 should therefore be amended accordingly.

CHAPTER 4

Relations with third countries

Article 25

Recognition of a third-country CCP

1. A CCP established in a third country may provide clearing services to clearing members or trading venues established in the Union only where that CCP is recognised by ESMA.
2. ESMA, after consulting the authorities referred to in paragraph 3, may recognise a CCP established in a third country that has applied for recognition to provide certain clearing services or activities where:
 - (a) the Commission has adopted an implementing act in accordance with paragraph 6;
 - (b) the CCP is authorised in the relevant third country, and is subject to effective supervision and enforcement ensuring full compliance with the prudential requirements applicable in that third country;
 - (c) cooperation arrangements have been established pursuant to paragraph 7;
 - (d) ~~the CCP is established or authorised in a third country that is considered as having equivalent systems for anti-money laundering and combating the financing of terrorism to those of the Union in accordance with the criteria set out in the common understanding between Member States on third-country equivalence under 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~~ ^(¹) **the CCP is established or authorised in a third country that is not considered, by the Commission in accordance with Directive (EU) 2015/849 of the European Parliament and of the Council (²), as having strategic deficiencies in its national anti-money laundering and counter financing of terrorism regime that poses significant threats to the financial system of the Union;**

¹ OJ L 309, 25.11.2005, p. 15.

² **Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).**

(e) the CCP has not been determined as systemically important or likely to become systemically important (Tier 1 CCP) in accordance with paragraph 2a.

2a. ESMA shall, after consulting the ESRB and the central banks of issue referred to in point (f) of paragraph 3, determine whether a CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States (Tier 2 CCP) by taking into account all of the following criteria:

- (a) the nature, size and complexity of the CCP's business, including the value in aggregate terms and in each Union currency of transactions cleared by the CCP, or the aggregate exposure of the CCP engaged in clearing activities to its clearing members, and to the extent possible their clients and indirect clients established in the Union, including where any of these persons have been designated by Member States as Other Systemically Important Institutions (O-SIIs) pursuant to Article 131(3) of Directive 2013/36/EU;
- (b) the effect that the failure of or a disruption to the CCP would have on financial markets, financial institutions, the broader financial system, or on the financial stability of the Union or of one or more of its Member States;
- (c) the CCP's clearing membership structure;
- (c¹) the availability of alternative clearing services in respective Union currency to clearing members, their clients and indirect clients established in the Union;
- (d) the CCP's relationship, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system to the extent that this is likely to have **an** effect on the financial stability of the Union or ~~of for one or more~~ of its Member States.

The Commission shall adopt a delegated act in accordance with Article 82 to further specify the criteria set out in the first subparagraph within [six months from the entry into force of this Regulation].

2b. Where ESMA determines a CCP to be systemically important or likely to become systemically important (Tier 2 CCP) in accordance with paragraph 2a, it may only recognise that CCP where, in addition to the conditions referred to in Article 25(2)(a), (b), (c) and (d), the following conditions are fulfilled:

- (a) the CCP complies, at the moment of recognition and thereafter on an ongoing basis, with the requirements set out in Article 16 and in Titles IV and V. With regard to the CCP's compliance with Articles 41, 44, 46, 50 and 54 ESMA shall consult the central banks of issue referred to in point (f) of paragraph 3 in accordance with the procedure set out in the second subparagraph of Article 25bb (5). ESMA shall take into account, in accordance with Article 25a(2), the extent to which a CCP's compliance with those requirements is satisfied by the CCP's compliance with the comparable requirements applicable in the third country;
- (b) the central banks of issue referred to in point (f) of paragraph 3 have provided ESMA with written confirmation, within 150 working days of the submission of a complete application or according to review in paragraph 5, that the CCP complies with the following requirements that those central banks of issue may have imposed in the carrying out of their monetary policy tasks:
 - (i) to submit any information which the central bank of issue referred to in point (f) of paragraph 3 may require upon its reasoned request;
 - (ii) to fully and duly cooperate with the central bank of issue referred to in point (f) of paragraph 3 in the context of the assessment of the CCP's resilience to adverse market conditions carried out in accordance with Article 25b(2);
 - (iii) to open, or notify the intent to open in accordance with relevant access criteria and requirements for use of an overnight deposit account with the central bank of issue.

(iv) ~~[requirements in exceptional situations need to be discussed]~~

[to comply with requirements, applied in exceptional situations by the central bank of issue within its competences to address temporary systemic liquidity risks affecting the transmission of monetary policy or the smooth functioning of payment systems and relating to liquidity risk control, margin requirements, collateral, settlement arrangements, or interoperability arrangements. These temporary requirements may include, in particular enhancements to the liquidity risk management of a CCP, such as an increase in the liquidity buffer, ~~an~~ increase in the frequency of the collection of intraday margins, and limits to cross-currency exposures, or specific modalities for depositing cash with the central bank and settling payments in the currency of the central bank **with a view to preserving the financial soundness and safety of CCPs and the financial stability of the Union or one of its Member States and to promoting consistency with the requirements of this regulation.** ~~The temporary requirements shall [Option 1: have due regard to preserving the soundness and financial safety of the CCP or Option 2: avoid duplication and promote consistency with the requirements of this regulation and preserve the safety and soundness of the CCP].~~

The application of these requirements shall be a condition for recognition for a limited period of time of up to 6 months. Where at the end of that period the central bank of issue considers that the exceptional situation persists ~~[Option 1: the central bank of issue may continue to apply those requirements for an additional period not exceeding 6 months or Option 2: the application of the requirements for recognition purposes may be extended to one **once to** additional period not exceeding 6 months].~~

