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Proposal for a

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

**on a framework for the recovery and resolution of central counterparties and amending  
Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365**

(Text with EEA relevance)

{SWD(2016) 368 final}

{SWD(2016) 369 final}

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE PROPOSAL**

#### **1.1. Reasons for and objectives of the proposal**

A central counterparty (CCP) intervenes between participants in financial markets to act as the buyer to every seller and the seller to every buyer for a specified set of contracts. CCPs deal in financial transactions in various asset classes such as in equities, derivatives and repos. Their services are usually provided to their clearing members (typically banks) who have a direct contractual link with CCPs and the clients of the clearing members (e.g. pension funds).

The concentration of transactions and resulting positions in CCPs allows those positions to be netted down and therefore considerably reduce total exposures of the CCP, as well as of its clearing members and their clients. In exchange for taking on and netting their positions, the CCP collects collateral (in the shape of ‘margin’ and contributions to default funds) from clearing members and their clients to cover its liabilities in case one of its participants defaults on its obligations vis-à-vis the CCP. By doing so, they manage the risks inherent in financial markets (e.g. counterparty risk, liquidity risk and market risk), and therefore improve the overall stability and resilience of financial markets. In the process, they become critical nodes in the financial system, linking multiple financial actors and concentrating significant amounts of their exposure to diverse risks. Effective risk management of the CCP and robust supervisory oversight is therefore key to ensure that such exposures are adequately covered.

The scale and importance of CCPs in Europe and beyond is set to increase via the implementation of the G20 commitment to clear standardised derivatives transacted over-the-counter (OTC) through central counterparties. This obligation is implemented in the EU by the Regulation on OTC derivatives, central counterparties and trade repositories (‘EMIR’)<sup>1</sup>. That Regulation also sets out comprehensive prudential requirements for CCPs, as well as requirements regarding the operations and oversight of CCPs.

While CCPs in the EU are thus subject to high standards in view of their central role in the economy and of the added risks they are assuming, no harmonised EU rules exist for the unlikely situations in which these standards would be overwhelmed and in which CCPs would face severe distress – beyond that envisaged by EMIR – or outright failure. In principle, failing corporations should be subject to insolvency proceedings. However, the past crisis clearly illustrated that the failure of an important financial institution which is highly interconnected with others in financial markets can cause critical problems for the rest of the financial system and negatively impact prospects for growth across the wider economy. This is because their insolvency may abruptly curtail the provision of an institution’s critical functions to the economy, triggering market panic and contagion due to counterparties and investors being unsure about their assets and liabilities in drawn-out legal proceedings. Faced with this threat to financial stability, caused for example by lack of confidence in the market, and the overall public interest, governments have often been compelled to bail out failing financial institutions with public money to prevent this from happening.

Recovery and resolution constitute measures that aim to safeguard financial stability, ensure the continuity of critical functions and protect taxpayers in the event of the distress or failure of an institution that is experiencing financial difficulties, where insolvency proceedings

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<sup>1</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1–59)

would be insufficient to meet these aims. As such, the measures are designed to protect vital critical functions without exposing taxpayers to loss in order to preserve the ability of the financial system to fund economic growth and avoid the socio-economic costs of a financial meltdown. Recovery and resolution measures are most relevant where a financial institution is “systemic”, whereby because of its size, market importance and interconnectedness, for example, its distress or disorderly failure would jeopardise the normal functioning of the financial system, which would in turn adversely impact the real economy.

While CCPs are already well-regulated, have robust resources to deal with financial distress under EMIR and have not undergone distress or failed in large numbers in the past, the challenge posed by their growing importance in processing increasing amounts of new types of risk is widely recognised by governments, authorities and other market participants. Considering their central and growing role in financial markets, all CCPs in the EU are therefore considered to be systemic<sup>2</sup>.

Recovery measures are those which a financial institution itself takes to restore its long-term viability. Ensuring the right conditions for recovery measures to succeed is a key policy objective for CCPs, as their failure is considered to be potentially highly disruptive for the wider financial system. However, authorities acting in the public interest should also have powers to resolve a CCP if these measures fail or could damage financial stability. Resolution measures constitute extraordinary steps which authorities would be able to take to swiftly restructure CCPs and secure the continuity of their functions that are critical to the economy, thereby mitigating the damage to the financial system and the broader economy, while placing the residual parts of the CCP in insolvency, ensuring market efficiency. In the process, costs and losses are imposed as far as possible on the CCP’s owners and creditors, not the taxpayer, in line with how they would be treated if the CCP had entered insolvency and in full respect of the Charter of Fundamental Rights, the relevant case-law of the Court of Justice of the European Union, and the European Convention on Human Rights. Resolution does not aim to prevent the failure of inefficient institutions; rather it aims to maintain the critical functions of an institution, while allowing the remaining parts to be wound down in an orderly manner.

The analysis for the need to respond to the possible recovery and resolution of other financial firms than banks and CCPs has not progressed at the same pace. This is mainly due to the lessons learned during the financial crisis which did not demonstrate an equally urgent need for such measures. However such measures may be necessary in the future, taking account of the development of economic and financial risk in the sectors concerned.

Furthermore, specific and wider international work on insurance undertakings at G20-level is also in its relatively early stages of recommendations and few jurisdictions have on practice introduced regulatory reform in this area. Within the EU, to date three Member States have introduced legislation on the recovery and resolution of insurance undertakings or are in the process of doing so. EIOPA has engaged in a thorough, comparative and wide-ranging review of national recovery and resolution practices and developments in this area and is set to present a report on this topic in the first half of 2017. On the basis of that report, the

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<sup>2</sup> Pursuant to Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 and Commission Delegated Regulation (EU) 2016/592 of 1 March 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation, several classes of interest rate OTC derivatives denominated EUR, GBP, JPY and USD and several classes of credit OTC derivatives denominated in EUR are required to be centrally cleared with authorised or recognised central counterparties respectively as of 21 June 2016 and 9 February 2017.

Commission will consider the appropriate way forward, in close consultation with the European Parliament, Council and all relevant stakeholders.

## 1.2. Consistency with existing provisions in the policy area

A comprehensive EU recovery and resolution framework has already been adopted for banks and investment firms<sup>3</sup>. The proposed framework for CCPs neither duplicates this regime nor the requirements of EMIR but complements them. It sets out provisions comparable to those in the framework applicable to banks and investment firms to facilitate orderly recovery and resolution, but adapts them to the specific features of CCPs' business models and the risks they incur, including by determining how losses would be shared in scenarios where existing CCPs' pre-funded resources required under EMIR are exhausted.

More broadly, at the international level, G20 leaders have endorsed an approach developed by the Financial Stability Board (FSB) to address the risks which the failure of any financial institution (bank, financial-market infrastructure, insurance undertaking, etc.) of global systemic relevance could have on the financial system via comprehensive and appropriate recovery and resolution tools<sup>4</sup>. Furthermore, the Committee on Payment and Market Infrastructures (CPMI) and the International Organisation of Securities Commissions (IOSCO) have developed guidance on recovery plans for financial-market infrastructures, including CCPs, while the FSB has issued further guidance on the application of its Key Attributes of Effective Resolution Regimes to financial market infrastructures, such as CCPs, as well as insurers<sup>5</sup>. In mid-2016, these organisations consulted further on key parts of this guidance, including on issues such as the timing of when resolution authorities should place a CCP into resolution because its viability and financial stability are at stake, and which powers and tools the resolution authority should employ at this point to best secure the continuity of critical functions, minimise contagion and allocate costs and losses in the most efficient way possible<sup>6</sup>. Finally, in December 2013 the European Parliament adopted an own-initiative report calling on the Commission to propose appropriate EU measures to ensure that the impacts of a potential failure of key financial institutions, most notably CCPs, could be mitigated<sup>7</sup>.

## 1.3. Consistency with other Union policies

A proposal to create a European framework for the recovery and resolution for CCPs was signalled in the Commission's Work Programme for 2015 and a roadmap on the initiative was

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<sup>3</sup> Directive 2014/59/EU, the Bank Recovery and Resolution Directive (BRRD) As part of the steps to integrate responsibilities for bank supervision and resolution in the Banking Union, the latter has been complemented by a Single Resolution Mechanism (Regulation (EU) No 806/2014). See [http://ec.europa.eu/internal\\_market/bank/crisis\\_management/index\\_en.htm](http://ec.europa.eu/internal_market/bank/crisis_management/index_en.htm) [http://ec.europa.eu/internal\\_market/finances/banking-union/index\\_en.htm](http://ec.europa.eu/internal_market/finances/banking-union/index_en.htm)

<sup>4</sup> Key Attributes of Effective Resolution Regimes for Financial Institutions, Financial Stability Board (November 2011) [http://www.financialstabilityboard.org/publications/r\\_111104cc.pdf](http://www.financialstabilityboard.org/publications/r_111104cc.pdf) Updated in October 2014 with sector-specific annexes [http://www.financialstabilityboard.org/wp-content/uploads/r\\_141015.pdf](http://www.financialstabilityboard.org/wp-content/uploads/r_141015.pdf).

<sup>5</sup> <http://www.bis.org/cpmi/publ/d121.pdf>; [http://www.financialstabilityboard.org/wp-content/uploads/r\\_141015.pdf](http://www.financialstabilityboard.org/wp-content/uploads/r_141015.pdf).

<sup>6</sup> <http://www.fsb.org/wp-content/uploads/Essential-Aspects-of-CCP-Resolution-Planning.pdf>; <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD539.pdf>.

<sup>7</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP/TEXT+TA+P7-TA-2013-0533+0+DOC+XML+V0/EN>.

published in April 2015<sup>8</sup>. In order to take account of the further refinement of the relevant international guidance mentioned in the previous section, the initiative was carried over into the Work Programme for 2016. The initiative is part of the Commission's efforts to ensure that threats to the smooth functioning of the financial system and to taxpayers are tackled and that financial markets can continue to play their role in contributing to sustainable, long-term growth to further deepen the internal market in the interests of consumers and businesses.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

### **2.1. Legal basis**

The legal basis for this proposal is Article 114 of the Treaty on the Functioning of the European Union (TFEU), which allows the adoption of measures for the approximation of national provisions which have as their object the establishment and functioning of the internal market.

The proposal harmonises national laws on recovery and resolution of CCPs to the extent necessary to ensure that CCPs are subject to similar tools and procedures to address their possible distress or failure. At present, while authorised CCPs are able to operate and provide services across the EU, the regulatory landscape for managing potential crises exceeding the requirements of EMIR is fragmented. Some Member States have enacted requirements for CCPs to prepare contingency plans against their distress or cover CCPs as part of broader resolution regimes for the financial sector designed primarily for banks. No Member State has yet developed a full national regime for CCP recovery and resolution which fully complies with the G20-endorsed FSB principles, including as regards the need for effective coordination and oversight against cross-border spill-overs<sup>9</sup>. Without an EU-level framework, Member States are unlikely to develop comprehensive and compatible regimes. The divergent approaches by which CCPs and authorities would mitigate or tackle CCP distress or failure would not be fully coherently planned and could be inconsistently applied. This could lead to the disruption of critical functions to clearing members and clients across borders and to wider financial instability. EU level action is therefore necessary to adequately equip Member State authorities with tools and powers that would be enforced in an expedient, coherent and equal fashion across the Union.

EU-level action is warranted also for CCPs that have fewer direct cross-border links, but where harmonisation would mitigate possible level playing-field and competition concerns arising from the prospective and actual national handling of a CCP failure. For example, national regimes with different degrees of potential state intervention with public funds would result in an un-level playing-field in favour of those CCPs based in Member States where support is more likely. The experience with bank failures in different Member States underlines how problems at systemic financial institutions can fragment the Single Market into national economic zones. Market perceptions and biases in favour of entities located in jurisdictions with relatively stronger implied backing by the state can cause competitive distortions and arbitrarily influence costs for businesses depending on their geographic location and the perceived appetite of, or necessity for, a Member State to pre-emptively ring-fence assets, liquidity or capital to minimise cross-border exposures. While the risk of this type of fragmentation of the Single Market in case of CCPs is less imminent, differing

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<sup>8</sup> [http://ec.europa.eu/smart-regulation/impact/planned\\_ia/docs/2015\\_fisma\\_029\\_cwp\\_ccp\\_resolution\\_of\\_non\\_bank\\_resolution\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2015_fisma_029_cwp_ccp_resolution_of_non_bank_resolution_en.pdf).

<sup>9</sup> See section 3.2. of the accompanying Impact Assessment.

perceptions and uncertainty over the ability of Member States to take control of a failed CCP and resolve it effectively could undermine market participants' trust in and thereby the integrity of, the functioning of the Single Market. Indeed, the uncertainty over how the failure of key market infrastructures could be managed in the absence of common EU-rules is cited as one reason for the lag in the pace of integration in Europe's capital markets<sup>10</sup>.

The harmonisation of requirements applicable to CCPs would improve the level playing-field for economic operators and help boost the integration of the internal market. By ensuring that all relevant Member State authorities have the same minimum tools to ensure the orderly recovery and resolution of CCPs and by facilitating cooperation between authorities, so as to mitigate any cross-border spill-over effects when dealing with their distress or failure, the harmonised framework would also enhance financial stability across the internal market and prevent outcomes in which Member States would be compelled to act alone, and in uncoordinated fashion, in relation to operators established in their jurisdiction.

Article 114 of the TFEU is, therefore, the appropriate legal basis.

## **2.2. Subsidiarity**

Under the principle of subsidiarity set out in Article 5(3) of the Treaty on European Union (TEU), in areas which do not fall within its exclusive competence, the Union should act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

EU financial markets are open and integrated. CCPs are able to operate cross-border within the markets and product lines they serve. In the process, they link multiple financial actors, counterparties and clients across borders throughout the single market. Due to this advanced and multi-layered cross-border integration of the financial sector, an EU resolution and recovery framework is needed that mirrors the level of integration of the business. Current tools to deal with CCPs that face a crisis are limited to CCPs' internal arrangements or are, where developed, nationally based. This means that there are potentially divergent approaches by which CCPs and authorities mitigate or tackle the problems within a CCP facing financial distress or on the verge of failure, which could ultimately lead to the disruption of critical functions for the economy, fragmentation of the internal market and wider financial instability. The failure of a CCP operating beyond national borders, which is true of the majority of cases, is likely to affect, to differing degrees, the stability of financial markets in the Member States in which it operates. Only EU action can ensure that CCPs and their clearing members (which can be located in different Member States to the CCP) are subject to adequate and effective intervention to mitigate or address a crisis situation in a coordinated and coherent manner. Therefore, to secure these objectives at the Union-level and at the level of Member States, it is appropriate that the Union should develop the necessary legislative framework.

## **2.3. Proportionality**

Under the principle of proportionality, the content and form of Union action should not exceed what is necessary to achieve the objectives of the Treaties. In principle, a failed CCP should be subject to insolvency procedures like any other business. However, CCPs are central financial infrastructures which are highly interconnected with, and centralise risk on

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<sup>10</sup> See section 4 of the accompanying Impact Assessment.

behalf of, myriad financial actors. As such, depriving these actors of the critical services provided by a CCP could create serious consequences for financial stability and the wider economy. To mitigate this, it is justified to require adequate contingency plans for orderly recovery and resolution and to grant authorities resolution powers to swiftly restructure their operations if necessary.

As the systemic importance of a CCP failure cannot be determined with full certainty in advance, the proposed framework should apply in principle to all CCPs, irrespective of their size and complexity. The majority of CCPs established in the EU provide services to clearing members and clients across the EU and some beyond, and their distress or failure could thus resonate globally. Recovery and resolution plans should thus be tailored to the specific risk-profile of each CCP. The exercise of any extraordinary actions by the authority to preserve financial stability and protect taxpayers would also always have to be fully justified and proportionate, not go beyond what is necessary to achieve the objectives, and be consistent with the Charter of Fundamental Rights as interpreted by the Court of Justice of the European Union as regards any limitations to the right of property which the powers may entail. Finally, they would be conducted in such a way as to ensure that affected stakeholders are treated no worse than if the CCP had not been resolved but would have been subject to further possible actions under the CCP's operating rules for allocating losses or gone into insolvency.

#### **2.4. Choice of instrument**

Article 114 TFEU allows the adoption of acts both in the shape of Regulations or Directives. The adoption of a Regulation is retained here for the following reasons.

First, a Regulation would best complement and build on the approach established by EMIR which provides the requirements for CCPs in the field of prudential regulation. The new requirements for CCPs to set out comprehensive recovery arrangements build on the objectives and provisions of EMIR to ensure that CCPs are resilient. Setting these out in another legal form (namely a Directive) would be inconsistent and require Member States to adopt laws in a specific part of an area otherwise governed by directly applicable EU law. The provisions for authorities to have targeted powers and tools to carry out, where necessary, effective and orderly resolution to maintain financial stability if the requirements under EMIR and the recovery arrangements fail are no longer concerned with furthering the going-concern resilience of CCPs but do involve securing the viability of their critical functions in a way whereby operation of these functions (in the same legal entity or in another form) continues to meet the requirements and objectives of EMIR. Accordingly the provisions governing how to achieve this should be framed in the same legal form as EMIR.

Second, a Regulation would best deliver a common approach and a single rulebook for authorities and would avoid divergence between national rules and the possible legal uncertainties which this can entail notably in cross-border contexts as outlined above. It would also facilitate international cooperation, where relevant, and make it easier to do business with and in the EU, as the system in the EU would be uniform. Moreover, considering that the impact of a EU CCP failure could potentially have consequences for the financial system of all EU Member States, such a uniform framework would alleviate any damaging uncertainties about the conditions in which such a failure would be dealt with by the relevant authorities of CCPs in different Member States and help reassure stressed markets.

Third, because of their business models the likelihood of a CCP failure is generally understood to be far lower than for banks. In contrast to banks of various sizes and risk

profiles, the failure of which can arise in different scenarios, assume varying proportions and consequently require a wider array of resolution tools (and derogations), CCP-failure is more likely to occur for reasons which are known upfront (defaults by clearing members or severe operational failure) and which can be managed with a more distinct set of tools. Therefore, this more limited applicability and need to cater for as large a variety of options entails that the objectives can be better served via a Regulation, albeit that some flexibility is necessary to allow authorities to react to the circumstances of the case.