Before imposing or extending ~~these~~ **those** requirements the central bank of issue shall ~~[Option 1: inform ESMA, the other central banks of issue referred to point (f) of paragraph 3 and the members of the college for third-country CCPs and provide them with an explanation of how the requirements it intends to impose preserve the soundness and financial safety of the CCPs~~ **and the financial stability of the Union and or one of its Member States and with a** justification of why the requirements are necessary and proportionate to ensure the transmission of monetary policy or the smooth functioning of payment systems in relation to the currency it issues ~~or Option 2: Option 1 and consult. ESMA and the other central banks of issue referred to point (f) of paragraph 3. ESMA and each central bank of issue may~~ **shall submit** ~~respond~~ to the central bank of issue **an opinion**'s request for ~~consultation~~ within ~~{10}~~ working days as of the transmission of the draft requirement or draft extension. In emergency situations, the aforementioned period shall not exceed ~~{24}~~ hours. **In its opinion ESMA shall consider in particular the effects of the requirements imposed on the soundness and financial safety of the CCP. The other central banks of issue referred to in point (f) of paragraph 3 also may submit an opinion within the same deadline.**

~~During the period in which temporary requirements applicable in exceptional situations are imposed~~ **The** central bank of issue ~~and ESMA~~ shall cooperate and share information with ESMA and the other central banks of issue referred to point (f) of paragraph (3) in relation to the temporary requirements applicable in exceptional situations on a continuous basis, in particular in relation to the assessment of systemic liquidity risks and the effects of the imposed requirements on the soundness and financial safety of the CCP.

Where a central bank of issue referred to in point (f) of Article 25(3) imposes any of the requirements referred to in the first subparagraph after a Tier 2 CCP has been recognised, any such requirement shall be considered as a condition for recognition and the central banks of issue shall provide ESMA with written confirmation, within ~~{30 20}~~ working days, that the CCP complies with the requirement 1³.

Where a central bank of issue has not provided a written confirmation to ESMA within the deadline, ESMA may consider this requirement to be fulfilled;

- (c) the CCP has provided ESMA with its unconditional written consent, signed by the legal representative of the CCP, to provide within 72 hours after service of a request by ESMA any documents, records, information and data held by such CCP at any time, and that ESMA may access any of the CCP's business premises, as well as a reasoned legal opinion by an independent legal expert confirming that the consent provided is valid and enforceable under the relevant applicable laws;
- (d) the CCP has put in place all necessary measures and procedures that ensure the effective compliance with the requirements laid down in points (a) and (c);
- (e) the Commission has not adopted an implementing act in accordance with paragraph 2c.

2c. As a measure of last resort, ESMA, after consulting the ESRB, and in agreement with the central banks of issue referred to in point (f) of paragraph 3 on aspects which relate to the currency they issue in accordance with the third subparagraph of Article 25bb(5), and commensurate with the degree of systemic importance of the CCP in accordance with paragraph 2a, may, on the basis of a fully reasoned assessment, conclude that a CCP or some of its clearing services are of such substantial systemic importance that the CCP should not be recognised. In its assessment ESMA shall:

³ **Since the text under (iv) is closely linked to the competences granted to the ECB in the Treaties and E(S)CB Statute, it will need to be revisited in the course of the negotiations of the ECB recommendation to amend Article 22 of the E(S)CB Statute.**

- (a) explain that compliance with the conditions set out in paragraph 2b does not sufficiently address the financial stability risk for the Union or for one ~~or more~~ of its Member States;
- (b) provide a quantitative technical assessment of the costs and benefits and consequences of a decision not to recognise the CCP.

On the basis of its assessment, ESMA shall recommend that the Commission adopt an implementing act confirming that that CCP or some of its clearing services should not be recognised in accordance with paragraph 2b.

After submission of the recommendation referred to in the second subparagraph, the Commission may adopt an implementing act specifying:

- (a) that following the adaptation period specified by the Commission in accordance with point (b), that third country CCP shall not provide some or all of its clearing services to clearing members and trading venues established in the Union unless it is authorised to do so in accordance with Article 14.
- (b) an appropriate adaptation period for the CCP, its clearing members and their clients. The adaptation period shall not exceed 2 years, and may be extended once by an additional 6 months;
- (c) the conditions under which that CCP may be temporarily recognised during the adaptation period referred to in point (b);
- (d) any measures that shall be taken during the adaptation period, in order to limit the potential costs to clearing members and their clients, in particular those established in the Union.

In specifying the services and adaptation period referred to in points (a) and (b) of the third subparagraph, the Commission shall consider:

- (a) the characteristics of the services offered by the CCP and their substitutability;
- (b) based on the legal and economic consequences whether and to what extent outstanding cleared transactions shall be included within the scope of the implementing act;

- (c) the potential cost implications to clearing members and their clients, in particular those established in the Union.

This implementing act shall be adopted in accordance with the examination procedure referred to in Article 86(2).

3. When assessing whether the conditions referred to in paragraph 2 (a), (b), (c) and (d) are met, ESMA shall consult:
 - (a) the competent authority of a Member State in which the CCP provides or intends to provide clearing services and which has been selected by the CCP;
 - (b) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States which make or are anticipated by the CCP to make the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period;
 - (c) the competent authorities responsible for the supervision of trading venues located in the Union, served or to be served by the CCP;
 - (d) the competent authorities supervising CCPs established in the Union with which interoperability arrangements have been established;
 - (e) the relevant members of the ESCB of the Member States in which the CCP provides or intends to provide clearing services and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established;
 - (f) the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the CCP.