Finally, compared to EU banks EU CCPs represent a far smaller number of entities and the corporate structures of CCPs and the way in which they provide services across borders differ from those of cross-border banking groups. In the latter case, subsidiaries and branches are often set up in various jurisdictions to serve customers, acquire assets, obtain funds etc., justifying a greater degree of sensitivity for local laws in the implementation of resolution decisions. In the case of CCPs, the provision of services happens in a less dispersed way, centrally from one jurisdiction into others without the intermediation of subsidiaries or branches. This favours adopting a Regulation to ensure the uniform application of decisions across jurisdictions.

### **3. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

#### **3.1. Stakeholder consultation**

A public consultation on a possible recovery and resolution framework for non-bank institutions<sup>11</sup> was carried out between 5 October and 28 December 2012. It asked questions about the need for recovery and resolution arrangements mainly in relation to CCPs, central securities depositories and insurance undertakings. 67 replies were received<sup>12</sup>.

On the whole, the consultation indicated that the priority should be to develop an EU-wide recovery and resolution framework for CCPs. The implementation of the G20 requirement for standardised OTC derivatives to be centrally cleared was recognised as a compelling argument in favour of taking action. Respondents generally agreed that, like the BRRD for banks, a framework for CCPs should ensure continuity of their critical functions, minimise exposure to losses for taxpayers from their failure and improve legal certainty for their clearing members and clients. Almost all stakeholders agreed that, in order to safeguard financial stability, the continuity of key operations of CCPs should be the priority. Many considered that while it is critical to ensure that recovery and resolution arrangements for CCPs are credible and robust, these should not place excessive burdens on members or participants to cover potentially significant liabilities arising from the default of a major clearing member or, even less, from internal risk management errors by the CCP. Stakeholders generally noted that this necessitated tailoring the BRRD tools to the specificities of CCPs' business models.

#### **3.2. Collection and use of expertise**

In addition to stakeholder-consultation, the Commission participated in the discussions and exchange of views informing the CPMI/IOSCO report providing guidance on the recovery of financial market infrastructures. The Commission also participated in the work relating to the resolution of other non-bank financial institutions carried out by the FSB, including the latest

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<sup>11</sup> [http://ec.europa.eu/internal\\_market/consultations/2012/nonbanks/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2012/nonbanks/consultation-document_en.pdf).

<sup>12</sup> A summary is available at: [http://ec.europa.eu/internal\\_market/consultations/2012/nonbanks/summary-of-replies.pdf](http://ec.europa.eu/internal_market/consultations/2012/nonbanks/summary-of-replies.pdf).

discussions on refining parts of this guidance to help authorities plan effective resolution strategies. On their part, in elaborating the reports proposing guidance on (respectively) recovery and resolution, both CPMI/IOSCO and FSB asked interested parties to provide comments on their draft guidance documents and published the responses received<sup>13</sup>. On the whole, these international level consultations for financial market infrastructures confirm the views expressed in the Commission's own consultation, and provide useful additional feedback on the relative merits of some of the proposed policy options and resolution tools.

Commission services also held four meetings with Member States' experts to discuss the international work being carried out by the FSB and CPMI-IOSCO, the most contentious policy choices, and the scope and nature of the proposal. Member State experts generally agreed with the policy direction proposed by the Commission, based on the international guidance and building on EMIR and the BRRD as relevant.

### **3.3. Impact assessment**

The Commission conducted an impact assessment of relevant policy alternatives. Policy options were assessed against the key objectives of safeguarding financial stability and confidence in CCPs, minimising losses for society as a whole and in particular for taxpayers and strengthening the Single Market for services provided by CCPs, while maintaining a level playing field.

The Impact Assessment (IA) was approved by the Impact Assessment Board (IAB) on 6 May 2015. The IAB made a number of recommendations for improvements. Taking into account these recommendations, the IA was further refined. In particular, the justification on the need for action at EU level and the identification and the assessment of the options were further substantiated. The options assessed and the conclusions reached were also checked against the latest guidance from the ongoing international work, which the Commission followed closely. The legislative proposal is fully in line with the latest FSB and G20 policy discussions and orientation<sup>14</sup>.

Regarding the need for action at EU level, the IA concluded that EU action is necessary given the cross-border nature of CCPs' business, which links multiple financial actors, counterparties and clients throughout the Single Market. The tools currently available to Member State authorities are inadequate to deal with CCPs that face significant stress which could compromise their viability. Divergent approaches across Member States to mitigate or tackle potential severe problems of CCPs could ultimately lead to the disruption of critical functions for the economy and wider financial instability. Acting at EU level is necessary to adequately equip Member State authorities with tools and powers that would have enforceability across the Union, to deal with the failure of CCPs located within their jurisdictions, and to ensure effective communication amongst all relevant authorities, whether in the same or in different Member States.

Appropriate recovery and resolution planning should help ensure that costs are not borne by taxpayers but rather by the market participants associated with the CCP (creditors, clearing members, their clients) in a proportionate and non-discriminatory manner.

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<sup>13</sup> Public responses can be found at: <http://www.bis.org/publ/cpss109/comments.htm> and: [https://www.financialstabilityboard.org/publications/c\\_131121.htm](https://www.financialstabilityboard.org/publications/c_131121.htm).

<sup>14</sup> See the FSB's August 2016 discussion note on "Essential Aspects of CCP Resolution Planning", at: <http://www.fsb.org/2016/08/essential-aspects-of-ccp-resolution-planning/>.

Regarding the question of how resolution of CCPs can be ensured in a timely and robust manner, the IA examined options relating to possible triggers as to when to enter into resolution and options relating to which resolution tools and powers authorities should be equipped with.

The IA found that prescriptive triggers for resolution, such as the breach of specific requirements, would bring transparency to the resolution framework by making clear *ex-ante* to all stakeholders when a possible public intervention might be prompted. Prescriptive triggers would nevertheless not be suitable as it would be difficult to identify single or compound indicators that can clearly predict future events compromising financial stability. Prescriptive triggers could also leave undue room for entities to "game the system", i.e. take measures around the triggers that would compromise the trigger's validity; moreover, CCPs could fail in a way that may not meet specific prescriptive conditions, and therefore resolution would not be available as an option to achieve an orderly restructuring or wind down. More flexible triggers that leave the decision on entry into resolution to authorities avoid these problems and provide authorities with the power to take quick and decisive action to resolve any systemically important CCP that is failing or likely to fail before it has become insolvent. The IA concluded that more flexible triggers are the preferred option; however, it highlighted that it is essential to ensure that authorities will only use resolution tools if a CCP is close to failure and no other measures can restore its viability and ensure overall financial stability, and most importantly that it would be in the public interest to place the CCP into resolution, rather than subjecting it to normal winding up or insolvency proceedings.

As regards resolution tools and powers, the IA concluded that resolution authorities should be equipped with a harmonised but not exhaustive and not prescriptive resolution toolkit that affords authorities the necessary discretion to take into account the circumstances of a potential crisis. Conceivable paths of how to potentially resolve an entity in various scenarios would be laid out in non-binding resolution plans. The alternative option of equipping authorities with a comprehensive, exhaustive toolkit and setting out the order in which the tools should be used was rejected as it could risk the effectiveness of resolution by limiting authorities' ability to respond in a flexible way to the specific circumstances of an evolving crisis situation. It was considered unlikely that perfectly matched resolution tools and a hierarchy of their use could be developed to address all conceivable crisis scenarios, which would risk that envisaged resolution measures would not be appropriate to deal with the concrete problems at stake.

With regard to specific tools, the IA found that making the tools set out under the international guidelines comprehensively available in both recovery and resolution would minimise any costs borne by the taxpayer and would best achieve *ex-ante* market discipline. They would also enable distributing losses to all CCP stakeholders in a manner that provides certainty to market participants in advance and is as equitable as possible.

Market participants could be impacted differently by the various options, but a key aim of resolution is that they are no worse off than if the CCP had not been resolved but they would instead have been subject to further possible actions under the CCP's operating rules for allocating losses or if the CCP had entered insolvency.

Some other tools, such as requesting CCPs and clearing members to build up additional pre-funded means to absorb losses and replenish resources, were not considered to improve market discipline effectively or were deemed to be disproportionately costly in view of the low likelihood of being used. Overall, the preferred options were thus considered to contribute

positively to maintaining financial stability and confidence in the broader financial system, without imposing undue or excessive costs which could weigh heavily on broader economic growth.

### **3.4. Fundamental rights**

Like the BRRD before it, the framework for CCPs is fully compatible with the Charter of Fundamental Rights. While resolution action may entail changes to the assets and rights of CCPs' owners and clearing participants, in accordance with Article 52 of the Charter, limitations on some rights and freedoms are allowed. As required by the Charter, such limitations on the exercise of these rights and freedoms are provided for by the Regulation, they respect the essence of these rights and freedoms, and they are only applied where genuinely necessary to meet the objectives of general interest recognised by the Union. The protection of financial stability has been recognised by the Court of Justice as a general interest, justifying restrictions to fundamental rights and freedoms under the Treaty provided that they are proportionate and suitable to reach the objectives they pursue. Affected stakeholders can also appeal specific elements of resolution decisions which impact them and are entitled to compensation in case they are left worse off than they would have been if the CCP had not been resolved but they would have been subject to further possible actions under the CCP's operating rules for allocating losses or the CCP had entered insolvency.

### **3.5. BUDGETARY IMPLICATION**

The above policy options will have no implications for the budget of the Union.

The present proposal would require ESMA to (i) develop 5 technical standards and 2 guidelines, and (ii) take part in resolution colleges (together with EBA), make decisions in case of disagreement and exercise binding mediation. The delivery of technical standards is due 12 months after the entry into force of the Regulation. The proposed tasks for ESMA will not require the establishment of additional posts and can be carried out with existing resources, in most cases based on work already done by EBA in the context of BRRD implementation. The tasks for ESMA would also be prepared by a newly established ESMA resolution committee where relevant EBA competent authorities shall be invited to participate as observers, maximising use of existing resources.

## **4. OTHER ELEMENTS**

### **4.1. Implementation plans and monitoring, evaluation and reporting arrangements**

After entry into force, the preparation and development of proportionate recovery and resolution plans and the measures implemented by CCPs and authorities based on these plans is a tangible medium-term indicator for follow-up. In the event of distress affecting a CCP, other indicators to monitor would be whether, when and how CCPs are activating their recovery plans and whether, when and how supervisory authorities are taking action in accordance with the early intervention powers granted by the framework. Finally, in the event of CCP-failure and of the resolution conditions being met, the indicators to monitor would be when resolution authorities intervene, which tools they use, and how any losses are shared among private stakeholders. An examination of the functioning of specific provisions as well as a more general review could be carried out after three years. The monitoring and evaluation framework could be refined in this context as appropriate, building on concrete experience with the regime.

## **4.2. Detailed explanation of the specific provisions of the proposal**

### *4.2.1. Scope and objectives*

In view of their function and central role in financial markets, the scope covers all CCPs established in the EU. The relevant powers and tools bestowed by the Regulation would thus be available for use in relation to all CCPs irrespective of their size, interconnectedness or other characteristics. Proportionality would nonetheless be assured as recovery and resolution plans are to be specific to each CCP and take due account of their systemic relevance. The exercise of the early intervention and resolution powers by authorities should, in all cases, also be proportionate and justified.

The objectives are, first, to seek the orderly recovery of CCPs in various scenarios of financial distress through the implementation of robust and comprehensive recovery plans, agreed between the CCP and its clearing members. Second, if this were to be insufficient and the conditions for resolution were to be met, authorities should take swift action in order to safeguard financial stability, secure the continuity of the CCP's critical functions, and protect taxpayers to the maximum extent. In case of resolution, action by the authority should be predicated on the owners, creditors and counterparties of CCPs bearing losses in line with the hierarchy of claims in insolvency, and managers being replaced and held accountable for any wrong-doing under national law.

Due to their legal and corporate structure, effective CCP recovery and resolution does not necessarily need to encompass the wider groups of which CCPs may form part. However, where expedient to achieve the objectives above, specific powers can apply to the parent companies of CCPs. These include for instance the option for authorities to decide on a case-by-case basis that recovery plans should cover parent companies.

### *4.2.2. Set-up of resolution authorities and resolution colleges*

Resolution authorities for CCPs shall be set up and equipped with a harmonised set of powers to undertake all the relevant preparatory and resolution actions below. The authorities can be central banks, competent ministries, the competent authorities (i.e. supervisors) of CCPs or other public administrative authorities. In case the powers are assigned to an existing authority, appropriate operational independence should be in place for the resolution functions. In case of multiple authorities possessing these powers, tasks should be clearly allocated. The appointed body(ies) are to have statutory tasks in order to ensure the orderly resolution of CCPs where the conditions for resolution are met, in a way which protects financial stability and taxpayers. It is not excluded that the authority can have similar duties in relation to other financial institutions. Where required under national law in a Member State, courts can be involved in approving the decision to resolve a CCP, provided that the procedure is expeditious.

Considering the role and precedent set by EMIR for colleges and for their tasks, as well as the possible impacts which resolution actions can have on clearing members and other stakeholders, CCPs' resolution authorities are required to set up and chair resolution colleges for each CCP. These largely mirror the composition of the colleges in EMIR. In addition to the CCP's resolution authority, members of the college should therefore include the competent authorities of the clearing members, CCPs, central securities depositories and trading venues present in the EMIR college, as well as the relevant central banks, and ESMA. In addition, other members should include, the resolution authorities of the clearing members whose competent authorities are members, if different, the relevant competent authority of any parent undertaking to which recovery plans would apply, as well as any competent

ministries afforded a specific role in the resolution of CCPs, and EBA. The existing colleges under EMIR and the newly set-up resolution colleges should jointly undertake the specific tasks allocated to them under this Regulation, as described below.

#### *4.2.3. Preparation – recovery plans*

CCPs are required to prepare recovery plans to overcome any form of financial distress which would exceed their default management resources and other requirements under EMIR. This should include scenarios involving defaults by clearing members (i.e. default events) as well as the materialisation of other risks and losses (i.e. other (non-default) events). The precise circumstances in which the plans should be triggered would not be fixed in the law but CCPs are required to develop suitable indicators informing clearing participants and authorities for when this would occur. The plans should not rely on any extraordinary public financial assistance but should outline how possible access to central bank facilities under standard terms could be obtained.

In line with the CPMI-IOSCO guidance, the plans should be comprehensive, effective, transparent and measurable for those potentially impacted by them, set appropriate incentives and minimise negative impacts for all stakeholders and the financial system more broadly. Subject to these principles, CCPs can determine the appropriate range of options and recovery tools. These include tools to re-match the CCP's book through tearing up contracts, such that the contracts are terminated and the losses and gains are crystallised, establishing voluntary agreements such as auctions with the remaining clearing members such that they voluntarily take on positions, or to arrange for additional resources by requiring clearing members to provide additional resources subject to a cap ("cash calls") and haircutting payments due to clearing participants as a result of an economic gain in a derivatives contract ("variation margin haircutting"). The Regulation neither determines which specific options recovery plans should contain nor excludes others. However, it requires that the plans should constitute arrangements agreed between CCPs and their clearing members in order to reinforce their effectiveness in all cases, binding or committing clearing members to act in accordance with the pre-agreed operating rules in case they are activated regardless of the jurisdiction in which they are based. Clearing members are required to fully inform their clients how they would transmit any losses or costs arising from the exercise of recovery tools by the CCP to them.

Recovery plans are to be reviewed by the competent authority of the CCP. Considering the possible impacts of the plan on clearing members and other stakeholders, the college set up under EMIR should be associated in the process. For instance, the assessment of the plan's adequacy should be subject to a joint decision by the college. In case a joint decision cannot be reached, binding mediation could be carried out by the European Securities and Markets Authority (ESMA), in line with its mandate (Article 19(3) of Regulation (EU) No 1095/2010).

#### *4.2.4. Preparation – resolution plans and resolvability assessments*

Resolution authorities are required to prepare resolution plans for how CCPs would be restructured and their critical functions kept alive in the event of their failure. As in the case of recovery plans, they should cover both default events and other (non-default) event scenarios, and should not assume any extraordinary public financial support besides access to central bank facilities under standard terms. The plans should outline the resolution powers and tools which authorities would employ in case a CCP meets the conditions for resolution, proportionate to and in full consideration of the business model, market share and systemic relevance of the CCP both in the jurisdiction in which it is established as well as in other

Member States and third countries. The plan is not binding, but any departure from it at the point of resolution should be duly justified by the authority.

As part of resolution planning, resolution authorities should also assess the overall resolvability of the CCP and address any impediments thereto. Consequently, they should have powers requiring the CCP to, for example, change specific business practices or its operational or legal structures, revise any intra-group agreements which could hamper resolution, or increase its pre-funded loss-absorbing resources on a case-by-case basis.

As in the case of recovery plans, the possible impacts of actions on clearing members and stakeholders means that resolution colleges should be associated in drawing up the resolution plan and in agreeing to any measures to address resolvability. For instance, the resolution college should be required to reach a joint decision in both cases, failing which binding mediation by ESMA could be carried out.

#### *4.2.5. Early intervention*

Competent authorities are granted specific powers to intervene in the operations of CCPs where their viability is at risk but before they reach the point of failure or where their actions may be detrimental for overall financial stability. The powers would complement those in EMIR, constituting specific supervisory options in these circumstances. Notably competent authorities could require the CCP to undertake specific actions in its recovery plan, or to refrain from taking such action.

#### *4.2.6. Resolution triggers*

A CCP should be placed in resolution when it is failing or likely to fail, when no private sector alternative can avert failure, and when its failure would jeopardise the public interest and financial stability. In addition, in line with the guidance of the Financial Stability Board Key Attributes for Effective Resolution Regimes, a CCP could be placed into resolution even if not all of these conditions are met, where the application of further recovery measures by the CCP could prevent its failure but could compromise financial stability in the process. Except for very specific circumstances, the CCP should also be considered to be failing or likely to fail if it requires extraordinary public financial support.

The resolution authority would assess whether all conditions are met. The assessment of the first condition (whether the CCP is failing or likely to fail) should however be the primary responsibility of the competent authority. It is generally considered that competent authorities are more likely to have a detailed understanding of the CCP's financial health up to the point of failure. However, provided they have all necessary data and information to do so that assessment can also be carried out by the resolution authority.