4. The CCP referred to in paragraph 1 shall submit its application to ESMA.

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

The recognition decision shall be based on the conditions set out in paragraph 2 for Tier 1 CCPs and in paragraphs 2 and 2b for Tier 2 CCPs and shall be independent of any assessment as the basis for the equivalence decision as referred to in Article 13(3).

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

ESMA shall publish on its website a list of the CCPs recognised in accordance with this Regulation.

5. ESMA shall, after consulting the authorities and entities referred to in paragraph 3, review the recognition of a CCP established in a third country where that CCP has extended the range of its activities and services in the Union and in any case at least every two years. That review shall be conducted in accordance with paragraphs 2, 2a, 2b, 3 and 4.

Where, following the review referred to in the first subparagraph, ESMA determines that a third country CCP that has been recognised as Tier 1 CCP should be recognised as a Tier 2 CCP, ESMA shall set an appropriate adaptation period which shall not exceed 18 months within which the CCP must comply with the requirements referred to in paragraph (2b). ESMA may extend that adaptation period up to an additional 6 months upon the reasoned request of the CCP or competent authority responsible for the supervision of the clearing members, where such extension is justified by exceptional circumstances and implications to the clearing members established in the Union.

6. The Commission may adopt an implementing act under Article 5 of Regulation (EU) No 182/2011, determining the following:
- (a) that the legal and supervisory arrangements of a third country ensure that CCPs authorised in that third country comply on an ongoing basis with legally binding requirements which are equivalent to the requirements laid down in Title IV of this Regulation;
 - (b) that those CCPs are subject to effective supervision and enforcement in that third country on an ongoing basis;
 - (c) that the legal framework of that third country provides for an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes;

The Commission may subject the application of the implementing act referred to in the first subparagraph to the effective fulfilment of any requirement set out therein by a third country on an ongoing basis and to the ability by ESMA to effectively exercise its responsibilities in relation to third-country CCPs recognised under paragraphs 2 and 2b or in relation to monitoring referred to in paragraph 6b, including by way of agreeing and applying the cooperation arrangements referred to in paragraph 7.

- 6a. The Commission may adopt a delegated act in accordance with Article 82 to further specify the criteria referred to in points (a), (b) and (c) of paragraph 6.
- 6b. ESMA shall monitor the regulatory and supervisory developments in third countries for which implementing acts have been adopted pursuant to paragraph 6.

Where ESMA identifies any regulatory or supervisory development in those third countries that may impact the financial stability of the Union or of one ~~or more~~ of its Member States, it shall inform the Commission, ~~and~~ **and** the members of the ~~college for~~ **college** referred to in Article 25ba confidentially and without delay.

ESMA shall submit a confidential report to the Commission and the ~~competent authorities referred to in the second subparagraph~~ **members of the third country CCPs college referred to in Article 25ba** on the regulatory and supervisory developments in the third countries referred to in the first subparagraph on an annual basis.

7. ESMA shall establish effective cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent to this Regulation in accordance with paragraph 6. Such arrangements shall specify at least:
- (a) the mechanism for the exchange of information between ESMA, the central banks of issue referred to in point (f) of paragraph 3 and the competent authorities of the third countries concerned, including access to all information requested by ESMA regarding CCPs authorised in third countries;
 - (b) the mechanism for prompt notification to ESMA where a third-country competent authority deems a CCP it is supervising to be in breach of the conditions of its authorisation or of other law to which it is subject;
 - (c) the mechanism for prompt notification to ESMA by a third- country competent authority where a CCP it is supervising has been granted the right to provide clearing services to clearing members or clients established in the Union;
 - (d) the procedures concerning the coordination of supervisory activities, including the agreement of third-country authorities to allow investigations and on-site inspections in accordance with Articles 25d and 25e respectively.
 - (e) the procedures necessary for the effective monitoring of regulatory and supervisory developments in a third country;.
 - (f) the procedures for third country authorities concerning the effective enforcement of decisions adopted by ESMA according to Articles 25b, 25c, 25d, 25e, 25f, 25g, 25h, 25i, 25j, 25m and 25n.
 - (g) the procedures for third country authorities to inform ESMA, the college for third country CCPs referred to in Article 25ba, the central banks of issue referred to in point (f) of paragraph 3, without undue delay of any emergency situations relating to the CCP, including developments in financial markets, which may have an adverse effect on market liquidity and the stability of the financial system, in the Union or one of its Member States, and the procedures and contingency plans to address such situations.

8. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the information that the applicant CCP shall provide ESMA in its application for recognition.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

Article 25a

Comparable compliance

1. The CCP referred to in Article 25(2b)(a) may submit a reasoned request that ESMA assesses its comparable compliance with the requirements referred to in Article 25(2b)(a) and set out in Article 16 and Titles IV and V.
2. The request referred to in paragraph 1 shall provide the factual basis for a finding of comparability and the reasons why compliance with the requirements applicable in the third country satisfies the requirements set out in Article 16 and Titles IV and V.
3. The Commission, in order to ensure that the assessment referred to in paragraph 1 effectively reflects the regulatory objectives of the requirements set out in Article 16 and Titles IV and V and the Union's interests as a whole, shall adopt a delegated act to specify the following:
 - (a) the minimum elements to be assessed for the purposes of paragraph 1;
 - (b) the modalities and conditions to carry out the assessment.

The Commission shall adopt the delegated act referred to in the first subparagraph in accordance with Article 82.

Article 25b

Ongoing compliance with the conditions for recognition

1. ESMA shall be responsible for carrying out the duties resulting from this Regulation for the supervision on an ongoing basis of the compliance of recognised Tier 2 CCPs with the requirements referred to in Article 25(2b)(a). With regard to decisions pursuant to Articles 41, 44, 46, 50 and 54 ESMA shall consult the central banks of issue referred to in point (f) of Article 25(3) in accordance with the second subparagraph of Article 25bb (5).

ESMA shall require confirmation from each Tier 2 CCP at least on a yearly basis that the requirements referred to in points (a), (c) and (d) of Article 25(2b) continue to be fulfilled.

Where a central bank of issue referred to point (f) of Article 25(3) considers that a Tier 2 CCP no longer fulfils the condition referred to in Article 25(2b)(b), it shall immediately notify ESMA.

2. ESMA shall carry out assessments of the resilience of recognised CCPs to adverse market developments in accordance with Article 32(2) of Regulation (EU) No 1095/2010, in coordination with the assessments referred to in point b of Article 21(6). Central banks of issue referred to in point (f) of Article 25(3) may contribute to such assessments in the carrying out of their monetary policy tasks.

Article 25ba

ESMA third country CCPs College

1. ESMA shall establish a college for third country CCPs to facilitate the sharing of information in accordance with Article 25bb (6) of this Regulation.
2. The college shall consist of:
 - (a) the Chair of the CCP Supervisory Committee, who shall chair the college;
 - (b) the competent authorities responsible for supervision of CCPs designated by the Member States pursuant to Article 22; In Member States where more than one authority has been designated as competent in accordance with Article 22, those authorities shall agree on a common representative.

- (c) the competent authorities responsible for the supervision of the clearing members established in the Union;
 - (d) the competent authorities responsible for the supervision of trading venues established in the Union, served or to be served by the CCPs;
 - (e) the competent authorities supervising central securities depositories established in the Union to which the CCPs are linked or intends to be linked;
 - (f) the members of the ESCB.
3. The college may request the CCP Supervisory Committee to discuss specific matters in relation to a CCP established in a third country. The CCP Supervisory Committee shall duly consider such requests and provide an appropriate response.
4. The establishment and functioning of the college shall be based on a written agreement between all its members.

Article 25bb

ESMA third country CCPs Supervisory Committee

1. ESMA shall establish a permanent internal committee for third country CCPs pursuant to Article 41 of Regulation (EU) No 1095/2010 for the purpose of preparing the decisions and carrying out the tasks entrusted to ESMA in Articles 25, 25a, 25b, 25c, 25d, 25e, 25f, 25g, 25h, 25i, 25j, 25m and 25n of this Regulation.

The CCP Supervisory Committee shall submit to the Board of Supervisors all complete draft decisions for adoption in accordance with Article 25bc.

2. The CCP Supervisory Committee shall be composed of:
- (a) the Chair, appointed in accordance with paragraph 4, who shall chair the committee and be voting;
 - (b) the competent authorities referred to in Article 22 of this Regulation of [seven] Member States appointed in accordance with paragraph 3, who shall be voting;

(c) in respect of the preparation of all decisions pertaining to the Articles referred to in paragraph 1 in relation to Tier 2 CCPs and to Article 25 (2a), for which the CCP Supervisory Committee convenes, the central banks of issue referred in point (f) of Article 25 (3) that have requested membership of the CCP Supervisory Committee. Membership shall be granted upon a one-off written request addressed to the Chair. Those central banks of issues will be non-voting members of the Supervisory committee.

3. [The competent authorities referred to in point (b) of paragraph 2 shall be selected from the Member States that fulfil at least two of the following conditions:

- (a) any of their competent authorities referred to in Article 18(2) is member of at least two colleges established according to Article 18;
- (b) a CCP has been authorised to clear derivatives at least one year before the establishment of the Supervisory Committee or the review of its composition;
- (c) a CCP authorised in that Member State provides clearing services to trading venues established in more than one Member State.

Where more than ~~seven~~ Member States fulfil at least two of the conditions referred to in the first subparagraph, ESMA shall appoint as members to the Supervisory Committee the competent authorities of the seven Member States that have the largest overall exposure. The overall exposure is defined as the yearly average of the total daily amount of initial margins and default fund contributions, converted in euro, held by all CCPs authorised in each Member State in the year preceding the establishment of the Committee or the review of its composition.

Where more than ~~five~~ of the Member States that have the largest overall exposure are euro area Member States, ESMA shall appoint as members of the Supervisory Committee:

- (a) the competent authorities from the five-euro area Member States with the largest overall exposure; and

- (b) the competent authorities from two non-euro area Member States with the largest overall exposure.

In Member States where more than one authority has been designated as competent in accordance with Article 22, those authorities shall agree on a common representative.

The composition of the Committee shall be reviewed every 5 years.]

4. The Chair of the CCP Supervisory Committee shall be a full-time, independent professional. The Chair shall be appointed on the basis of merit, skills, knowledge of clearing, post-trading, prudential supervision and financial matters, as well as of experience relevant to CCP supervision and regulation.

The Chair shall be chosen on the basis of an open selection procedure organised by the Commission, which shall respect the principles of gender balance, experience and qualification.

The Chair shall be appointed by the Board of Supervisors [in accordance with Article 44 of Regulation (EU) 1095/2010].

Where the Chair of the CCP Supervisory Committee no longer fulfils the conditions required for the performance of his or her duties as referred to in the first subparagraph or has been found guilty of serious misconduct, the Board of Supervisors shall adopt a decision to remove him or her from office.