#### *4.2.7. Resolution tools and powers*

As resolution action would be set out in the resolution plan in advance, it should be carried out in a way which does not undermine the functioning of the rest of a wider group of which the CCP may form part. Any outstanding contractual obligations of financial support for the CCP, such as guarantees from a parent undertaking, should however be exercisable by the resolution authority, in line with how they would be called upon in normal insolvency proceedings.

Resolution should be undertaken by way of several tools which could be used separately or in conjunction: (i) sale of a CCP's entire or critical functions to a viable competitor, (ii) creation

of a publicly controlled bridge CCP, and (iii) allocation of losses and positions among clearing members. The Regulation does not mandate which tools and powers to use in different scenarios but leaves the choice to the authority, depending on the circumstances but where practicable in line with the resolution plan agreed by the resolution college.

The various loss and position allocation options would provide the resolution authority with means to re-match the CCP's book, stem further losses and obtain additional resources to recapitalise the CCP. Depending on the options chosen by the CCP and approved by the EMIR college as part of recovery plans, there can be overlap in the loss and position allocation tools available to the CCP as part of its recovery plan and to the resolution authority during resolution. For instance, resolution could take the shape of further auctions of the defaulters' positions among remaining clearing members, a partial or full tear-up of contracts, further haircuts of outgoing variation margin payments, the exercise of any outstanding cash calls set out in recovery plans or of a cash call reserved specifically for the resolution authority in the CCP's internal (operating) rules, and a write-down of capital and debt instruments issued by the CCP or other unsecured liabilities and a conversion of any debt instruments or other unsecured liabilities into shares.

Finally, the Regulation does not exclude the possibility for resolution authorities to exercise other options in accordance with the principles of resolution, including full respect for the hierarchy of claims, such to avoid public bail-outs and moral hazard etc., notwithstanding the safeguard that no creditor should be left worse-off than in insolvency. As such they can call on further private resources, either within the CCP (e.g. using default funds of non-affected product lines) or from outside parties (e.g. calling on clearing members to voluntarily accept further allocations of positions). Should these options be unavailable or be demonstrably insufficient to safeguard financial stability, government participation in the shape of equity support or temporary public ownership could be considered as a last resort. Such steps by the government would nonetheless need to comply with applicable rules on State aid, including a restructuring of the operations of the CCP, and enable the deployed funds to be recouped from the CCP over time.

Separately, temporary liquidity support from the central bank could, while not a resolution tool, facilitate the process of resolution. Such support would be subject to the scenarios set out in resolution plans under which CCPs in resolution could be envisaged to access central bank liquidity, and to the ultimate discretion of central banks themselves.

#### *4.2.8. Ancillary provisions concerning resolution*

In order to ensure that resolution decisions are taken in accordance with key principles regarding property rights, compliance with relevant securities and company law and national constitutional arrangements, the Regulation includes the necessary provisions and steps which resolution authorities would have to comply with before and upon taking resolution decisions. For example, these include ensuring an accurate valuation of the balance sheet of the CCP, safeguards for affected stakeholders to receive compensation if they end up worse than if the CCP had not been resolved but they would have been subject to further possible actions under the CCP's internal rules for allocating losses or in insolvency and the procedural steps by way of which authorities should notify the CCP and other authorities concerned of resolution decisions.

To facilitate resolution and the objective of safeguarding financial stability, the framework also includes a temporary moratorium on certain obligations of the CCP and stays on the ordinary rights of counterparties to terminate and close-out against the CCP arising solely by

virtue of the exercise of resolution powers in relation to the CCP. Accompanying these steps are appropriate protections for payments due to other financial market infrastructures and for collateral and netting arrangements in line with those in the BRRD.

#### 4.2.9. *Third countries*

The distress or failure of a CCP can have international spill-over-effects, in particular where its clearing members are established in jurisdictions other than where the CCP is established. The FSB Key Attributes set out that authorities in different jurisdictions should cooperate in resolution cases, to recognise and enforce each other's resolution actions in relation to relevant actors, assets or liabilities located in their territory.

In order to improve the enforceability of an EU authority's action on clearing members located in third countries, CCPs would be required to ensure that the actions in their recovery plans are binding across jurisdictions. This means ensuring that recovery options constitute contractual obligations under the law of the country in which the CCP is established, or otherwise demonstrating to the satisfaction of competent and resolution authorities that the plans' provisions are enforceable, for instance under the law of a third country. This would help resolution authorities enforce any outstanding obligations in these plans in resolution.

Beyond this, authorities should engage in cooperation with a third country authority in order to recognise and enforce its decision in relation to any relevant assets or contracts governed by the law of that country. Resolution authorities should enter into cooperation arrangements with authorities in third countries setting out the details of cooperation. For any given CCP, there may be several Member States or third countries where clearing members could be located or under whose laws relevant assets or contracts could be governed. ESMA should therefore issue guidance on the relevant content of those arrangements with concerned third countries, in order to establish common application of the conditions in these cases.

In order to facilitate the enforcement of actions by a third-country resolution authority on relevant clearing members, contracts or other assets or liabilities located in the EU, relevant national authorities should be in charge of recognising and giving effect to them, or refusing to do so in specific circumstances. Recognition should occur provided the measures do not have an adverse effect on the financial stability of the Member State, creditors of the CCP receive the same treatment as other creditors regardless of location, and there would be no material fiscal implications for the Member State.

#### 4.2.10. *Changes to the Company Law Directives, BRRD, EMIR and the ESMA Regulation and creation of an ESMA Resolution Committee*

The Union Company Law Directives contain rules for the protection of shareholders and creditors. Some of these rules may hinder rapid action by resolution authorities. These rules have already been amended as regards banks by Directive 2014/59/EU and, pursuant to the Commission proposal amending Directive 2014/59/EU (COM(2016) 852), the application of those amendments is proposed to be extended in national law to CCPs<sup>15</sup>.

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<sup>15</sup> The Second Company Law Directive requires that any increase in capital in a public limited liability company be agreed by the general meeting, while Directive 2007/36 (the Shareholders' Rights Directive) requires a 21 day convocation period for that meeting. Restoring the financial situation of a CCP rapidly by means of capital increase is therefore not possible. The proposal therefore amends the Shareholders' Rights Directive to allow the general meeting to decide in advance that a shortened convocation period will apply for a general meeting to decide on an increase of capital in emergency situations. Such authorisation will be part of the recovery plan. This will allow rapid action while

Pursuant to the Commission proposal amending Directive 2014/59/EU (COM(2016) 852), CCPs with banking licences subject to the BRRD will be, by the time this Regulation is applicable, carved out of scope of that Directive and brought exclusively under the arrangements and requirements of this Regulation.

Furthermore, in order to ensure that authorities can impose penalties when the provisions of the proposed Regulation have not been complied with, the Commission proposal amending Directive 2014/59/EU (COM(2016) 852) stipulates extending the scope of application of its Title VIII also to CCPs. This extension ensures that sanctioning powers regarding recovery and resolution of financial institutions are consistent.

EMIR is amended to introduce the possibility for a clearing obligation to be temporarily suspended in the context of resolution of a CCP where necessary to preserve financial stability and market confidence, in particular to avoid contagion effects and to prevent counterparties and investors having high and uncertain risk exposures to a CCP. The role of CCPs' risk committee is also enhanced to encourage the CCP to manage its risks prudently.

In order to ensure that the authorities responsible for resolution may provide input to the work of ESMA under this Regulation, they should be able to accompany the competent authority to meetings of the ESMA Board of Supervisors who shall be non-voting. To prepare its decisions under this Regulation and ensure full input of EBA members in this process, ESMA is required to set up a committee for this purpose where certain competent authorities under Regulation 1093/2010 shall be invited to participate as observers.

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retaining shareholders' decision-making powers. Moreover, Company Law Directives require that increase and decrease of capital, mergers and divisions are subject to shareholders' agreement, and pre-emption rights apply whenever the capital is increased by consideration in cash. In addition, the Takeover Bids Directive requires mandatory bids when any person – including the State – acquires shares in a listed company above the control threshold (usually 30-50%). To address these obstacles, the proposal allows Member States to derogate from those provisions that require consent from creditors or shareholders or otherwise hinder the effective and rapid resolution.

Proposal for a

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

**on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,<sup>16</sup>

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

Having regard to the opinion of the European Economic and Social Committee,<sup>17</sup>

Having regard to the opinion of the European Central Bank,<sup>18</sup>

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Financial markets are pivotal for the functioning of modern economies. The more integrated they are, the more efficient the allocation of economic resources will be, benefitting economic performance. However, in order to improve the functioning of the single market in financial services, it is important to have procedures in place to ensure that if a financial institution or a financial market infrastructure that is active in this market faces financial distress or is at the point of failure, such an event does not de-stabilise the entire financial market and damage growth across the wider economy.
- (2) Central counterparties (CCPs) are key components of financial markets, stepping in between participants to act as the buyer to every seller and the seller to every buyer, and playing a central role in processing financial transactions and managing exposures to diverse risks inherent in those transactions. CCPs centralise the handling of counterparties' transactions and positions, and honour the obligations created by the transactions and receive adequate collateral from their members as margin and as contributions to default funds.
- (3) The integration of Union financial markets has meant that CCPs have evolved from primarily serving domestic needs and markets to constituting critical nodes in Union financial markets more widely. CCPs authorised in the Union today clear several product classes, from listed and over-the-counter (OTC) financial and commodity

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<sup>16</sup> OJ C , , p. .

<sup>17</sup> OJ C , , p. .

<sup>18</sup> OJ C , , p. .

derivatives to cash equities, bonds and other products such as repos. They provide their services across national borders to a broad range of financial and other institutions across the Union. While some CCPs authorised in the Union remain focussed on domestic markets, they are all systemically important in at least their home markets.

- (4) As a significant amount of the financial risk of the Union financial system is processed by and concentrated in CCPs on behalf of clearing members and their clients, effective regulation and robust supervision of CCPs is essential. In force since August 2012, Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>19</sup> requires CCPs to observe high prudential, organisational and conduct of business standards. Competent authorities are tasked with the full oversight of their activities, working together within colleges which group together relevant authorities for the specific tasks allocated to them. In accordance with commitments entered into by G20 leaders since the financial crisis, Regulation (EU) No 648/2012 also requires standardised OTC derivatives to be centrally cleared by a CCP. As the obligation to centrally clear OTC derivatives comes into effect, the volume and range of business done by CCPs is likely to increase which may, in turn, provide additional challenges for the CCPs' risk management strategies.
- (5) Regulation (EU) No 648/2012 has contributed to the increased resilience of CCPs and of wider financial markets against the broad range of risks processed and concentrated in CCPs. However, no system of rules and practices can prevent existing resources from being inadequate in managing the risks incurred by the CCP, including one or more defaults by clearing members. Faced with a scenario of severe distress or impending failure, financial institutions should in principle remain subject to normal insolvency proceedings. However, as the financial crisis has shown, in particular during a period of prolonged economic instability and uncertainty, such proceedings can disrupt functions critical to the economy, jeopardising financial stability. Normal corporate insolvency procedures may not always ensure sufficient speed of intervention or adequately prioritise the continuation of the critical functions of financial institutions for the sake of preserving financial stability. In order to prevent these negative consequences of normal insolvency proceedings, it is necessary to create a special resolution framework for CCPs.
- (6) The crisis also highlighted the lack of adequate tools to preserve the critical functions provided by failing financial institutions. It further demonstrated the lack of frameworks to enable cooperation and coordination amongst authorities, in particular those located in different Member States or jurisdictions, to ensure the implementation of swift and decisive action. Without such tools and lack of cooperation and coordination frameworks, Member States were compelled to save financial institutions using taxpayers' money in order to stem contagion and reduce panic. While CCPs were not direct recipients of extraordinary public financial support in the crisis, they were indirect beneficiaries of the rescue measures undertaken in relation to banks and were protected from the effects which banks failing on their obligations would otherwise have had on them. A recovery and resolution framework for CCPs is therefore necessary to prevent reliance on taxpayers' money in the event of their disorderly failure.

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<sup>19</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

- (7) The objective of a credible recovery and resolution framework is to ensure, to the greatest extent possible, that CCPs set out measures to recover from financial distress, to maintain the critical functions of a CCP which is failing or likely to fail while winding down the remaining activities through normal insolvency proceedings, and to preserve financial stability while minimising the cost of a CCP failure on taxpayers. The recovery and resolution framework further bolsters CCPs' and authorities' preparedness to mitigate financial stress and provide authorities with further insight into CCPs' preparations for stress scenarios. It also provides authorities with powers to prepare for the potential resolution of a CCP and deal with the declining health of a CCP in a coordinated manner, thus contributing to the smooth functioning of financial markets.
- (8) Currently, there are no harmonised provisions for the recovery and resolution of CCPs across the Union. Some Member States have already enacted legislative changes that require CCPs to draw up recovery plans and that introduce mechanisms to resolve failing CCPs. Furthermore, there are considerable substantive and procedural differences between Member States on the laws, regulations and administrative provisions which govern the insolvency of CCPs. The absence of common conditions, powers and processes for recovery and resolution of CCPs is likely to constitute a barrier to the smooth operation of the internal market and hinder cooperation between national authorities when dealing with the failure of a CCP and applying appropriate loss allocation mechanisms on its members, both in the Union and globally. This is particularly true where different approaches mean that national authorities do not have the same level of control or the same ability to resolve CCPs. Those differences in recovery and resolution regimes may affect CCPs and their members differently across Member States, potentially creating competitive distortions across the internal market. The absence of common rules and tools for how distress or failure in a CCP would be handled can affect participants' choice to clear and CCPs' choice of their place of establishment, thereby preventing CCPs from fully benefiting from their fundamental freedoms within the single market. In turn, this could discourage participants from accessing CCPs across borders in the internal market and hinder further integration in Europe's capital markets. Common recovery and resolution rules in all Member States are therefore necessary to ensure that CCPs are not limited in exercising their internal market freedoms by the financial capacity of Member States and their authorities to manage their failure.
- (9) The review of the regulatory framework applicable to banks and other financial institutions which has taken place in the wake of the crisis, and in particular the strengthening of banks' capital and liquidity buffers, better tools for macro-prudential policies and comprehensive rules on the recovery and resolution of banks, have reduced the likelihood of future crises and enhanced the resilience of all financial institutions and market infrastructures, including CCPs, to economic stress, whether caused by systemic disturbances or by events specific to individual institutions. Since 1 January 2015, a recovery and resolution regime for banks has applied in all Member States pursuant to Directive 2014/59/EU of the European Parliament and of the Council<sup>20</sup>.

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<sup>20</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC,

- (10) Building on the approach for bank recovery and resolution, Member States' authorities should be prepared and have adequate recovery and resolution tools at their disposal to handle situations involving CCP failures. However, due to their different functions and business models, the risks inherent in banks and CCPs are different. Specific tools and powers are therefore needed for CCP failure scenarios caused both by the failure of the CCP's clearing members or as a result of non-default events.
- (11) The use of a Regulation is necessary in order to complement and build on the approach established by Regulation (EU) No 648/2012, which provides for uniform prudential requirements applicable to CCPs. Setting recovery and resolution requirements in a Directive could create inconsistencies by the adoption of potentially different national laws in respect of an area otherwise governed by directly applicable Union law and increasingly characterised by the cross-border provision of CCPs' services. It is therefore appropriate to also adopt uniform and directly applicable rules on recovery and resolution of CCPs.
- (12) In order to ensure consistency with existing Union legislation in the area of financial services, as well as the greatest possible level of financial stability across the Union, the recovery and resolution regime should apply to all CCPs subject to the prudential requirements laid down in Regulation (EU) No 648/2012, regardless of whether they have a bank licence. The insolvency of a CCP affiliated to a group could rapidly impact the solvency of the whole group and cause further financial instability. While the groups of which a CCP may form part do not need to be subject to the full regime, certain provisions should also apply to parent undertakings, where application of those provisions at that level would be conducive to more effective recovery and resolution. Authorities should therefore possess targeted means of action with respect to parent undertakings in order to ensure effective recovery and resolution of the CCP and reduce the possibility of contagion to other group entities.
- (13) In order to ensure that resolution actions are taken efficiently and effectively, and in line with resolution objectives, Member States should appoint public administrative authorities or authorities entrusted with public administrative powers to perform functions and tasks in relation to resolution. Member States should also ensure that appropriate resources are allocated to those resolution authorities. Where a Member State designates the authority responsible for the prudential supervision of CCPs as a resolution authority, adequate structural arrangements should be put in place to separate the supervisory and resolution functions to avoid any conflicts of interest and risk of regulatory forbearance.
- (14) In light of the consequences that the failure of a CCP and the subsequent actions may have on the financial system and the economy of a Member State, as well as the possible ultimate need to use public funds to resolve a crisis, the Ministries of Finance or other relevant ministries in the Member States should be closely involved, at an early stage, in the process of recovery and resolution.
- (15) As CCPs often provide services across the Union, effective recovery and resolution requires cooperation among competent authorities and resolution authorities within supervisory and resolution colleges, notably at the preparatory stages of recovery and resolution. That includes the assessment of recovery plans developed by the CCP, the

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2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

preparation and maintenance of resolution plans and addressing any impediments to resolvability.