The term of office of the Chair of the CCP Supervisory Committee shall be five years and may be extended once.

By way of derogation from the previous subparagraph, the term of office of the first Chair appointed following the entry into force of this Regulation shall be three years and may be extended once for a period of five years.

The Chair of the CCP Supervisory Committee shall not hold any office at national, Union, or international level. The Chair shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body.

5. Decisions of the CCP Supervisory Committee shall be taken by a simple majority of its members. Each member shall have one vote. In case of a draw, the Chair shall have the casting vote.

With regard to decisions pursuant to Articles 41, 44, 46, 50 and 54 in relation to Tier 2 CCPs the CCP Supervisory Committee shall consult the central banks of issue referred to in point (f) of Article 25 (3). Each central banks of issue may respond to the CCP Supervisory Committee's request for consultation within 10 working days as of the transmission of the draft decision. In emergency situations, the aforementioned period shall not exceed 24 hours. Where a central bank of issue proposes amendments or objects to a CCP Supervisory committee draft decisions pursuant to Articles 41, 44, 46, 50 and 54, it shall provide full and detailed reasons, in writing. Upon conclusion of the period for consultation, the CCP Supervisory Committee duly consider the amendments proposed by the central banks of issues referred to in point (f) of Article 25 (3).

Where the CCP Supervisory Committee does not reflect in its draft decision the amendments proposed by a central bank of issue, the CCP Supervisory committee shall inform that central bank of issue in writing stating its full reasons for not taking into account the amendments proposed by a central bank of issue, providing an explanation for deviations from those amendments. The CCP Supervisory Committee shall submit to the Board of Supervisors the amendments proposed by central banks of issue referred to in point (f) of Article 25 (3) and its explanations for not taking them into account) together with its draft decision to be submitted to the Board of Supervisors for adoption.

With regard to decisions pursuant to Articles 25 (2c), the CCP Supervisory Committee shall seek the agreement of the central banks of issue referred to in point (f) of Article 25 (3) on those aspects of the draft decision which relate to the currency they issue. The agreement of each central bank of issue shall be deemed to be given, unless the central bank of issue proposes amendments or object within 10 working days as of the transmission of the draft decision. Where the central bank of issue proposes amendments or objects to a draft decision, it shall provide full and detailed reasons, in writing. Where a central bank of issue referred in point (f) of Article 25 (3) proposes amendments with respect to those aspects of the draft decision pursuant to Article 25 (2c), which relate to the currency it issues, the CCP Supervisory Committee may only adopt those aspects as amended. Where a central bank of issue objects with respect to those aspects of the draft decision pursuant to Article 25 (2c), which relate to the currency it issues, the CCP Supervisory Committee shall not adopt those aspects.

6. The CCP Supervisory Committee shall inform the college of the complete draft decisions it submits to the Board of Supervisors pursuant to paragraph 1.
7. For the purposes of this Regulation, ESMA shall ensure structural separation between the CCP Supervisory Committee and other functions referred to in Regulation (EU) No 1095/2010.

Article 25bc

Decision-making at the Board of Supervisors

Where the CCP Supervisory Committee submits draft decisions to the Board of Supervisors pursuant to Articles 25(2), 25(2a), 25(2b), 25(2c), 25(5), 25m, 85 (6), 89 (3b) and additionally only for Tier 2 CCPs in accordance with Articles 41, 44, 46, 50 and 54, the Board of Supervisors shall decide in accordance with Article 44 of Regulation (EU) No 1095/2010 within 10 working days.

Where the CCP Supervisory Committee submits draft decisions to the Board of Supervisors pursuant to Articles other than those referred to in the first subparagraph, those draft decisions the Board of Supervisors shall decide in accordance with Article 44 of Regulation (EU) No 1095/2010 within 3 working days.

In emergency situations the aforementioned period shall not exceed 24 hours.

Article 25c

Request for information

1. ESMA may by simple request or by decision require recognised CCPs and related third parties to whom those CCPs have outsourced operational functions or activities to provide all necessary information to enable ESMA to carry out its duties under this Regulation.
2. When sending a simple request for information under paragraph 1, ESMA shall indicate all of the following:
 - (a) the reference to this Article as the legal basis of the request;
 - (b) the purpose of the request;
 - (c) the information required;
 - (d) the time limit to provide the information;
 - (e) inform the person from whom the information is requested that there is no obligation to provide the information but that in case of a voluntary reply to the request the information provided must not be incorrect or misleading;
 - (f) the fine provided for in Article 25g in conjunction with point (a) of Section V of Annex III, where the answers to questions asked are incorrect or misleading.
3. When requiring that information is provided under paragraph 1 by decision, ESMA shall indicate all of the following:
 - (a) the reference to this Article as the legal basis of the request;
 - (b) the purpose of the request;
 - (c) the information required;
 - (d) the time limit to provide the information;
 - (e) the periodic penalty payments provided for in Article 25h where the production of the required information is incomplete;

- (f) the fine provided for in Article 25g in conjunction with point (a) of Section V of Annex III, where the answers to questions asked are incorrect or misleading; and
 - (g) the right to appeal the decision before ESMA's Board of Appeal and to have the decision reviewed by the Court of Justice of the European Union ('Court of Justice') in accordance with Articles 60 and 61 of Regulation (EU) No 1095/2010.
4. The persons referred to in paragraph 1 or their representatives and, in case of persons or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
5. ESMA shall, without delay, send a copy of the simple request or of its decision to the relevant third-country competent authority where the persons referred to in paragraph 1 concerned by the request for information are domiciled or established.

Article 25d

General investigations

1. In order to carry out its duties under this Regulation, ESMA may conduct necessary investigations of Tier 2 CCPs and related third parties to whom those CCPs have outsourced operational functions, services or activities. To that end, the officials and other persons authorised by ESMA shall be empowered to:
- (a) examine any records, data, procedures and any other material relevant to the execution of its tasks irrespective of the medium on which they are stored;
 - (b) take or obtain certified copies of or extracts from such records, data, procedures and other material;
 - (c) summon and ask Tier 2 CCPs or their representatives or staff for oral or written explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers;
 - (d) interview any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation;

(e) request records of telephone and data traffic.

The members of the ~~college for~~ third country CCPs college referred to in Article 25ba shall be informed without undue delay of any findings that may be relevant for execution of their tasks.

2. The officials and other persons authorised by ESMA for the purposes of the investigations referred to in paragraph 1 shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the investigation. That authorisation shall also indicate the periodic penalty payments provided for in Article 25h where the production of the required records, data, procedures or any other material, or the answers to questions asked to Tier 2 CCPs are not provided or are incomplete, and the fines provided for in Article 25g in conjunction with point (b) of Section V of Annex III, where the answers to questions asked to Tier 2 CCPs are incorrect or misleading.
3. Tier 2 CCPs are required to submit to investigations launched on the basis of a decision of ESMA. The decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 25h, the legal remedies available under Regulation (EU) No 1095/2010 and the right to have the decision reviewed by the Court of Justice.
4. Prior to notifying a Tier 2 CCP of an investigation, ESMA shall inform the relevant third-country competent authority where the investigation is to be carried out of the investigation and of the identity of the authorised persons. Officials of the third-country competent authority concerned may, upon the request of ESMA, assist those authorised persons in carrying out their duties. Officials of the third-country competent authority concerned may also attend the investigations.

On-site inspections

1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections at any business premises of Tier 2 CCPs and related third parties to whom those CCPs have outsourced operational functions, services or activities.

The central banks of issue of the financial instruments cleared by the CCP may submit a request to ESMA to participate in such on-site inspections where relevant for the carrying out of their monetary policy tasks.

The college for third country CCPs college referred to in Article 25ba shall be informed without undue delay of any findings that may be relevant for the execution of their tasks.

2. The officials and other persons authorised by ESMA to conduct an on-site inspection may enter any business premises or land of the legal persons subject to an investigation decision adopted by ESMA and shall have all the powers stipulated in Article 25d(1). They shall also have the power to seal any business premises and books or records for the period of, and to the extent necessary for, the inspection.
3. In sufficient time before the inspection, ESMA shall give notice of the inspection to the relevant third-country competent authority where the inspection is to be conducted. Where the proper conduct and efficiency of the inspection so require, ESMA, after informing the relevant third-country competent authority, may carry out the on-site inspection without prior notice to the CCP.

The officials and other persons authorised by ESMA to conduct an on-site inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the periodic penalty payments provided for in Article 25h where the persons concerned do not submit to the inspection.

4. Tier 2 CCPs shall submit to on-site inspections ordered by decision of ESMA. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the periodic penalty payments provided for in Article 25h, the legal remedies available under Regulation (EU) No 1095/2010 as well as the right to have the decision reviewed by the Court of Justice.

5. Officials of, as well as those authorised or appointed by, the competent authority of the third country where the inspection is to be conducted may, at the request of ESMA, actively assist the officials and other persons authorised by ESMA. Officials of the third-country competent authority may also attend the on-site inspections.
6. ESMA may also request third-country competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in this Article and in Article 25d(1) on its behalf.
7. Where the officials and other accompanying persons authorised by ESMA find that a person opposes an inspection ordered pursuant to this Article, the third-country competent authority concerned may afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, to enable them to conduct their on-site inspection.

Article 25f

Procedural rules for taking supervisory measures and imposing fines

1. Where, in carrying out its duties under this Regulation, ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III, ESMA shall appoint an independent investigation officer within ESMA to investigate the matter. The appointed officer shall not be involved or have been directly or indirectly involved in the recognition or supervision process of the CCP concerned and shall perform his functions independently from ESMA.
2. The investigation officer shall investigate the alleged infringements, taking into account any comments submitted by the persons who are subject to the investigations, and shall submit a complete file with his findings to ESMA.

In order to carry out his tasks, the investigation officer may exercise the power to request information in accordance with Article 25c and to conduct investigations and on-site inspections in accordance with Articles 25d and 25e. When using those powers, the investigation officer shall comply with Article 25c(4).

Where carrying out his tasks, the investigation officer shall have access to all documents and information gathered by ESMA in its activities.

3. Upon completion of his investigation and before submitting the file with his findings to ESMA, the investigation officer shall give the persons subject to the investigations the opportunity to be heard on the matters being investigated. The investigation officer shall base his findings only on facts on which the persons concerned have had the opportunity to comment.

The rights of the defence of the persons concerned shall be fully respected during investigations under this Article.

4. When submitting the file with his findings to ESMA, the investigation officer shall notify that fact to the persons who are subject to the investigations. The persons subject to the investigations shall be entitled to have access to the file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information affecting third parties.

5. On the basis of the file containing the investigation officer's findings and, when requested by the persons concerned, after having heard the persons subject to the investigations in accordance with Article 25i, ESMA shall decide if one or more of the infringements listed in Annex III has been committed by the persons who have been subject to the investigations and, in such a case, shall take a supervisory measure in accordance with Article 25n and impose a fine in accordance with Article 25g.