- (16) Resolution of CCPs should strike the balance between the need, on the one hand, for procedures that take into account the urgency of the situation and allow for efficient, fair and timely solutions and, on the other, the necessity to protect financial stability in all the Member States where the CCP provides services. The authorities whose areas of competence would be affected by the failure of a CCP should share their views in the resolution college to achieve these objectives. Similarly, in order to ensure a regular exchange of views and coordination with relevant third countries authorities, these should be invited to participate in resolution colleges as observers where necessary. Authorities should always take into account the impact of their decisions on the financial stability in the Member States where the CCP's operations are critical or important for local financial markets, including where clearing members are located and where linked trading venues and financial market infrastructures are established.
- (17) In order to prepare the decisions of ESMA in relation to the tasks allocated to it and to ensure the comprehensive involvement of EBA and its members in the preparation of these decisions, ESMA should create an internal Resolution Committee and should invite relevant EBA competent authorities to participate as observers.
- (18) In order to address the potential failure of a CCP in an effective and proportionate manner, authorities should take into account a number of factors when exercising their recovery and resolution powers such as the nature of the CCP's business, shareholding structure, legal form, risk profile, size, legal status and interconnectedness to the financial system. The authorities should also take account of whether its failure and subsequent winding up under normal insolvency proceedings would be likely to have a significant negative effect on financial markets, on other financial institutions, or on the wider economy.
- (19) In order to deal in an efficient manner with failing CCPs, authorities should have the power to impose preparatory measures on CCPs. A minimum standard should be established as regards the contents and information to be included in recovery plans to ensure that all CCPs in the Union have sufficiently detailed plans for recovery should they face financial distress. Such plans should be based on realistic assumptions applicable in a range of robust and severe scenarios, including deteriorations arising from a default event or from a non-default event. The recovery plan should form part of the operating rules of the CCP agreed contractually with clearing members. Those operating rules should further contain provisions to ensure the enforceability of recovery measures outlined in the plan in all scenarios. Recovery plans should not assume access to extraordinary public financial support or expose taxpayers to the risk of loss.
- (20) CCPs should prepare and regularly update their recovery plans. The requirement to prepare a recovery plan should be applied proportionately, reflecting the systemic importance of the CCP and its interconnectedness with the financial system. The recovery phase in this context should start when there is a significant deterioration of the CCP's financial situation or risk of breach of its prudential requirements under Regulation (EU) 648/2012. This should be indicated with relation to a framework of qualitative or quantitative indicators included in the recovery plan.

- (21) The CCP should submit its recovery plan to competent authorities and the supervisory college, established under Regulation (EU) No 648/2012, for a complete assessment, to be reached by joint decision of the college. The assessment should include whether the plan is comprehensive and whether it could feasibly restore the viability of the CCP, in a timely manner, including in periods of severe financial stress.
- (22) Recovery plans should comprehensively set out the actions that the CCP would take to address any unmatched outstanding obligations, uncovered loss, liquidity shortfall, or capital inadequacy, as well as the actions to replenish any depleted pre-funded financial resources and liquidity arrangements in order to restore the CCP's viability and its continuing ability to meet its requirements for authorisation.
- (23) CCPs should ensure that the plans are non-discriminatory and balanced in terms of their impacts and the incentives they create. They should not disadvantage clearing members or clients in a disproportionate way. In particular, in accordance with Regulation (EU) No 648/2012 CCPs should ensure that their clearing members have limited exposures toward the CCP. CCPs should ensure that all relevant stakeholders are consulted on the recovery plan through their involvement in the CCP's risk committee, and by being involved in the development of the recovery plan.
- (24) To ensure the ability of a CCP to apply the recovery options where necessary to contracts or assets governed by the law of a third country or to entities based in third countries, the CCP's operating rules should include contractual provisions for that purpose.
- (25) Where a CCP does not present an adequate recovery plan, competent authorities should be able to require the CCP to take measures necessary to redress the material deficiencies of the plan in order to strengthen the business of the CCP and ensure that the CCP can restore its capital or match its book in case of failure. That power should allow competent authorities to take preventive action to the extent that it is necessary to address any deficiencies and therefore to meet the objectives of financial stability.
- (26) Resolution planning is an essential component of effective resolution. The plans should be drawn up by the resolution authority of the CCP and jointly agreed by the relevant authorities of the resolution college. Authorities should have all the information necessary to identify and ensure the continuance of critical functions. The content of a resolution plan should, however, be proportionate to the systemic importance of the CCP and based, inter alia, on the information provided by it.
- (27) Resolution authorities, on the basis of the assessment of resolvability, should have the power to require changes to the structure and organisation of CCPs directly or indirectly through the competent authority, to take measures which are necessary and proportionate to reduce or remove material impediments to the use of resolution tools and ensure the resolvability of the entities concerned.
- (28) Resolution plans and resolvability assessments constitute areas where day-to-day supervisory considerations are taken over by the need to expedite and ensure swift restructuring actions in order to secure a CCP's critical functions and safeguard financial stability. In the event of disagreement between the different members of the resolution college on decisions to be taken with regard to the CCP's resolution plan, the assessment of the CCP's resolvability and the decision to remove any impediments

thereto, ESMA should play a mediation role in accordance with Article 19 of Regulation (EU) No 1095/2010. Such binding mediation by ESMA should nonetheless be prepared for its consideration by an ESMA internal committee, in view of the competences of ESMA members to ensure financial stability and to oversee clearing members in several Member States. Certain competent authorities under the EBA Regulation should be invited to participate as observers to that ESMA internal committee in view of the fact that such authorities carry out similar tasks under Directive 2014/59/EU. Such binding mediation should not prevent non-binding mediation in accordance with Article 31 of Regulation (EU) No 1095/2010 in other cases.

- (29) Where expedient to achieve the objective of orderly recovery and resolution, competent and resolution authorities should identify specific measures in relation to a parent undertaking. Depending on the structure of the group to which the CCP belongs, it can be necessary that the recovery plan of the CCP sets out the conditions under which the provision of possible financial support, guarantees or other forms of operational support from a parent undertaking or another group-entity to a CCP within the same group would be triggered. Transparency on such arrangements would mitigate risks to the liquidity and solvency of the group entity providing support to a CCP facing financial distress. Any change to such arrangements should be considered to be a material change for the purpose of reviewing the recovery plan.
- (30) Given the sensitivity of the information contained in the recovery and resolution plans, those plans should be subject to appropriate confidentiality provisions.
- (31) Competent authorities should transmit the recovery plans and any changes thereto to the relevant resolution authorities, and the latter should transmit the resolution plans and any changes thereto to competent authorities, thus permanently keeping every relevant authority fully informed.
- (32) In order to preserve financial stability, it is necessary that competent authorities are able to remedy the deterioration of a CCP's financial and economic situation before that CCP reaches a point at which authorities have no other alternative but to resolve it or to direct the CCP to change course where its actions could be detrimental for overall financial stability. Therefore, competent authorities should be granted early intervention powers to avoid or minimise adverse effects on financial stability that could result from the CCP's implementation of certain measures. The early intervention powers should be conferred on competent authorities in addition to their powers provided for in the national law of Member States or under Regulation (EU) No 648/2012 for circumstances other than those considered to be early intervention.
- (33) During the recovery and early intervention phases, shareholders should retain their rights in full. They should no longer fully retain such rights once the CCP has been put under resolution.
- (34) The resolution framework should provide for timely entry into resolution before a CCP is insolvent. A CCP should be considered to be failing or likely to fail when it infringes or is likely in the near future to infringe the requirements for continuing authorisation, when its recovery has failed to restore its viability, when the assets of the CCP are or are likely in the near future to be less than its liabilities, when the CCP is or is likely in the near future to be unable to pay its debts as they fall due, or when

the CCP requires extraordinary public financial support. However, the fact that a CCP does not comply with all the requirements for authorisation should not justify by itself the entry into resolution.

- (35) The provision for emergency liquidity assistance from a central bank – where such a facility is available – should not be a condition that demonstrates that a CCP is or will be, in the near future, unable to pay its liabilities as they fall due. In order to preserve financial stability, in particular in the case of a systemic liquidity shortage, State guarantees on liquidity facilities provided by central banks or State guarantees of newly issued liabilities to remedy a serious disturbance in the economy of a Member State should not trigger the resolution framework provided that a number of conditions are met.
- (36) Where a CCP meets the conditions for resolution, the resolution authority of the CCP should have at its disposal a harmonised set of resolution tools and powers. Their exercise should be subject to common conditions, objectives, and general principles. The use of additional tools and powers by resolution authorities should be consistent with the resolution principles and objectives. In particular, the use of such tools or powers should not impinge on the effective resolution of cross-border groups.
- (37) The prime objectives of resolution should be to ensure the continuity of critical functions, to avoid adverse effects on financial stability, and to protect public funds by minimising reliance on extraordinary public financial support to failing CCPs.
- (38) The critical functions of a failing CCP should be maintained, albeit re-structured with changes to the management where appropriate, through the use of resolution tools as a going concern with the use, to the extent possible, of private funds. That could be achieved either through sale to or merger with a solvent third party, or after having restructured or written down the contracts and liabilities of the CCP via the allocation of losses and positions, or after having written down shares or written down and converted its debt to equity, in order to effect a recapitalisation. In line with this objective, prior to these actions, the resolution authority should consider enforcing any existing and outstanding contractual obligations of the CCP in line with how they would be called in under normal insolvency proceedings.
- (39) Rapid and decisive action is necessary to sustain market confidence and minimise contagion. Once the conditions for resolution have been met, the resolution authority of the CCP should not delay in taking appropriate and coordinated resolution action in the public interest. The failure of a CCP can occur under circumstances requiring an immediate reaction by the relevant resolution authority. That authority should therefore be allowed to take resolution action notwithstanding the exercise of recovery measures by the CCP or without imposing an obligation to first use the early intervention powers.
- (40) When taking resolution actions, the resolution authority of the CCP should take into account and follow the measures provided for in the resolution plans developed within the resolution college, unless the resolution authority considers, taking into account circumstances of the case, that resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans. The resolution authority should promptly inform the resolution college of the resolution actions they plan to undertake, in particular where such action deviates from the plan.

- (41) Interference with property rights should be proportionate to the financial stability risk. Resolution tools should therefore be applied only to those CCPs that meet the conditions for resolution, specifically where it is necessary to pursue the objective of financial stability in the public interest. Given that resolution tools and powers may disrupt the rights of shareholders, clearing participants and creditors, resolution action should be taken only where necessary in the public interest and any interference with those rights should be compatible with the Charter. In particular, where creditors within the same class are treated differently in the context of resolution action, such distinctions should be justified in the public interest and proportionate to the risks being addressed and should be neither directly nor indirectly discriminatory on the grounds of nationality.
- (42) Affected shareholders, clearing participants and creditors should not incur losses greater than those which they would have incurred if the resolution authority would not have taken resolution action in relation to the CCP and they would instead have been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or the CCP had been wound up in normal insolvency proceedings. In the event of a partial transfer of assets of a CCP under resolution to a private purchaser or to a bridge CCP, the residual part of the CCP under resolution should be wound up under normal insolvency proceedings.
- (43) For the purpose of protecting the right of shareholders, counterparties and creditors, clear obligations should be laid down concerning the valuation of the assets and liabilities of the CCP and the valuation of the treatment that shareholders and creditors would have received if the resolution authority would not have taken resolution action. It should be possible to commence a valuation already during the recovery phase. Before any resolution action is taken, a fair and realistic valuation of the assets and liabilities of the CCP should be carried out. Such a valuation should be subject to a right of appeal only together with the resolution decision. In addition, in certain cases, an ex-post comparison between the treatment that shareholders and creditors have actually been afforded and the treatment they would have received if the resolution authority would not have taken resolution action in relation to the CCP and they would instead have been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or under normal insolvency proceedings, should be carried out after resolution tools have been used. Where shareholders and creditors have received, in payment of, or compensation for, their claims, less than the amount that they would have received if the resolution authority would not have taken resolution action in relation to the CCP and they would instead have been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or under normal insolvency proceedings, they should in certain cases be entitled to the payment of the difference. As opposed to the valuation prior to the resolution action, it should be possible to challenge that comparison separately from the resolution decision. Member States should be free to decide on the procedure as to how to pay any difference of treatment that has been determined to shareholders and creditors.
- (44) To ensure an effective resolution, the valuation process should determine as accurately as possible any losses that need to be allocated for the CCP to re-establish a matched book of outstanding positions and to meet ongoing payment obligations. The valuation of assets and liabilities of failing CCP should be based on fair, prudent and realistic assumptions at the moment when the resolution tools are used. The value of liabilities

should not, however, be affected in the valuation by the financial state of the CCP. It should be possible, for reasons of urgency, that resolution authorities make a rapid valuation of the assets or the liabilities of a failing CCP. That valuation should be provisional and should apply until an independent valuation is carried out.

- (45) Upon entry into resolution, any outstanding contractual obligations set out in the operating rules of the CCP, including outstanding recovery measures, should be honoured except where the exercise of another resolution power or tool is more appropriate to avoid adverse effects for financial stability or to secure the critical functions of the CCP in a timely manner. Losses should then be absorbed by regulatory capital instruments and should be allocated to shareholders up to their capacity either through the cancellation or transfer of instruments of ownership or through severe dilution. Where those instruments are not sufficient, resolution authorities should have the power to write down subordinated unsecured debt and senior unsecured liabilities, to the extent necessary, without jeopardising broader financial stability, in accordance with their ranking under applicable national insolvency law.
- (46) In case the exercise by the CCP of its recovery measures has not succeeded in stemming losses, restoring it to a balanced position in terms of having a matched book of outstanding positions or replenishing pre-funded resources comprehensively, or where the resolution authority has determined that the exercise of these actions by the CCP would be detrimental for financial stability, the exercise of loss and position allocation powers by the authority should be aimed at allocating the outstanding losses, ensuring the return of the CCP to a balanced position and replenishing the required pre-funded resources either through the continued exercise of the tools in the CCP's operating rules or through other actions.
- (47) Resolution authorities should also ensure that the costs of the resolution of the CCP are minimised and that creditors of the same class are treated in an equitable manner. Where creditors within the same class are treated differently in the context of resolution action, those distinctions should be justified in the public interest and should be neither directly nor indirectly discriminatory on the basis of nationality or any other ground.
- (48) The resolution tools should be used to the fullest extent possible before any public sector injection of capital or equivalent extraordinary public financial support to a CCP. The use of public financial support to assist in the resolution of failing institutions should comply with the relevant State aid provisions.
- (49) An effective resolution regime should minimise the costs of the resolution of a failing CCP borne by the taxpayers. It should ensure that CCPs can be resolved without jeopardising financial stability. The loss and position allocation tools achieve that objective by ensuring that shareholders and counterparties who are among the creditors of the failing CCP suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the CCP. The loss and position allocation tools therefore give shareholders and counterparties of CCPs a stronger incentive to monitor

the health of a CCP during normal circumstances in accordance with the recommendations of the Financial Stability Board<sup>21</sup>.

- (50) In order to ensure that resolution authorities have the necessary flexibility to allocate losses and positions to counterparties in a range of circumstances, it is appropriate that those authorities are able to apply the loss and position allocation tools both where the objective is to maintain the operations of the failing CCP and where critical services are transferred to a bridge CCP or a third party and the residual part of the CCP ceases to operate and is wound up.
- (51) Where the loss and position allocation tools are applied with the objective of restoring the viability of the failing CCP to enable it to continue to operate as a going concern, the resolution should be accompanied by replacement of management, except where retention of management is appropriate and necessary for the achievement of the resolution objectives, and a subsequent restructuring of the CCP and its activities in a way that addresses the reasons for its failure. That restructuring should be achieved through the implementation of a business reorganisation plan, which should be compatible with the restructuring plan that the CCP might be required to submit pursuant to the State aid framework.
- (52) The loss and position allocation tools should be exercised with a view to re-matching the CCP's book, stemming any further losses and obtaining additional resources to help recapitalise the CCP and replenish its prefunded resources. In order to ensure that they are effective and achieve their objective, they should be able to apply to as wide a range of contracts giving rise to unsecured liabilities or creating an unmatched book for the failing CCP as possible. They should provide for the possibility to auction defaulters' positions among remaining clearing members, forcibly allocate them to the extent that voluntary arrangements established as part of recovery plan are not exhausted upon entry into resolution, partially or fully tear-up the contracts of defaulted clearing members, product lines and of the CCP, further haircut outgoing variation margin payments, exercise any outstanding cash calls set out in recovery plans, exercise additional cash calls specifically earmarked for the resolution authority and write-down of capital and debt instruments issued by the CCP or other unsecured liabilities and a conversion of any debt instruments into shares.
- (53) Resolution authorities should be able to exclude or partially exclude some contracts from loss and position allocation in a number of circumstances. Where those exclusions are applied, the level of loss or exposure applied to other contracts may be increased to take account of such exclusions subject to the "no creditor worse off principle" being respected.
- (54) Where the resolution tools have been used to transfer the critical functions or viable business of a CCP to a sound entity such as a private sector purchaser or bridge CCP, the residual part of the CCP should be liquidated within an appropriate time frame having regard to any need for the failing CCP to provide services or support to enable the purchaser or bridge CCP to carry out the activities or provide the services acquired by virtue of that transfer.

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<sup>21</sup> [http://www.fsb.org/wp-content/uploads/r\\_141015.pdf](http://www.fsb.org/wp-content/uploads/r_141015.pdf)

- (55) The sale of business tool should enable authorities to sell the CCP or parts of its business to one or more purchasers without the consent of shareholders. When applying the sale of business tool, authorities should make arrangements for the marketing of that CCP or part of its business in an open, transparent and non-discriminatory process, while aiming to maximise, as far as possible, the sale price.
- (56) Any net proceeds from the transfer of assets or liabilities of the CCP under resolution when applying the sale of business tool should benefit the entity left in the winding up proceedings. Any net proceeds from the transfer of instruments of ownership issued by the CCP under resolution when applying the sale of business tool should benefit the shareholders. Proceeds should be calculated net of the costs arisen from the failure of the CCP and from the resolution process.
- (57) In order to perform the sale of business in a timely manner and protect financial stability, the assessment of the buyer of a qualifying holding should be carried out in a timely manner that does not delay the application of the sale of business tool
- (58) Information concerning the marketing of a failing CCP and the negotiations with potential acquirers prior to the application of the sale-of-business tool is likely to be of systemic importance. In order to ensure financial stability, it is important that the disclosure to the public of such information required by Regulation (EU) No 596/2014 of the European Parliament and of the Council<sup>22</sup> may be delayed for the time necessary to plan and structure the resolution of the CCP in accordance with delays permitted under the market abuse regime.
- (59) As a CCP which is wholly or partially owned by one or more public authorities or controlled by the resolution authority, a bridge CCP should have as its main purpose ensuring that essential financial services continue to be provided to the clearing members and clients of the CCP that had been placed under resolution and that essential financial activities continue to be performed. The bridge CCP should be operated as a viable going concern entity and be put back on the market when conditions are appropriate or wound up if not longer viable.
- (60) Should all other options be practically unavailable or be demonstrably insufficient to safeguard financial stability, government participation in the shape of equity support or temporary public ownership should be possible, in accordance with applicable rules on State aid, including a restructuring of the operations of the CCP, and enable the deployed funds to be recouped from the CCP over time. The use of government stabilisation tools is notwithstanding the role of central banks in providing liquidity to the financial system even in times of stress.
- (61) To ensure the ability of a Union authority to apply the loss and position allocation tools to contracts with entities based in third countries, recognition of that possibility should be included in the operating rules of the CCP.
- (62) Resolution authorities should have all the necessary legal powers that, in different combinations, could be exercised when using the resolution tools. They should include

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<sup>22</sup> Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

the power to transfer instruments of ownership, assets, rights, obligations or liabilities of a failing CCP to another entity such as another CCP or a bridge CCP, the power to write down or cancel instruments of ownership, or write down or convert liabilities of a failing CCP, the power to write down variation margin, the power to enforce any outstanding obligations of third parties in relation to the CCP including cash calls and position allocations, the power to tear up contracts of the CCP partially and fully, the power to replace the management and the power to impose a temporary moratorium on the payment of claims. The CCP and the members of its board and senior management should remain liable, subject to Member State law, under civil or criminal law for their responsibility for the failure of the CCP.

- (63) The resolution framework should include procedural requirements to ensure that resolution actions are properly notified and made public. However, as information obtained by resolution authorities and their professional advisers during the resolution process is likely to be sensitive, before the resolution decision is made public, it should be subject to an effective confidentiality regime. The fact that information on the contents and details of recovery and resolution plans and the result of any assessment of those plans may have far-reaching effects, in particular on the undertakings concerned, must be taken into account. Any information provided in respect of a decision before it is taken, be it on whether the conditions for resolution are satisfied, on the use of a specific tool or of any action during the proceedings, must be presumed to have effects on the public and private interests concerned by the action. However, information that the resolution authority is examining a specific CCP could be enough for there to be negative effects on that CCP. It is therefore necessary to ensure that there are appropriate mechanisms for maintaining the confidentiality of such information, such as the content and details of recovery and resolution plans and the result of any assessment carried out in that context.
- (64) Resolution authorities should have ancillary powers to ensure the effectiveness of the transfer of instruments of ownership or debt instruments and assets, rights and liabilities. Subject to the safeguards, those powers should include the power to remove third parties rights from the transferred instruments or assets and the power to enforce contracts and to provide for the continuity of arrangements vis-à-vis the recipient of the transferred assets and instruments of ownership. However, the rights of employees to terminate a contract of employment should not be affected. The right of a party to terminate a contract with a CCP under resolution, or a group entity thereof, for reasons other than the resolution of the failing CCP should not be affected either. Resolution authorities should have the ancillary power to require the residual CCP that is being wound up under normal insolvency proceedings to provide services that are necessary to enable the CCP to which assets, contracts or instruments of ownership have been transferred by virtue of the application of the sale of business tool or the bridge CCP tool to operate its business.
- (65) In accordance with Article 47 of the Charter, the parties concerned have a right to due process and to an effective remedy against the measures affecting them. Therefore, the decisions taken by the resolution authorities should be subject to a right of appeal.
- (66) Resolution action taken by national resolution authorities may require economic assessments and a large margin of discretion. The national resolution authorities are specifically equipped with the expertise needed for making those assessments and for determining the appropriate use of the margin of discretion. Therefore, it is important

to ensure that the economic assessments made by national resolution authorities in that context are used as a basis by national courts when reviewing the crisis management measures concerned.

- (67) In order to cover situations of extreme urgency, and since the suspension of any decision of the resolution authorities might impede the continuity of critical functions, it is necessary to provide that the lodging of any appeal should not result in automatic suspension of the effects of the challenged decision and that the decision of the resolution authority should be immediately enforceable.
- (68) In addition, where necessary in order to protect third parties who have acquired assets, contracts, rights and liabilities of the CCP under resolution in good faith by virtue of the exercise of the resolution powers by the authorities and to ensure the stability of the financial markets, a right of appeal should not affect any subsequent administrative act or transaction concluded on the basis of an annulled decision. In such cases, remedies for a wrongful decision should therefore be limited to the award of compensation for the damages suffered by the affected persons.
- (69) Given that resolution action may be required to be taken urgently due to serious financial stability risks in the Member State and the Union, any procedure under national law relating to the application for ex-ante judicial approval of a crisis management measure and the court's consideration of such an application should be swift. This is without prejudice to the right that interested parties might have in making an application to the court to set aside the decision for a limited period after the resolution authority has taken the crisis management measure.
- (70) It is in the interest of an efficient resolution, and in order to avoid conflicts of jurisdiction, that no normal insolvency proceedings for the failing CCP be opened or continued whilst the resolution authority is exercising its resolution powers or using the resolution tools, except at the initiative of, or with the consent of, the resolution authority. It is useful and necessary to suspend, for a limited period, certain contractual obligations so that the resolution authority has time to put into practice the resolution tools. This should not, however, apply to obligations of a failing CCP towards systems designated under Directive 98/26/EC of the European Parliament and of the Council<sup>23</sup>, other central counterparties and central banks. Directive 98/26/EC reduces the risk associated with participation in payment and securities settlement systems, in particular by reducing disruption in the event of the insolvency of a participant in such a system. To ensure that those protections apply appropriately in crisis situations, whilst maintaining appropriate certainty for operators of payment and securities systems and other market participants, a crisis prevention measure or a resolution action should not be deemed to be insolvency proceedings within the meaning of Directive 98/26/EC, provided that the substantive obligations under the contract continue to be performed. However, the operation of a system designated under or the right to collateral security guaranteed by Directive 98/26/EC should not be undermined.
- (71) In order to ensure that resolution authorities, when transferring assets and liabilities to a private sector purchaser or bridge CCP, have an adequate period to identify contracts that need to be transferred, it might be appropriate to impose proportionate restrictions

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<sup>23</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11. 6. 1998, p. 45).

on counterparties' rights to close out, accelerate or otherwise terminate financial contracts before the transfer is made. Such a restriction would be necessary to allow authorities to obtain a true picture of the balance sheet of the failing CCP, without the changes in value and scope that extensive exercise of termination rights would entail. In order to interfere with the contractual rights of counterparties to the minimum extent necessary, the restriction on termination rights should apply only in relation to the crisis prevention measure or resolution action, including the occurrence of any event directly linked to the application of such a measure, and rights to terminate arising from any other default, including failure to pay or deliver margin, should remain.

- (72) In order to preserve legitimate capital market arrangements in the event of a transfer of some, but not all, of the assets, contracts, rights and liabilities of a failing CCP, it is appropriate to include safeguards to prevent the splitting of linked liabilities, rights and contracts, as appropriate. Such a restriction on selected practices in relation to linked contracts and related collateral should extend to contracts with the same counterparty covered by security arrangements, title transfer financial collateral arrangements, set-off arrangements, close out netting agreements, and structured finance arrangements. Where the safeguard applies, resolution authorities should seek to transfer all linked contracts within a protected arrangement, or leave them all with the residual failing CCP. Those safeguards should ensure that the regulatory capital treatment of exposures covered by a netting agreement for the purposes of Directive 2013/36/EU is affected to a minimum degree.
- (73) EU CCPs provide services to clearing members and clients located in third countries and third country CCPs provide services to clearing members and clients located in the EU. Effective resolution of internationally active CCPs requires cooperation between, Member States and third-country authorities. For that purpose ESMA should provide guidance on the relevant content of cooperation arrangements to be concluded with authorities of third countries. Those cooperation arrangements should ensure effective planning, decision-making and coordination in respect of internationally active CCPs. National resolution authorities should recognise and enforce third-country resolution proceedings in certain circumstances. Cooperation should also take place with regard to subsidiaries of Union or third-country CCPs and their clearing members and clients.
- (74) In order to ensure consistent harmonisation and adequate protection for market participants across the Union, the Commission should adopt draft regulatory technical standards developed by ESMA by means of delegated acts pursuant to Article 290 TFEU, in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 to specify the content of the written arrangements and procedures for the functioning of the resolution colleges, the contents of resolution plans and elements relevant to the conduct of valuations.
- (75) The Commission should be able to suspend any clearing obligation established pursuant to Article 5 of Regulation (EU) No 648/2012, following a request from the resolution authority of a CCP in resolution or the competent authority of a clearing member of a CCP in resolution, and following a non-binding opinion by ESMA, for specific classes of OTC derivatives which are cleared by a CCP which is in resolution. The decision to suspend should be adopted only if it is necessary to preserve financial stability and market confidence, in particular to avoid contagion effects and to prevent counterparties and investors having high and uncertain risk exposures to a CCP. In

order to adopt its decision, the Commission should take into account the resolution objectives and the criteria stated in Regulation (EU) No 648/2012 for subjecting OTC derivatives to the clearing obligation regarding those OTC derivatives for which the suspension is requested. The suspension should be of a temporary nature with a possibility of renewal. Likewise, the role of the CCP's risk committee, as set out on Article 28 of Regulation (EU) No 648/2012, should be enhanced to further encourage the CCP to manage its risks prudently and improve its resilience. Members of the risk committee should be able to inform the competent authority when the CCP does not follow the risk committee's advice, and representatives of clearing members and clients on the risk committee should be able to use information provided to monitor their exposures to the CCP, in accordance with confidentiality safeguards. Finally, resolution authorities of CCPs should also have access to all necessary information in trade repositories. Regulation (EU) No 648/2012 and Regulation (EU) 2365/2015 of the European Parliament and of the Council<sup>24</sup> should therefore be amended accordingly.

- (76) In order to ensure that resolution authorities of CCPs are represented in all relevant fora, and to ensure that the ESMA benefits from all expertise necessary to carry out the tasks related to the recovery and resolution of CCPs, Regulation (EU) No 1095/2010 should be amended in order to include national CCP resolution authorities in the concept of competent authorities established by that Regulation.
- (77) In order to prepare the decisions of ESMA in relation to the tasks allocated to it involving the development of draft technical standards on ex ante and ex-post valuations and on resolution colleges and plans, and of guidelines on the conditions for resolution, and on binding mediation, and to ensure the comprehensive involvement of EBA and its members in the preparation of these decisions, ESMA should create an internal Resolution Committee where relevant EBA competent authorities shall be invited to participate as observers.
- (78) This Regulation respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, and, in particular, the right to property, the right to an effective remedy and to a fair trial and the right of defence.
- (79) When taking decisions or actions under this Regulation, competent authorities and resolution authorities should always have due regard to the impact of their decisions and actions on financial stability in other Member States and on the economic situation in other Member States and should give consideration to the significance of any clearing member for the financial sector and the economy of the Member State where such a clearing member is established.
- (80) Since the objective of this Regulation, namely the harmonisation of the rules and processes for the resolution of CCPs, cannot be sufficiently achieved by the Member States, but can rather, by reason of the effects of a failure of any CCPs in the whole Union, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that

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<sup>24</sup> Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).

Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

- (81) In order avoid inconsistencies between the provisions relating to the recovery and resolution of CCPs and the legal framework governing the recovery and resolution of credit institutions and investment firms, it is appropriate to defer the application of this Regulation until the date from which Member States are to apply the measures transposing [*PO: Please insert reference to the Directive amending Directive 2014/59/EU*].

HAVE ADOPTED THIS REGULATION:

# TITLE I

## SUBJECT MATTER AND DEFINITIONS

### *Article 1* *Subject matter*

This Regulation lays down rules and procedures relating to the recovery and resolution of central counterparties (CCPs) authorised in accordance with Regulation (EU) No 648/2012 and rules relating to the arrangements with third countries in the field of recovery and resolution of CCPs.

### *Article 2* *Definitions*

For the purposes of this Regulation the following definitions apply:

- (1) 'CCP' means a CCP as defined in point (1) of Article 2 of Regulation (EU) No 648/2012;
- (2) 'resolution college' means the college established pursuant to Article 4;
- (3) 'resolution authority' means an authority designated by a Member State in accordance with Article 3;
- (4) 'resolution tool' means a resolution tool referred to in Article 27(1);
- (5) 'resolution power' means a power referred to in Article 48;
- (6) 'resolution objectives' means the resolution objectives laid down in Article 21;
- (7) 'competent authority' means an authority designated by a Member State in accordance with Article 22 of Regulation (EU) No 648/2012;
- (8) 'resolution plan' means a resolution plan for a CCP drawn up in accordance with Article 13;
- (9) 'resolution action' means the decision to place a CCP under resolution pursuant to Article 22, the application of a resolution tool, or the exercise of one or more resolution powers;
- (10) 'clearing member' means a clearing member as defined in point 14 of Article 2 of Regulation (EU) No 648/2012;
- (11) 'parent undertaking' means a parent undertaking as defined in point (15)(a) of Article 4(1) of Regulation (EU) No 575/2013;
- (12) 'third-country CCP' means a CCP, the head office of which is established in a third country;
- (13) 'set-off arrangement' means an arrangement under which two or more claims or obligations owed between the CCP under resolution and a counterparty can be set off against each other;
- (14) 'financial market infrastructure' (FMI) means a central counterparty, a central securities depository, a trade repository, a payment system or another system defined and designated by a Member State under Article 2(a) of Directive 98/26/EC;

- (15) 'client' means a client as defined in point 15 of Article 2 of Regulation (EU) No 648/2012;
- (16) 'linked CCP' means a CCP with which an interoperability arrangement has been set up under Title V of Regulation (EU) No 648/2012;
- (17) 'clearing participants' means clearing members and clients;
- (18) 'recovery plan' means a recovery plan drawn up and maintained by a CCP in accordance with Article 9;
- (19) 'board' means the administrative or supervisory board, or both, set up pursuant to national company law in accordance with Article 27(2) of Regulation (EU) No 648/2012;
- (20) 'college' means the college referred to in Article 18(1) of Regulation (EU) No 648/2012;
- (21) 'capital' means subscribed capital within the meaning of Article 22 of Council Directive 86/635/EEC<sup>25</sup> including instruments of ownership in so far it has been paid up, plus the related share premium accounts, it fully absorbs losses in going concern situations, and, in the event of bankruptcy or liquidation, it ranks after all other claims;
- (22) 'default waterfall' means default waterfall in accordance with Article 45 of Regulation (EU) No 648/2012;
- (23) 'critical functions' means activities, services or operations provided to third parties external to the CCP the discontinuance of which is likely to lead to the disruption of services that are essential to the real economy or to disrupt financial stability in one or more Member States due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of a CCP or group, with particular regard to the substitutability of those activities, services or operations;
- (24) 'group' means a parent undertaking and its subsidiaries;
- (25) 'linked FMI' means a linked CCP or another FMI with which the CCP has contractual arrangements;
- (26) 'extraordinary public financial support' means State aid within the meaning of Article 107(1) TFEU, or any other public financial support at supra-national level, which, if provided for at national level, would constitute State aid, that is provided in order to preserve or restore the viability, liquidity or solvency of a CCP or of a group of which such a CCP forms part;
- (27) 'financial contracts' means contracts and agreements as set out in point 100 of Article 2(1) of Directive 2014/59/EU;
- (28) 'normal insolvency proceedings' means collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to CCPs under national law and either specific to those institutions or generally applicable to any natural or legal person;
- (29) 'instruments of ownership' means shares, other instruments that confer ownership, instruments that are convertible into or give the right to acquire shares or other

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<sup>25</sup> Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

instruments of ownership, and instruments representing interests in shares or other instruments of ownership;

- (30) 'designated national macroprudential authority' means the authority entrusted with the conduct of macroprudential policy referred to in Recommendation B1 of the Recommendation of the European Systemic Risk Board (ESRB) of 22 December 2011 on the macroprudential mandate of national authorities (ESRB/2011/3);
- (31) 'default fund' means a default fund held by a CCP in accordance with Article 42 of Regulation (EU) No 648/2012;
- (32) 'pre-funded resources' means resources which are held by and freely available to the relevant legal person;
- (33) 'senior management' means the person or persons who effectively direct the business of the CCP, and the executive member or members of the board;
- (34) 'trade repository' means a trade repository as defined in point 2 of Article 2 of Regulation (EU) No 648/2012 or in point 1 of Article 3 of Regulation (EU) 2015/2365 of the European Parliament and of the Council<sup>26</sup>;
- (35) 'Union State aid framework' means the framework established by Articles 107, 108 and 109 of the Treaty on the Functioning of the European Union (TFEU) and regulations and all Union acts, including guidelines, communications and notices, made or adopted pursuant to Article 108(4) or Article 109 TFEU;
- (36) 'debt instruments' means bonds or other forms of unsecured transferable debt, instruments creating or acknowledging a debt, and instruments giving rights to acquire debt instruments;
- (37) 'resolution cash call' means a request for cash resources to be provided by clearing members to the CCP, additional to prefunded resources, based on statutory powers available to a resolution authority in accordance with Article 31;
- (38) 'cash calls' means requests for cash resources to be provided by clearing members to the CCP, additional to prefunded resources, based on contractual arrangements laid out in the operating rules of the CCP;
- (39) 'transfer powers' means the powers specified in points (c) or (d) of Article 48(1) to transfer shares, other instruments of ownership, debt instruments, assets, rights, obligations or liabilities, or any combination of those items from a CCP under resolution to a recipient;
- (40) 'derivative' means a derivative as defined in point 5 of Article 2 of Regulation (EU) No 648/2012;
- (41) 'netting arrangement' means an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including 'close-out netting provisions' as defined in point (n)(i) of Article 2(1) of Directive 2002/47/EC of the European Parliament and

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<sup>26</sup> Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).

of the Council<sup>27</sup> and 'netting' as defined in point (k) of Article 2 of Directive 98/26/EC;

- (42) 'crisis prevention measure' means the exercise of powers to require a CCP to take measures to remedy deficiencies in its recovery plan under Article 10(8) and (9), the exercise of powers to address or remove impediments to resolvability under Article 17, or the application of an early intervention measure under Article 19;
- (43) 'termination right' means a right to terminate a contract, a right to accelerate, close out, set-off or net obligations or any similar provision that suspends, modifies or extinguishes an obligation of a party to the contract or a provision that prevents an obligation under the contract from arising that would otherwise arise;
- (44) 'title transfer financial collateral arrangement' means a title transfer financial collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC;
- (45) 'covered bond' means an instrument as referred to in Article 52(4) of Directive 2009/65/EC of the European Parliament and of the Council<sup>28</sup>;
- (46) 'third-country resolution proceedings' means an action under the law of a third country to manage the failure of a third-country CCP that is comparable, in terms of objectives and anticipated results, to resolution actions under this Regulation;
- (47) 'relevant national authorities' means the resolution authorities, competent authorities or competent ministries designated in accordance with this Regulation or pursuant to Article 3 of Directive 2014/59/EU or other authorities in Member States with powers in relation to assets, rights, obligations or liabilities of third-country CCPs providing clearing services in their jurisdiction;
- (48) 'relevant third-country authority' means a third-country authority responsible for carrying out functions comparable to those of resolution authorities or competent authorities pursuant to this Regulation.