6. The investigation officer shall not participate in ESMA's deliberations or in any other way intervene in ESMA's decision-making process.

7. The Commission shall adopt delegated acts in accordance with Article 82 to specify further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of penalties.

8. ESMA shall refer matters for criminal prosecution to the appropriate authorities for investigation and possible criminal prosecution where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical fact or facts which are substantially the same has already acquired the force of *res judicata* as the result of criminal proceedings under national law.

Article 25g

Fines

1. Where, in accordance with Article 25f(5), ESMA finds that a CCP has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2 of this Article.

An infringement by a CCP shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the CCP or its senior management acted deliberately to commit the infringement.

2. The basic amounts of the fines referred to in paragraph 1 shall be up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10 % of the total annual turnover, as defined in relevant Union law, of a legal person in the preceding business year.
3. The basic amounts set out in paragraph 2 shall be adjusted, if need be, by taking into account aggravating or mitigating factors in accordance with the relevant coefficients set out in Annex IV.

The relevant aggravating coefficients shall be applied one by one to the basic amount. If more than one aggravating coefficient is applicable, the difference between the basic amount and the amount resulting from the application of each individual aggravating coefficient shall be added to the basic amount.

The relevant mitigating coefficients shall be applied one by one to the basic amount. If more than one mitigating coefficient is applicable, the difference between the basic amount and the amount resulting from the application of each individual mitigating coefficient shall be subtracted from the basic amount.

4. Notwithstanding paragraphs 2 and 3, the amount of the fine shall not exceed 20 % of the annual turnover of the CCP concerned in the preceding business year but, where the CCP has directly or indirectly benefited financially from the infringement, the amount of the fine shall be at least equal to that benefit.

Where an act or omission of a CCP constitutes more than one infringement listed in Annex III, only the higher fine calculated in accordance with paragraphs 2 and 3 and relating to one of those infringements shall apply.

Article 25h

Periodic penalty payments

1. ESMA shall, by decision, impose periodic penalty payments in order to compel:
 - (a) a Tier 2 CCP to put an end to an infringement in accordance with a decision taken pursuant to Article 25n(1)(a);
 - (b) a person referred to in Article 25c(1) to supply complete information which has been requested by a decision pursuant to Article 25c;
 - (c) a Tier 2 CCP:
 - (i) to submit to an investigation and in particular to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by a decision pursuant to Article 25d; or
 - (ii) to submit to an on-site inspection ordered by a decision taken pursuant to Article 25e.
2. A periodic penalty payment shall be effective and proportionate. The periodic penalty payment shall be imposed for each day of delay.

3. Notwithstanding paragraph 2, the amount of the periodic penalty payments shall be 3 % of the average daily turnover in the preceding business year, or, in the case of natural persons, 2 % of the average daily income in the preceding calendar year. It shall be calculated from the date stipulated in the decision imposing the periodic penalty payment.
4. A periodic penalty payment shall be imposed for a maximum period of six months following the notification of ESMA's decision. Following the end of the period, ESMA shall review the measure.

Article 25i

Hearing of the persons concerned

1. Before taking any decision on a fine or periodic penalty payment under Articles 25g and 25h, ESMA shall give the persons subject to the proceedings the opportunity to be heard on its findings. ESMA shall base its decisions only on findings on which the persons subject to the proceedings have had an opportunity to comment.
2. The rights of the defence of the persons subject to the proceedings shall be fully respected in the proceedings. They shall be entitled to have access to ESMA's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or ESMA's internal preparatory documents.

Article 25j

Disclosure, nature, enforcement and allocation of fines and periodic penalty payments

1. ESMA shall disclose to the public every fine and periodic penalty payment that has been imposed pursuant to Articles 25g and 25h unless such disclosure to the public would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. Such disclosure shall not contain personal data within the meaning of Regulation (EC) No 45/2001.
2. Fines and periodic penalty payments imposed pursuant to Articles 25g and 25h shall be of an administrative nature.

3. Where ESMA decides to impose no fines or penalty payments, it shall inform the European Parliament, the Council, the Commission, and the relevant third-country competent authorities accordingly and shall set out the reasons for its decision.

4. Fines and periodic penalty payments imposed pursuant to Articles 25g and 25h shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the Member State or third-country in which it is carried out.

5. The amounts of the fines and periodic penalty payments shall be allocated to the general budget of the European Union.

Article 25k

Review by the Court of Justice

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

Article 25l

Amendments to Annex IV

In order to take account of developments on financial markets the Commission shall be empowered to adopt delegated acts in accordance with Article 82 concerning measures to amend Annex IV.

Article 25m

Withdrawal of recognition

1. Without prejudice to Article 25n, and subject to the following paragraphs, ESMA after consulting the authorities and entities referred to in ~~paragraph 3~~ of Article 25 **(3)**, ~~may~~ **shall** withdraw a recognition decision adopted in accordance with Article 25 where the CCP concerned:

- (a) has not made use of the recognition within 6 months, expressly renounces the ~~authorisation~~ **recognition** or has ceased to engage in business for more than six months;
- (b) has obtained the recognition through false statements or by any other irregular means;
- (c) **has seriously and systematically infringed any of the conditions for recognition pursuant to article 25 (2b) or** is no longer in compliance with **any of these conditions for recognition pursuant to Article 25(2b)** **and has not taken the remedial action requested by ESMA within a set timeframe of up to a maximum of 6 months;**
- (d) the implementing act referred to in Article 25(6) has been withdrawn or suspended, or any of the conditions attached to it is no longer satisfied.