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<sup>27</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

<sup>28</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32)

# **TITLE II**

## **AUTHORITIES, RESOLUTION COLLEGE AND PROCEDURES**

### **SECTION I**

#### **RESOLUTION AUTHORITIES, RESOLUTION COLLEGES AND INVOLVEMENT OF EUROPEAN SUPERVISORY AUTHORITIES**

##### *Article 3*

##### *Designation of resolution authorities and competent ministries*

1. Each Member State shall designate one or more resolution authorities that are empowered to use the resolution tools and exercise the resolution powers as set out in this Regulation.

Resolution authorities shall be national central banks, competent ministries, public administrative authorities or other authorities entrusted with public administrative powers.

2. Resolution authorities shall have the expertise, resources and operational capacity to apply resolution measures and exercise their powers with the speed and flexibility that are necessary to achieve the resolution objectives.

3. Where a resolution authority designated pursuant to paragraph 1 is entrusted with other functions, the Member State shall ensure the operational independence of that resolution authority and shall put in place all necessary arrangements to avoid conflicts of interest between the functions entrusted to the resolution authority pursuant to this Regulation and all other functions entrusted to that authority.

4. The staff involved in carrying out the functions entrusted to the resolution authority pursuant to this Regulation shall be structurally separated from, and subject to separate reporting lines from, the staff involved in carrying out the other functions of that authority.

The resolution authority shall adopt and make public the internal rules ensuring the structural separation referred to in the first subparagraph, including rules regarding professional secrecy and information exchanges between the different functional areas.

5. Each Member State shall designate a single ministry which is responsible for exercising the functions entrusted to the competent ministry pursuant to this Regulation.
6. Where the resolution authority in a Member State is not the competent ministry, the resolution authority shall inform the competent ministry of the decisions taken pursuant to this Regulation.
7. Where the decisions referred to in paragraph 6 have a direct fiscal impact or systemic implications, the resolution authority shall obtain the approval of the competent ministry before their implementation unless otherwise stipulated in national law.
8. Member States shall notify the Commission and the European Securities and Markets Authority (ESMA) of the resolution authorities designated pursuant to paragraph 1.

9. Where a Member State designates more than one resolution authority pursuant to paragraph 1, the notification referred to in paragraph 8 shall include the following:
  - (a) the reasons justifying that multiple designation;
  - (b) the allocation of functions and responsibilities between those authorities;
  - (c) the way in which coordination between them is ensured;
  - (d) the resolution authority designated as the contact authority for the purposes of cooperation and coordination with the relevant authorities of other Member States.
10. ESMA shall publish a list of the resolution authorities and the contact authorities notified pursuant to paragraph 8.

*Article 4*  
*Resolution colleges*

1. The resolution authority shall establish, manage and chair a resolution college to carry out the tasks referred to in Articles 13 16 and 17 and ensure cooperation and coordination with third-country resolution authorities.

Resolution colleges shall provide a framework for resolution authorities and other relevant authorities to perform the following tasks:

  - (a) exchange information relevant for the development of resolution plans, for the application of preparatory and preventative measures and for resolution;
  - (b) develop resolution plans pursuant to Article 13;
  - (c) assess the resolvability of CCPs pursuant to Article 16;
  - (d) identify, address and remove impediments to the resolvability of CCPs pursuant to Article 17;
  - (e) coordinate public communication of resolution strategies and schemes.
2. The following shall be members of the resolution college:
  - (a) the resolution authority of the CCP;
  - (b) the competent authority of the CCP;
  - (c) the competent authorities and the resolution authorities of the clearing members referred to in point (c) of Article 18(2) of Regulation (EU) No 648/2012;
  - (d) the competent authorities referred to in point (d) of Article 18(2) of Regulation (EU) No 648/2012;
  - (e) the competent authorities and the resolution authorities of the CCPs referred to in point (e) of Article 18(2) of Regulation (EU) No 648/2012;

- (f) the competent authorities referred to in point (f) of Article 18(2) of Regulation (EU) No 648/2012;
  - (g) the members of the ESCB referred to in point (g) of Article 18(2) of Regulation (EU) No 648/2012;
  - (h) the central banks referred to in point (h) of Article 18(2) of Regulation (EU) No 648/2012;
  - (i) the competent authority of the parent undertaking, where Article 8(4) applies;
  - (j) the competent ministry, where the resolution authority referred to in point (a) is not the competent ministry;
  - (k) ESMA;
  - (l) the European Banking Authority (EBA).
3. ESMA and EBA shall not have voting rights in resolution colleges.
4. The competent and resolution authorities of clearing members established in third countries and the competent and resolution authorities of third-country CCPs with which the CCP has established interoperability arrangements may be invited to participate in the resolution college as observers. Their attendance shall be conditional on those authorities being subject to confidentiality requirements equivalent, in the opinion of the chair of the college, to those laid down in Article 71. The participation of third country authorities in the resolution college shall be limited to the discussion of cross-border enforcement issues, including the following:
- (a) effective and coordinated enforcement of resolution actions, in particular in accordance with Articles 53 and 75;
  - (b) identifying and removing possible impediments to effective resolution action that may stem from divergent laws governing collateral, netting and set-off arrangements and different recovery and resolution powers or strategies;
  - (c) identifying and coordinating any need for new licensing, recognition or authorisation requirements, considering the need for resolution actions to be carried out in a timely fashion;
  - (d) the possible suspension of any clearing obligation for the relevant asset classes affected by the resolution of the CCP pursuant to Article 6a of Regulation (EU) No 648/2012 or to any equivalent provision under the national law of the third country concerned;
  - (e) the possible influence of different time-zones on the applicable close of business hours regarding the end of trading.
5. The chair of the resolution college shall be responsible for the following tasks:
- (a) establishing written arrangements and procedures for the functioning of the resolution college, after consulting the other members of the resolution college;

- (b) coordinating all activities of the resolution college;
  - (c) convening and chairing all meetings of the resolution college;
  - (d) keeping all members of the resolution college fully informed in advance of the organisation of meetings, of the main issues to be discussed in those meetings and of the items to be considered for the purposes of those discussions;
  - (e) deciding whether and which third-country authorities are invited to attend particular meetings of the resolution college in accordance with paragraph 4;
  - (f) coordinating the timely exchange of all relevant information between members of the resolution college;
  - (g) keeping all members of the resolution college informed, in a timely manner, of the decisions and outcomes of those meetings.
6. In order to ensure the consistent and coherent functioning of resolution colleges across the Union, ESMA shall develop draft regulatory technical standards in order to specify the content of the written arrangements and procedures for the functioning of the resolution colleges referred to in paragraph 1.

For the purposes of preparing the regulatory standards referred to in the first subparagraph, ESMA shall take into account the relevant provisions of the Commission Delegated Regulation (EU) No 876/2013<sup>29</sup>, of Section 1 of Chapter 6 of Commission Delegated Regulation (EU) –/2016 supplementing Directive 2014/59/EU with regard to regulatory technical standards adopted on the basis of Article 88(7) of Directive 2014/59/EU<sup>30</sup>.

ESMA shall submit those draft regulatory technical standards to the Commission by [*PO: insert date 12 months after the date of entry into force of this Regulation*].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in paragraph 6 in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### *Article 5* *ESMA Resolution Committee*

1. ESMA shall create a resolution committee pursuant to Article 41 of Regulation (EU) No 1095/2010 for the purpose of preparing the decisions entrusted to ESMA in this Regulation, except for the decisions to be adopted pursuant to Article 12 of this Regulation.

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<sup>29</sup> Commission Delegated Regulation (EU) No 876/2013 of 28 May 2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on colleges for central counterparties (OJ L 244, 13.9.2013, p. 19)

<sup>30</sup> Commission Delegated Regulation (EU) ... of 23.3.2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges, C(2016) 1691 final [*Note to Publication Office – Please introduce number of Delegated Regulation*]

The resolution committee shall promote the development and coordination of resolution plans and develop methods for the resolution of failing CCPs.

2. The resolution committee shall be composed of the authorities designated pursuant to Article 3(1) of this Regulation.

Authorities referred to in points (i) and (iv) of Article 4(2) of Regulation (EU) No 1093/2010 shall be invited to participate in the resolution committee as observers.

3. For the purposes of this Regulation, ESMA shall cooperate with the European Insurance and Occupational Pensions Authority (EIOPA) and EBA within the framework of the Joint Committee of the European Supervisory Authorities established in Article 54 of Regulation (EU) No 1093/2010, Article 54 of Regulation (EU) No 1094/2010 and Article 54 of Regulation (EU) No 1095/2010.
4. For the purposes of this Regulation, ESMA shall ensure structural separation between the resolution committee and other functions referred to in Regulation (EU) No 1095/2010.

#### *Article 6*

#### *Cooperation between authorities*

1. Competent authorities and resolution authorities shall cooperate closely in the preparation, planning and application of resolution decisions.
2. Competent authorities and resolution authorities shall cooperate with ESMA for the purposes of this Regulation in accordance with Regulation (EU) No 1095/2010.

Competent authorities and resolution authorities shall, without delay, provide ESMA with all the information necessary to carry out its duties in accordance with Article 35 of Regulation (EU) No 1095/2010.

## **SECTION II**

### **DECISION-MAKING AND PROCEDURES**

#### *Article 7*

#### *General principles regarding decision-making*

Competent authorities, resolution authorities and ESMA shall take account of all the following principles when making decisions and taking action pursuant to this Regulation:

- (a) that the proportionality of any decision or action in relation to an individual CCP is ensured, taking into account at least the following factors:
  - i) the CCP's legal form;
  - ii) the nature, size and complexity of the CCP's business;
  - iii) the CCP's clearing membership structure;
  - iv) the CCP's shareholding structure;
  - v) the CCP's interconnectedness with other financial market infrastructures, other financial institutions and with the financial system in general;
  - vi) the actual or potential consequences of the infringements referred to in Articles 19(1) and 22(2).

- (b) that the imperatives of efficacy of decision-making and of keeping costs as low as possible when taking early intervention or resolution action are observed;
- (c) that decisions are made and action is taken in a timely manner and with due urgency when required;
- (d) that resolution authorities, competent authorities and other authorities cooperate with each other to ensure that decisions are made and action is taken in a coordinated and efficient manner;
- (e) that the roles and responsibilities of relevant authorities within each Member State are defined clearly;
- (f) that due consideration is given to the interests of the Member States where the CCP provides services and where its clearing members, their clients, and any linked CCPs are established, and in particular the impact of any decision or action or inaction on the financial stability or fiscal resources of those Member States and the Union as a whole;
- (g) that due consideration is given to the objectives of balancing the interests of the various clearing participants, affected creditors and affected holders in the Member States involved and of avoiding unfairly prejudicing or unfairly protecting the interests of particular actors in some Member States, including avoiding unfair burden allocation across Member States;
- (h) that any obligation under this Regulation to consult an authority before any decision or action is taken implies at least an obligation to consult on those elements of the proposed decision or action which have or which are likely to have:
  - (i) an effect on the clearing members, clients or linked FMIs;
  - (ii) an impact on the financial stability of the Member State where the clearing members, clients or linked FMIs are established or located;
- (i) that resolution plans referred to in Article 13 are complied with, unless deviation from those plans is necessary in order to better achieve the resolution objectives;
- (j) that transparency is ensured wherever a proposed decision or action is likely to have implications on the financial stability or fiscal resources of any relevant Member State;
- (k) that they coordinate and cooperate as closely as possible, also with the goal to lower the overall cost of resolution;
- (l) that negative economic and social effects of any decision in all the Member States and third countries where the CCP provides services, including negative impacts on financial stability, are mitigated.

*Article 8*  
*Information exchange*

1. Resolution authorities and competent authorities shall, on request, provide each other with all the information relevant for the exercise of their tasks under this Regulation.
2. Resolution authorities shall only divulge confidential information provided by a third-country authority where that authority has given its prior consent.

Resolution authorities shall provide the competent ministry with all information relating to decisions or measures that require notification, consultation or consent of that ministry.

# TITLE III PREPARATION

## CHAPTER I Recovery and resolution planning

### SECTION 1 RECOVERY PLANNING

#### *Article 9* *Recovery plans*

1. CCPs shall draw up and maintain a recovery plan providing for measures to be taken in order to restore their financial position following a significant deterioration of their financial situation or a risk of breaching their prudential requirements under Regulation (EU) No 648/2012.
2. The recovery plan shall include a framework of indicators that identify the circumstances under which measures in the recovery plan are to be taken. The indicators may be of either a qualitative or a quantitative nature relating to the financial position of the CCP.  

CCPs shall put in place appropriate arrangements for the regular monitoring of the indicators.
3. CCPs shall not be prevented from deciding any of the following, where duly justified:
  - (a) to take measures provided for in their recovery plan despite the fact that the relevant indicators have not been met;
  - (b) to refrain from taking measures provided for in their recovery plan despite the fact that the relevant indicators have been met.
4. Any decision taken pursuant to paragraph 3 and its justification shall be notified to the competent authority without delay. Where a CCP intends to activate its recovery plan, it shall inform the competent authority of the nature and magnitude of the problems it has identified, setting out all relevant circumstances and indicating the recovery measures or other measures it intends to take to address the situation.  

Where the competent authority considers that a recovery measure that the CCP intends to take may cause significant adverse effects to the financial system, it may require the CCP to refrain from taking that measure.
5. The competent authority shall promptly inform the resolution authority of any notification received in accordance with the first subparagraph of paragraph 4 and any subsequent instruction by the competent authority in accordance with the second subparagraph of paragraph 4.
6. CCPs shall update their recovery plans at least annually and after a change to their legal or organisational structure or business or financial situation which could have a material effect on those plans or otherwise necessitate a change to the plans. Competent authorities may require CCPs to update their recovery plans more frequently.

7. Recovery plans shall be drafted in accordance with Section A of the Annex. Competent authorities may require CCPs to include additional information in their recovery plans.
8. The board of the CCP shall assess, taking into account the advice of the risk committee in accordance with Article 28(3) of Regulation (EU) No 648/2012, and approve the recovery plan before submitting it to the competent authority.
9. Recovery plans shall be considered as part of the operating rules of CCPs and CCPs shall ensure that the measures set out in the recovery plans are enforceable at all times.

*Article 10*  
*Assessment of recovery plans*

1. CCPs or, in cases where Article 11 applies their parent undertakings, shall submit their recovery plans to the competent authority for approval.
2. The competent authority shall transmit each plan to the college and to the resolution authority without undue delay.  
  
Within six months of the submission of each plan, and in coordination with the college in accordance with the procedure in Article 12, the competent authority shall review the recovery plan and assess the extent to which it satisfies the requirements set out in Article 9.
3. When assessing the recovery plan, the competent authority shall take into consideration the CCP's capital structure, its default waterfall, the level of complexity of the organisational structure and the risk profile of the CCP, and the impact that the implementation of the recovery plan would have on clearing members, their clients, financial markets served by the CCP and on the financial system as a whole.
4. The resolution authority shall examine the recovery plan in order to identify any measures which may adversely impact the resolvability of the CCP. The resolution authority shall make recommendations to the competent authority with regard to those matters.
5. Where the competent authority decides not to act on the recommendations of the resolution authority pursuant to paragraph 4, it shall justify that decision in full to the resolution authority.
6. Where the competent authority agrees with the recommendations of the resolution authority, or otherwise considers that there are material deficiencies in the recovery plan or material impediments to its implementation, it shall notify the CCP or its parent undertaking and shall give the CCP the opportunity to submit its views.
7. The competent authority, taking into account the CCP's views, may require the CCP or the parent undertaking to submit, within two months, extendable by one month with the competent authority's approval, a revised plan demonstrating how those deficiencies or impediments are addressed. The revised plan shall be assessed in accordance with the second subparagraph of paragraph 2.

8. Where the competent authority considers that the deficiencies and impediments have not been adequately addressed by the revised plan, or where the CCP or parent undertaking has not submitted a revised plan, it shall require the CCP or the parent undertaking to make specific changes to the plan.
9. Where it is not possible to adequately remedy the deficiencies or impediments through specific changes to the plan, the competent authority shall require the CCP or the parent undertaking to identify within a reasonable timeframe any changes to be made to its business in order to address the deficiencies in or impediments to the implementation of the recovery plan.

Where the CCP or parent undertaking fails to identify such changes within the timeframe set by the competent authority, or where the competent authority considers that the actions proposed would not adequately address the deficiencies or impediments to the implementation of the recovery plan, the competent authority shall require the CCP or parent undertaking to take any of the following measures, taking into account the seriousness of the deficiencies and impediments and the effect of the measures on the CCP's business:

  - (a) to reduce the risk profile of the CCP;
  - (b) to enhance the CCP's ability to be recapitalised in a timely manner to meet its prudential requirements;
  - (c) to review the CCP's strategy and structure;
  - (d) to make changes to the default waterfall, recovery measures and other loss allocation arrangements so as to improve resolvability and the resilience of critical functions;
  - (e) to make changes to the governance structure of the CCP.
10. The request referred to in the second subparagraph of paragraph 9 shall be reasoned and be notified in writing to the CCP.

#### *Article 11*

##### *Recovery plans for CCPs that belong to a group*

1. Where the parent undertaking of the group to which a CCP belongs is an institution as defined in point 23 of Article 2(1) of Directive 2014/59/EU or an entity referred to in point (c) or (d) of Article 1(1) of that Directive, the competent authority, as referred to in point 21 of Article 2(1) of that Directive, shall require the parent undertaking to submit a recovery plan for the group in accordance with that Directive. That competent authority shall submit the recovery plan for the group to the competent authority of the CCP.

Where the parent undertaking of the group to which a CCP belongs is not an institution or entity referred to in the first subparagraph and where appropriate in order to meet the criteria of Section A of the Annex, competent authorities may, after consulting the college and in accordance with the procedure laid down in Article 10 of this Regulation, require the parent undertaking to submit a plan for the recovery of the CCP as part of the recovery plan for the group. That request shall be reasoned and shall be notified in writing to the CCP and its parent undertaking.
2. Where the parent undertaking submits the recovery plan in accordance with paragraph 1, the provisions on the recovery of the CCP shall constitute a distinct part

of that recovery plan and shall comply with the requirements of this Regulation and the CCP shall not be required to prepare an individual recovery plan.

3. The competent authority of the CCP shall assess in accordance with Article 10 the provisions on the recovery of the CCP, and, where relevant, shall consult the competent authority of the group.

#### *Article 12*

##### *Coordination procedure for recovery plans*

1. The college shall reach a joint decision on all of the following issues:
  - (a) the review and assessment of the recovery plan;
  - (b) the application of the measures referred to in Article 9(6), (7), (8) and (9);
  - (c) whether a recovery plan is to be drawn up by parent undertakings in accordance with Article 11(1).
2. The college shall reach a joint decision on the issues referred to in points (a) and (b) within four months of the date of the transmission of the recovery plan by the competent authority.

The college shall reach a joint decision on the issue referred to in point (c) within four months of the date that the competent authority decides to request the parent undertaking to prepare a group plan.

ESMA may, at the request of a competent authority within the college, assist the college in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1095/2010.

3. Where, after four months from the date of transmission of the recovery plan, the college has failed to reach a joint decision on the issues referred to in points (a) and (b) of paragraph 1, the competent authority of the CCP shall make its own decision.

The competent authority of the CCP shall make the decision referred to in the first subparagraph taking into account the views of the other college members expressed during the four-month period. The competent authority of the CCP shall notify in writing that decision to the CCP, to its parent undertaking, where relevant, and to the other members of the college.

4. Where, by the end of that four-month period, any member of the college has referred to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010 a matter in relation to the assessment of recovery plans and implementation of the measures pursuant to points (a), (b) and (d) of Article 10(9) of this Regulation, the competent authority of the CCP shall await the decision taken by ESMA in accordance with Article 19(3) of Regulation (EU) No 1095/2010 and decide in accordance with the decision of ESMA.
5. The four-month period shall be deemed to be the conciliation phase within the meaning of Regulation (EU) No 1095/2010. ESMA shall take its decision within one month from the referral of the matter to it. The matter shall not be referred to ESMA after the end of the four month time period or after a joint decision has been reached. In the absence of an ESMA decision within one month, the decision of the competent authority of the CCP shall apply.

## SECTION 2 RESOLUTION PLANNING

### *Article 13 Resolution plans*

1. The resolution authority shall, after consultation with the competent authority and in coordination with the resolution college, in accordance with the procedure set out in Article 15, draw up a resolution plan for each CCP.
2. The resolution plan shall provide for the resolution actions that the resolution authority may take where the CCP meets the conditions for resolution referred to in Article 22.
3. The resolution plan shall take into consideration at least the following:
  - (a) the CCP's failure due to:
    - i. the default of one or more of its members;
    - ii. other reasons including losses from its investment activities or operational problems;
    - iii. broader financial instability or system wide events;
  - (b) the impact that the implementation of the resolution plan would have on clearing members and their clients, including where clearing members are likely to be subject to recovery measures or resolution actions in accordance with Directive 2014/59/EU, on any linked FMIs, financial markets served by the CCP and the financial system as a whole;
  - (c) the manner and the circumstances under which a CCP may apply for the use of central bank facilities and the identification of the assets that would be expected to qualify as collateral.
4. The resolution plan shall not assume any of the following:
  - (a) extraordinary public financial support;
  - (b) central bank emergency liquidity assistance;
  - (c) central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.
5. Resolution authorities shall review resolution plans and where appropriate update them, at least annually and in any case after changes to the legal or organisational structure of the CCP, its business or financial situation or any other change that materially affects the effectiveness of the plan.

The CCPs and the competent authorities shall promptly inform the resolution authorities of any such change.
6. The resolution plan shall specify the circumstances and different scenarios for using the resolution tools and exercising the resolution powers. The resolution plan shall include the following, quantified whenever appropriate and possible:
  - (a) a summary of the key elements of the plan;

- (b) a summary of the material changes to the CCP that have occurred since the resolution plan was last updated;
- (c) a demonstration of how the CCP's critical functions could be legally and economically separated, to the extent necessary, from its other functions so as to ensure their continuity upon the failure of the CCP;
- (d) an estimation of the timeframe for executing each material aspect of the plan;
- (e) a detailed description of the assessment of resolvability carried out in accordance with Article 16;
- (f) a description of any measures required pursuant to Article 17 to address or remove impediments to resolvability identified as a result of the assessment carried out in accordance with Article 16;
- (g) a description of the processes for determining the value and marketability of the critical functions and assets of the CCP;
- (h) a detailed description of the arrangements for ensuring that the information required pursuant to Article 14 is up to date and available to the resolution authorities at all times;
- (i) an explanation as to how resolution actions could be financed without the assumption of the elements referred to in paragraph 4;
- (j) a detailed description of the different resolution strategies that could be applied according to the different possible scenarios and their related timeframes;
- (k) a description of critical interdependencies between the CCP and other market participants;
- (l) a description of the different options to ensure:
  - i. access to payments and clearing services and other infrastructures;
  - ii. timely settlement of obligations due to clearing participants and any linked FMIs;
  - iii. access of clearing participants to securities or cash accounts provided by the CCP and securities or cash collateral posted to and held by the CCP that is owed to such participants;
  - iv. continuity in the operations of links between the CCP and other FMIs;
  - v. the portability of the positions of clearing participants;
  - vi. preservation of the licenses, authorisations, recognitions and legal designations of a CCP necessary for the continued performance of the CCP's critical functions including its recognition for the purposes of the application of the relevant settlement finality rules and the participation in or links with other FMIs;
- (m) an analysis of the impact of the plan on the employees of the CCP, including an assessment of any associated costs, and a description of envisaged procedures to consult with staff during the resolution process, taking into account any national rules and systems for dialogue with social partners;
- (n) a plan for communicating with the media and the public;

- (o) a description of essential operations and systems for maintaining the continuous functioning of the CCP's operational processes.

The information referred to in point (a) of paragraph 6 shall be disclosed to the CCP concerned. The CCP may express its opinion in writing on the resolution plan to the resolution authority. That opinion shall be included in the plan.

7. Resolution authorities may require CCPs to provide them with detailed records of the contracts referred to in Article 29 of Regulation (EU) No 648/2012 to which it is a party. Resolution authorities may specify a time limit to provide those records and may specify different time limits for different types of contracts.
8. ESMA, after consulting with the ESRB and taking into account the relevant provisions of Commission Delegated Regulation (EU) –/2016 supplementing Directive 2014/59/EU with regard to regulatory technical standards adopted on the basis of Article 10(9) of Directive 2014/59/EU, shall develop draft regulatory technical standards further specifying the contents of the resolution plan in accordance with paragraph 6.

ESMA shall submit those draft regulatory technical standards to the Commission by [PO: please, insert date: twelve months from the date of entry into force of this Regulation].

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

#### *Article 14*

#### *CCPs' duty to cooperate and provide information*

CCPs shall cooperate as necessary in the drawing up of resolution plans and provide the resolution authorities, either directly or through the competent authority, with all the information necessary to draw up and implement those plans, including the information and analysis specified in Section B of the Annex.

Competent authorities shall provide resolution authorities with any information referred to in the first subparagraph which is already available to them.

#### *Article 15*

#### *Coordination procedure for resolution plans*

1. The resolution college shall reach a joint decision regarding the resolution plan and any changes thereto within a period of four months of the date of the transmission of that plan by the resolution authority as referred to in paragraph 2.
2. The resolution authority shall transmit to the resolution college a draft resolution plan, the information provided in accordance with Article 14 and any additional information relevant to the resolution college.

The resolution authority shall ensure that ESMA is provided with all the information that is relevant to its role in accordance with this Article.

3. The resolution authority may decide to involve third country authorities in the drawing up and review of the resolution plan, provided that they meet the confidentiality requirements laid down in Article 71 and are from jurisdictions in which any of the following entities are established:

- i. the CCP's parent undertaking, where applicable;
  - ii. significant clearing members of the CCP;
  - iii. the CCP's subsidiaries, where applicable;
  - iv. other providers of critical services to the CCP.
4. ESMA may, at the request of a resolution authority, assist the resolution college in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1095/2010.
5. Where, after four months from the date of transmission of the resolution plan, the college has failed to reach a joint decision, the resolution authority shall make its own decision on the resolution plan. The resolution authority shall make its decision taking into account the views of the other college members expressed during the four-month period. The resolution authority shall notify in writing the decision to the CCP, to its parent undertaking where relevant, and to the other members of the college.
6. Where, by the end of that four-month period, any member of the resolution college has referred to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010 a matter in relation to the resolution plan, the resolution authority of the CCP shall await any decision that ESMA may take in accordance with Article 19(3) of that Regulation and take its decision in accordance with the decision of ESMA.

The four-month time period shall be deemed to be the conciliation phase within the meaning of Regulation (EU) No 1095/2010. ESMA shall take its decision within one month from the referral of the matter to it. The matter shall not be referred to ESMA after the end of the four month time period or after a joint decision has been reached. In the absence of an ESMA decision within one month, the decision of the resolution authority shall apply.
7. Where a joint decision is taken pursuant to paragraph 1 and any resolution authority considers under paragraph 6 that the subject matter of the disagreement impinges on the fiscal responsibilities of its Member State, the resolution authority of the CCP shall initiate a reassessment of the resolution plan.

## **CHAPTER II**

### ***Resolvability***

#### *Article 16*

##### *Assessment of resolvability*

1. The resolution authority, in cooperation with the resolution college in accordance with Article 17, shall assess the extent to which a CCP is resolvable without assuming any of the following:
  - (a) extraordinary public financial support;
  - (b) central bank emergency liquidity assistance;
  - (c) central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

2. A CCP shall be deemed resolvable where the resolution authority considers it feasible and credible to either liquidate it under normal insolvency proceedings or to resolve it using the resolution tools and exercising the resolution powers while ensuring the continuity of the CCP's critical functions and avoiding to the maximum extent possible any significant adverse effect on the financial system.

The adverse effects referred to in the first subparagraph shall include broader financial instability or system wide events in any Member State.

The resolution authority shall notify ESMA in a timely manner where it considers a CCP not to be resolvable.

3. Upon request by the resolution authority, a CCP shall demonstrate that:
  - (a) there are no impediments to the reduction of the value of instruments of ownership following the exercise of resolution powers, regardless of whether outstanding contractual arrangements or other measures in the CCP's recovery plan have been fully exhausted;
  - (b) the contracts of the CCP with clearing members or third parties do not enable those clearing members or third parties to successfully challenge the exercise of resolution powers by a resolution authority or otherwise avoid being subject to those powers.
4. For the purposes of the assessment of resolvability referred to in paragraph 1, the resolution authority shall, as relevant, examine the matters specified in Section C of the Annex.
5. The resolution authority shall make the resolvability assessment at the same time as drawing up and updating the resolution plan in accordance with Article 13.

#### *Article 17*

#### *Addressing or removing impediments to resolvability*

1. Where, following the assessment in Article 16, the resolution authority and resolution college conclude that there are substantive impediments to the resolvability of a CCP, the resolution authority, in cooperation with the competent authority, shall prepare and submit a report to the CCP and to the resolution college.

The report referred to in the first subparagraph shall analyse the substantive impediments to the effective use of the resolution tools and the exercise of the resolution powers in relation to the CCP, consider their impact on the business model of the CCP and recommend targeted measures to remove those impediments.
2. The requirement for resolution colleges to reach a joint decision on resolution plans laid down in Article 15 shall be suspended following the submission of the report referred to in paragraph 1 until the measures to remove the substantive impediments to resolvability have been accepted by the resolution authority pursuant to paragraph 3 of this Article or alternative measures have been decided pursuant to paragraph 4 of this Article.
3. Within four months of the date of receipt of the report submitted in accordance with paragraph 1, the CCP shall propose to the resolution authority possible measures to address or remove the substantive impediments identified in the report. The resolution authority shall communicate to the resolution college any measure proposed by the CCP. The resolution authority and resolution college shall assess, in

accordance with point (b) of Article 18(1), whether those measures effectively address or remove those impediments.

4. Where the resolution authority and the resolution college conclude that the measures proposed by a CCP in accordance with paragraph 3 would not effectively reduce or remove the impediments identified in the report, the resolution authority shall identify alternative measures which it shall communicate to the resolution college for joint decision in accordance with Article 18.

The alternative measures referred to in the first subparagraph shall take into account the following:

- (a) the threat to financial stability of those impediments to the resolvability of a CCP;
- (b) the effect of the alternative measures on the particular CCP, its clearing members and their clients, any linked FMI and the internal market.

For the purposes of point (b) of the second subparagraph, the resolution authority shall consult the competent authority and the resolution college and, where appropriate, the designated national macroprudential authority.

5. The resolution authority shall, in accordance with Article 18, notify the CCP in writing, either directly or indirectly through the competent authority, of the alternative measures to take in order to achieve the objective of removing impediments to resolvability. The resolution authority shall justify why the measures proposed by the CCP would not be able to remove the impediments to resolvability and how the alternative measures would be effective in doing so.
6. The CCP shall propose within one month a plan to comply with the alternative measures.
7. For the purposes of paragraph 4, the resolution authority may:
  - (a) require the CCP to revise or draw up service agreements, whether intra-group or with third parties, to cover the provision of critical functions;
  - (b) require the CCP to limit its maximum individual and aggregate uncovered exposures;
  - (c) require the CCP to make changes to how it collects and holds margin pursuant to Article 41 of Regulation (EU) No 648/2012;
  - (d) require the CCP to make changes to the composition and number of its default funds referred to in Article 42 of Regulation (EU) No 648/2012;
  - (e) impose on the CCP specific or regular additional information requirements;
  - (f) require the CCP to divest specific assets;
  - (g) require the CCP to limit or cease specific existing or proposed activities;
  - (h) require the CCP to make changes to its recovery plan;
  - (i) restrict or prevent the development of new or existing business lines or provision of new or existing services;
  - (j) require changes to legal or operational structures of the CCP or any group entity directly or indirectly under its control to ensure that critical functions

may be legally and operationally separated from other functions through the application of resolutions tools;

- (k) require the CCP to set up a parent financial holding company in a Member State or a Union parent financial holding company;
- (l) require the CCP or any group entity directly or indirectly under its control which provides financial support to the CCP to issue liabilities that can be written down and converted or to set aside other resources to increase the capacity for loss absorption, recapitalisation and the replenishment of pre-funded resources;
- (m) require the CCP, or any group entity directly or indirectly under its control which provides financial support to the CCP to take other steps to enable capital, other liabilities and contracts to be able to absorb losses, to recapitalise the CCP or to replenish pre-funded resources, including in particular to attempt to renegotiate any liability it has issued or to revise contractual terms, with a view to ensuring that any decision of the resolution authority to write down, convert or restructure that liability, instrument or contract would be effected under the law of the jurisdiction governing that liability or instrument;
- (n) where the CCP is a subsidiary, coordinate with relevant authorities with a view to requiring the parent undertaking to set up a separate financial holding company to control the CCP, where that measure is necessary in order to facilitate the resolution of the CCP and to avoid the adverse effects that the use of the resolution tools and the exercise of the resolution powers could have on other entities of the group.

#### *Article 18*

##### *Coordination procedure to address or remove impediments to resolvability*

1. The resolution college shall reach a joint decision regarding:
  - (a) the identification of the material impediments to resolvability pursuant to Article 16(1);
  - (b) the assessment of the measures proposed by the CCP pursuant to Article 17(3), as necessary;
  - (c) the alternative measures required pursuant to Article 17(4).

2. The joint decision on the identification of material impediments to resolvability referred to in point (a) of paragraph 1 shall be adopted within four months of the submission of the report referred to in Article 17(1) to the resolution college.

The joint decision referred to in points (b) and (c) of paragraph 1 shall be adopted within four months of submission of the CCP's proposed measures to remove impediments to resolvability.

The joint decisions referred to in paragraph 1 shall be reasoned and notified in writing by the resolution authority to the CCP and, where relevant, its parent undertaking.

ESMA may, at the request of the resolution authority, assist the resolution college in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1095/2010.

3. Where, after four months from the date of transmission of the report provided for in Article 17(1), the college has failed to adopt a joint decision, the resolution authority shall take its own decision on the appropriate measures to be taken in accordance with Article 17(5). The resolution authority shall take its decision having taken into account the views of the other college members expressed during the four-month period.

The resolution authority shall notify the decision to the CCP, to its parent undertaking where relevant, and to the other members of the college in writing.

4. Where, by the end of that four-month period, any member of the resolution college has referred to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010 a matter referred to in points (j), (k) or (n) of Article 17(7), the resolution authority of the CCP shall defer its decision and await any decision that ESMA may take in accordance with Article 19(3) of that Regulation. In that case, the resolution authority shall take its decision in accordance with the decision of ESMA.

The four-month time period shall be deemed to be the conciliation phase within the meaning of Regulation (EU) No 1095/2010. ESMA shall take its decision within one month from the referral of the matter to it. The matter shall not be referred to ESMA after the end of the four month time period or after a joint decision has been reached. In the absence of an ESMA decision within one month, the decision of the resolution authority shall apply.