ESMA may limit the withdrawal of the recognition to a particular service, activity or class of financial instruments.

When determining the date of entry into effect of the decision to withdraw the recognition ESMA shall endeavour to minimise potential market disruption and provide for an appropriate adaptation period which shall not exceed 2 years.

2. **Before withdrawing the recognition according to point (c) of the first paragraph, ESMA shall take into account the possibility to apply measures under Article 25n paragraph 1, points (a) to (c).**

Where ESMA determines that remedial action within the set timeframe of up to a maximum of 6 months under point (c) of the first paragraph has not been taken or that the action taken is not appropriate and after consulting the authorities referred to in Article 25 (3), ESMA shall withdraw the recognition decision.

Where ESMA considers that the criterion referred to in point (c) of the first paragraph is fulfilled in relation to a CCP, **decides to withdraw the recognition of a third country CCP**, ESMA shall inform that CCP and the relevant third-country authorities prior to withdrawing a recognition decision. ~~and request that appropriate action is taken within set timeframe of up to a maximum of 6 months to remedy the situation.~~

~~Where ESMA determines that remedial action within the set timeframe has not been taken or that the action taken is not appropriate or that CCP has seriously and systemically infringed the conditions in Article 25 (2b) in consultation with the authorities referred to in paragraph 3 **Article 25**, it **ESMA** shall withdraw the recognition decision.~~

3. ESMA shall, without undue delay, notify the relevant third-country competent authority of a decision to withdraw the recognition of a recognised CCP.
4. Any of the authorities referred to in Article 25(3) which consider that one of the conditions referred to in paragraph 1 has been met may request ESMA to examine whether the conditions for the withdrawal of recognition of a recognised CCP concerned are met. Where ESMA decides not to withdraw the registration of the recognised CCP concerned, it shall provide full reasons to the requesting authority.

Article 25n

Supervisory measures

1. Where, in accordance with Article 25f(5), ESMA finds that a Tier 2 CCP has committed one of the infringements listed in Annex III, it shall take one or more of the following decisions:
 - (a) require the CCP to bring the infringement to an end;
 - (b) impose fines under Article 25g;
 - (c) issue public notices;
 - (d) withdraw the recognition of a CCP under Article 25m.
2. When taking the decisions referred to in paragraph 1, ESMA shall take into account the nature and seriousness of the infringement, having regard to the following criteria:

- (a) the duration and frequency of the infringement;
 - (b) whether the infringement has revealed serious or systemic weaknesses in the CCP's procedures or in its management systems or internal controls;
 - (c) whether financial crime has been occasioned, facilitated or otherwise attributable to the infringement;
 - (d) whether the infringement has been committed intentionally or negligently.
3. Without undue delay, ESMA shall notify any decision adopted pursuant to paragraph 1 to the CCP concerned, and shall communicate it to the relevant third-country competent authorities and the Commission. It shall publicly disclose any such decision on its website within 10 working days from the date when it was adopted.

When making public its decision as referred to in the first subparagraph, ESMA shall also make public the right of the CCP concerned to appeal the decision, the fact, where relevant, that such an appeal has been lodged, specifying that such an appeal does not have suspensive effect, and the fact that it is possible for ESMA's Board of Appeal to suspend the application of the contested decision in accordance with Article 60(3) of Regulation (EU) No 1095/2010.”

[...]

TITLE IX
TRANSITIONAL AND FINAL PROVISIONS

Article 85

Reports and reviews

- “6. ESMA shall, in cooperation with the ESRB and in agreement, in accordance with the third subparagraph of Article 25bb(5), with the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the third country CCP to which the implementing act referred to in the third subparagraph of Article 25(2c) is addressed, submit a report to the Commission on the application of the provisions of that implementing act, in particular assessing whether the financial stability risk for the Union or for one or more of its Member States is sufficiently mitigated. ESMA shall submit its report to the Commission within 12 months of the adaptation period determined according to point (b) of the third subparagraph of Article 25(2c).

Within 12 months of transmission of the report referred to in the first subparagraph, the Commission shall prepare a report on the application of the provisions of that implementing act. The Commission shall submit its report to the European Parliament and the Council, together with any appropriate proposals.

Article 89

Transitional provisions

- “3a. ESMA shall not exercise its powers pursuant to paragraph 2a, 2b and 2c of Article 25 until the entry into force of the delegated act referred to in the second subparagraph of paragraph 2a of Article 25.

- 3ab. ESMA shall establish and manage a college pursuant to Article 25ba for all CCP recognised according to Article 25 before [entry into force of this Regulation] within 4 months from the entry into force of the delegated act referred to in the second subparagraph of Article 25(2a).
- 3b. ESMA shall review the recognition decisions adopted pursuant to Article 25(1) before [entry into force of this Regulation] within 18 months from the entry into force of the delegated act referred to in the second subparagraph of Article 25(2a), in accordance with Article 25(5).

Where, following the review referred to in the first subparagraph, ESMA determines that a CCP recognised before [entry into force of this Regulation] qualifies as a Tier 2 CCP in accordance with Article 25(2a), ESMA shall set an appropriate adaptation period which shall not exceed 18 months within which the CCP must comply with the requirements referred to in Article 25(2b). ESMA may extend the adaptation period up to additional 6 months upon the reasoned request of the CCP or competent authority responsible for the supervision of the clearing members, where such extension is justified by exceptional circumstances and implications to the clearing members established in the Union."