# TITLE IV

## EARLY INTERVENTION

### *Article 19*

#### *Early intervention measures*

1. Where a CCP infringes or is likely to infringe in the near future the prudential requirements of Regulation (EU) No 648/2012, or where the competent authority has determined that there are other indications of an emerging crisis situation that could affect the operations of the CCP, competent authorities may:
  - (a) require the CCP to update the recovery plan in accordance with Article 9(6), where the circumstances that required early intervention are different from the assumptions set out in the initial recovery plan;
  - (b) require the CCP to implement one or more of the arrangements or measures set out in the recovery plan within a specific timeframe. Where the plan is updated pursuant to point (a), those arrangements or measures shall include any updated arrangements or measures;
  - (c) require the CCP to identify the causes of the infringement or likely infringement as mentioned in paragraph 1 and draw up an action programme, including suitable measures and timeframes;
  - (d) require the CCP to convene a meeting of its shareholders or, if the CCP fails to comply with that requirement, convene the meeting itself. In both cases the competent authority shall set the agenda, including the decisions to be considered for adoption by the shareholders;
  - (e) require one or more members of the board or senior management to be removed or replaced where any of those persons is found unfit to perform their duties pursuant to Article 27 of Regulation (EU) No 648/2012;
  - (f) require changes to the business strategy of the CCP;
  - (g) require changes to the legal or operational structures of the CCP;
  - (h) provide the resolution authority with all the information necessary to update the CCP's resolution plan in order to prepare for the possible resolution of the CCP and the valuation of its assets and liabilities in accordance with Article 24, including any information required through on-site inspections;
  - (i) require, where necessary and in accordance with paragraph 4, the implementation of the CCP's recovery measures;
  - (j) require the CCP to abstain from the implementation of certain recovery measures where the competent authority has determined that the implementation of those measures may have an adverse effect on financial stability;
  - (k) require the CCP to replenish its financial resources in a timely manner.
2. For each of those measures, the competent authority shall set an appropriate deadline and evaluate the effectiveness of those measures once they have been taken.
3. The competent authority may only apply the measures in points (a) to (k) of paragraph 1 after taking account of the impact of those measures in other Member

States where the CCP operates or provides services, in particular where the CCP's operations are critical or important for local financial markets, including the places in which clearing members linked trading venues and FMIs are established.

4. The competent authority may only apply the measure in point (i) of paragraph 1 where that measure is in the public interest and is necessary to achieve any of the following objectives:
  - (a) maintain the financial stability of the Union;
  - (b) maintain the continuity of the critical services of the CCP;
  - (c) maintain and enhance the financial resilience of the CCP.

The competent authority shall not apply the measure in point (i) of paragraph 1 in relation to measures involving the transfer of property, rights or liabilities of another CCP.

5. Where a CCP has initiated its default waterfall in accordance with Article 45 of Regulation (EU) No 648/2012, it shall inform the competent authority without undue delay and explain whether that event reflects weaknesses or problems of that CCP.
6. Where the conditions referred to in paragraph 1 are met, the competent authority shall notify ESMA and the resolution authority and consult the college.

Following those notifications and the consultation of the college, the competent authority shall decide whether to apply any of the measures provided for in paragraph 1. The competent authority shall notify the decision on the measures to be taken to the college, the resolution authority and ESMA.
7. The resolution authority, following the notification of the first subparagraph of paragraph 6, may require the CCP to contact potential purchasers in order to prepare for its resolution, subject to the conditions laid down in Article 41 and the confidentiality provisions laid down in Article 71.

#### *Article 20*

#### *Removal of senior management and board*

Where there is a significant deterioration in the financial situation of a CCP, or the CCP infringes its legal requirements, including its operating rules, and other measures taken in accordance with Article 19 are not sufficient to reverse that situation, competent authorities may require total or partial removal of the senior management or board of the CCP.

The appointment of the new senior management or board shall be done in accordance with Article 27 of Regulation (EU) No 648/2012 and be subject to the approval or consent of the competent authority.

# TITLE V RESOLUTION

## CHAPTER I

### Objectives, conditions and general principles

#### *Article 21 Resolution objectives*

1. When using the resolution tools and exercising the resolution powers, the resolution authority shall have regard to all the following resolution objectives and shall balance them as appropriate to the nature and circumstances of each case:
  - (a) to ensure the continuity of the CCP's critical functions, as identified in the CCP's recovery plan , in particular:
    - (i) the timely settlement of the CCP's obligations to its clearing members;
    - (ii) continuous access of clearing members to securities or cash accounts provided by the CCP and securities or cash collateral held by the CCP on behalf of those clearing members;
  - (b) to ensure the continuity of the links with other FMIs which, if disrupted, would have a material negative impact on financial stability or the timely completion of payment, clearing, settlement and recording functions;
  - (c) to avoid a significant adverse effect on the financial system, in particular by preventing contagion of financial distress between financial institutions and by maintaining market discipline;
  - (d) to protect public funds by minimising reliance on extraordinary public financial support;
  - (e) to minimise the cost of resolution on all affected stakeholders and avoid destruction of the CCP's value.
2. The board and senior management of a CCP under resolution shall provide the resolution authority with all necessary assistance for the achievement of the resolution objectives.

#### *Article 22 Conditions for resolution*

1. The resolution authority shall take a resolution action in relation to a CCP provided that all of the following conditions are met:
  - (a) the CCP is failing or is likely to fail as determined by any of the following:
    - i) the competent authority, after consulting the resolution authority;
    - ii) the resolution authority after consulting the competent authority, where the resolution authority has the necessary tools for reaching that conclusion;

- (b) there is no reasonable prospect that any alternative private sector measures or supervisory action, including early intervention measures taken, would prevent the failure of the CCP within a reasonable timeframe, having regard to all relevant circumstances;
- (c) a resolution action is necessary in the public interest to achieve the resolution objectives where winding down the CCP under normal insolvency proceedings would not meet those objectives to the same extent.

For the purposes of point (a)(ii), the competent authority shall provide without delay any relevant information that the resolution authority requests in order to perform its assessment.

2. For the purposes of point (a) of paragraph 1, a CCP shall be deemed to be failing or likely to fail where one or more of the following circumstances apply:

- (a) the CCP infringes, or is likely to infringe, its authorisation requirements in a way that would justify the withdrawal of its authorisation pursuant to Article 20 of Regulation (EU) No 648/2012;
- (b) the CCP is unable, or is likely to be unable, to provide a critical function;
- (c) the CCP is unable, or is likely to be unable, to restore its viability through the implementation of its recovery measures;
- (d) the CCP is unable, or is likely to be unable, to pay its debts or other liabilities as they fall due;
- (e) the CCP requires extraordinary public financial support.

For the purposes of point (e) extraordinary public financial support shall not include public financial support that meets all of the following conditions:

- i) it takes the form of a State guarantee to back liquidity facilities provided by a central bank according to the central bank's conditions, or the form of a State guarantee of newly issued liabilities;
- ii) the State guarantees referred to in point (i) are confined to solvent CCPs, conditional on final approval under the Union State aid framework, are precautionary and temporary, proportionate to remedy the consequences of the serious disturbance and are not used to offset losses that the CCP has incurred or is likely to incur in the future;
- iii) the State guarantees referred to in point (i) are required to remedy a serious disturbance in the economy of a Member State and preserve financial stability.

3. The resolution authority may also take a resolution action where it considers that the CCP applies or intends to apply recovery measures which could prevent the CCP's failure but cause significant adverse effects to the financial system.

4. ESMA shall issue guidelines to promote the convergence of supervisory and resolution practices regarding the application of the circumstances under which a CCP is deemed to be failing or likely to fail by *[PO, please insert date 12 months from entry into force of this Regulation]*.

For the issuance of those guidelines, ESMA shall take into account the guidelines issued in accordance with Article 32(6) of Directive 2014/59/EU.

*Article 23*  
*General principles regarding resolution*

The resolution authority shall take all appropriate measures to use the resolution tools referred to in Article 27 and exercise the resolution powers referred to in Article 48 in accordance with the following principles:

- (a) all contractual obligations and other arrangements in the CCP's recovery plan are enforced either partially or in full, to the extent that they have not been exhausted before entry into resolution, unless the resolution authority determines that the use of resolution tools or the exercise of resolution powers is more appropriate to achieve the resolution objectives in a timely manner;
- (b) the shareholders of the CCP under resolution bear first losses following the enforcement of all obligations and arrangements referred to in point (a) in accordance with that point;
- (c) creditors of the CCP under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings, save as expressly provided otherwise in this Regulation;
- (d) the CCP's creditors of the same class are treated in an equitable manner;
- (e) none of the CCP's creditors incur higher losses than they would have incurred under any of the following circumstances:
  - i) the resolution authority had not taken any resolution action pursuant to Article 21 following the default of one or more clearing members and the creditor was instead subject to possible outstanding obligations pursuant to the CCP's operating rules;
  - ii) the CCP had been wound up under normal insolvency proceedings, where no clearing member has defaulted;
- (f) the board and senior management of the CCP under resolution are replaced, except where the resolution authority considers that the retention of the board and senior management, in whole or in part, is necessary for the achievement of the resolution objectives;
- (g) resolution authorities inform and consult employee representatives in accordance with their national laws or practice;
- (h) where a CCP is part of a group, resolution authorities take account of the impact on other group entities and on the group as a whole.

**CHAPTER II**  
**Valuation**

*Article 24*  
*Objectives of valuation*

1. Resolution authorities shall ensure that any resolution action is taken on the basis of a valuation ensuring a fair, prudent and realistic assessment of the assets, liabilities, rights and obligations of the CCP.

2. Before the resolution authority places a CCP under resolution, it shall ensure that a first valuation is carried out to determine whether the conditions for resolution under Article 22(1) are met.
3. After the resolution authority has decided to place a CCP under resolution, it shall ensure that a second valuation is carried out to:
  - (a) inform the decision on the appropriate resolution action to be taken;
  - (b) ensure that any losses on the assets and rights of the CCP are fully recognised at the moment the resolution tools are used;
  - (c) inform the decision on the extent of the cancellation or dilution of instruments of ownership and the decision on the value and number of instruments of ownership issued or transferred as a result of the exercise of resolution powers;
  - (d) inform the decision on the extent of the write down or conversion of any unsecured liabilities, including debt instruments;
  - (e) where the loss and position allocation tools are used, inform the decision on the extent of losses to be applied against affected creditors' claims, outstanding obligations or positions in relation to the CCP;
  - (f) where the bridge CCP tool is used, inform the decision on the assets, liabilities, rights and obligations or instruments of ownership that may be transferred to the bridge CCP and the decision on the value of any consideration that may be paid to the CCP under resolution or, where relevant, to the holders of the instruments of ownership;
  - (g) where the sale of business tool is used, inform the decision on the assets, liabilities, rights and obligations or instruments of ownership that may be transferred to the third party purchaser and to inform the resolution authority's understanding of what constitutes commercial terms for the purposes of Article 40.

For the purposes of point (d), the valuation shall take into account any losses that would be absorbed by the enforcement of any outstanding obligations of the clearing members or other third parties owed to the CCP and the level of conversion to be applied to debt instruments.

4. The valuations referred to in paragraphs 2 and 3 may be subject to an appeal in accordance with Article 72 only together with the decision to use a resolution tool or to exercise a resolution power.

*Article 25*  
*Requirements for valuation*

1. The resolution authority shall ensure that the valuations referred to in Article 24 are carried out:
  - (a) by a person independent from any public authority and from the CCP;
  - (b) by the resolution authority, where those valuations cannot be carried out by a person as referred to in point (a).
2. The valuations referred to in Article 24 shall be considered definitive where they are carried out by the person referred to in point (a) of paragraph 1 and all the requirements laid down in this Article are fulfilled.

3. Without prejudice to the Union State aid framework, where applicable, a definitive valuation shall be based on prudent assumptions and shall not assume any potential provision of extraordinary public financial support, any central bank emergency liquidity assistance or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms to the CCP from the point in time at which resolution action is taken. The valuation shall also take account of the potential recovery of any reasonable expenses incurred by the CCP under resolution in accordance with Article 27(9).
4. A definitive valuation shall be supplemented by the following information held by the CCP:
  - (a) an updated balance sheet and a report on the financial position of the CCP, including the remaining available prefunded resources and outstanding financial commitments;
  - (b) the records of cleared contracts as referred to in Article 29 of Regulation (EU) No 648/2012;
  - (c) any information on the market and accounting values of its assets, liabilities and positions, including relevant claims and outstanding obligations owed or due to the CCP.
5. A definitive valuation shall indicate the subdivision of the creditors in classes in accordance with their priority levels under the applicable insolvency law. It shall also include an estimate of the treatment that each class of shareholders and creditors would have been expected to receive in application of the principle specified in point (e) of Article 23.

The estimate referred to in the first subparagraph shall not prejudice the valuation referred to in Article 61.

6. ESMA, taking into account any regulatory technical standards drafted in accordance with Article 36(14) and (15) of Directive 2014/59/EU, shall develop draft regulatory technical standards to specify:
  - (a) the circumstances in which a person is deemed to be independent from both the resolution authority and from the CCP for the purposes of paragraph 1 of this Article;
  - (b) the methodology for assessing the value of the assets and liabilities of the CCP;
  - (c) the separation of the valuations under Articles 24 and 61.

ESMA shall submit those draft regulatory technical standards to the Commission by *[PO: insert date: within 12 months of the entry into force of this Regulation]*.

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

#### *Article 26* *Provisional valuation*

1. The valuations referred to in Article 24 that do not meet the requirements laid down in Article 25(2) shall be considered to be provisional valuations.

Provisional valuations shall include a buffer for additional losses and an appropriate justification for that buffer.

2. Where resolution authorities take resolution action on the basis of a provisional valuation, they shall ensure that a definitive valuation is carried out as soon as practicable.

The resolution authority shall ensure that the definitive valuation referred to in the first subparagraph:

- (a) allows for full recognition of any losses of the CCP in its books;
  - (b) informs a decision to write back creditors' claims or to increase the value of the consideration paid, in accordance with paragraph 3.
3. Where the definitive valuation's estimate of the net asset value of the CCP is higher than the provisional valuation's estimate of the net asset value of the CCP, the resolution authority may:
  - (a) increase the value of the claims of affected creditors which have been written down or restructured;
  - (b) require a bridge CCP to make a further payment of consideration in respect of the assets, liabilities, rights and obligations to the CCP under resolution or, as the case may be, in respect of the instruments of ownership to the owners of those instruments.
4. ESMA, taking into account any regulatory technical standards drafted in accordance with Article 36(15) of Directive 2014/59/EU, shall develop draft regulatory technical standards to specify, for the purposes of paragraph 1 of this Article, the methodology for calculating the buffer for additional losses to be included in provisional valuations.

ESMA shall submit those draft regulatory technical standards to the Commission by *[PO: insert date: within 12 months of the entry into force of this Regulation]*.

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

## **CHAPTER III**

### **Resolution tools**

#### **SECTION 1**

#### **GENERAL PRINCIPLES**

##### *Article 27*

##### *General provisions on resolution tools*

1. Resolution authorities shall take resolution actions referred to in Article 21 by using any of the following resolution tools individually or in any combination:
  - (a) the position and loss allocation tools;
  - (b) the write-down and conversion tool;
  - (c) the sale of business tool;

- (d) the bridge CCP tool;
  - (e) any other resolution tool consistent with Articles 21 and 23.
2. In the event of a systemic crisis, the resolution authority may also provide extraordinary public financial support by using government stabilisation tools in accordance with Articles 45, 46 and 47 on the condition of prior and final approval under the Union State aid framework.
  3. Prior to the use of the tools referred to in paragraph 1, the resolution authority shall enforce:
    - (a) any existing and outstanding rights of the CCP, including any contractual obligations by clearing members to meet cash calls, to provide additional resources to the CCP, or to take on positions of defaulting clearing members, whether through an auction or other agreed means in the CCP's operating rules;
    - (b) any existing and outstanding contractual obligation committing parties other than clearing members to any forms of financial support.

The resolution authority may partially enforce the contractual obligations referred to in points (a) and (b) where it is not possible to enforce those contractual obligations in full within a reasonable timeframe.

4. By way of derogation from paragraph 3, the resolution authority may refrain from enforcing the relevant existing and outstanding obligations either partially or in full to avoid significant adverse effects on the financial system or widespread contagion, or where the use of the tools referred to in paragraph 1 is more appropriate in order to achieve the resolution objectives in a timely manner.
5. The resolution authority shall require the CCP to issue instruments of ownership to be subscribed by all non-defaulting clearing members where those non-defaulting clearing members have been subject to loss and position allocation tools in deviation from the CCP's operating rules which have resulted in the non-defaulting clearing member suffering a financial loss. The number of instruments of ownership issued to each affected non-defaulting clearing member shall be proportionate to its loss and shall take account of any outstanding contractual obligations of the clearing members toward the CCP.

The number of instruments of ownership to be subscribed by or transferred to non-defaulting clearing members shall be based on the valuation conducted in accordance with Article 24(3).
6. Where the use of a resolution tool other than the write-down and conversion tool results in losses being borne by clearing members, the resolution authority shall exercise the power to write down and convert any instruments of ownership and debt instruments or other unsecured liabilities immediately before or together with the use of the resolution tool.
7. Where only the resolution tools referred to in point (c) and (d) of paragraph 1 are used, and only part of the assets, rights, obligations or liabilities of the CCP under resolution are transferred in accordance with Articles 40 and 42, the residual part of that CCP shall be wound up in accordance with normal insolvency proceedings.
8. National insolvency law rules relating to the voidability or unenforceability of legal acts detrimental to creditors shall not apply to transfers of assets, rights, obligations

or liabilities from a CCP in relation to which resolution tools or government financial stabilisation tools are used.

9. The resolution authority may recover any reasonable expenses incurred in connection with the use of the resolution tools or powers or government financial stabilisation tools in any of the following ways:
  - (a) from the CCP under resolution, as a preferred creditor;
  - (b) from any consideration paid by the purchaser where the sale of business tool has been used;
  - (c) from any proceeds generated as a result of the termination of the bridge CCP, as a preferred creditor.
10. When using the resolution tools, resolution authorities shall ensure, on the basis of a valuation that complies with Article 25, the full allocation of losses, the replenishment of the prefunded resources of the CCP or the bridge CCP, and the recapitalisation of the CCP or the bridge CCP.

## **SECTION 2**

### **POSITION ALLOCATION AND LOSS ALLOCATION TOOLS**

#### *Article 28*

#### *Objective and scope of the position and loss allocation tools*

1. Resolution authorities shall use the position allocation tool in accordance with Article 29 and the loss allocation tools in accordance with Articles 30 and 31.
2. The tools referred to in paragraph 1 shall be used in respect of all contracts relating to clearing services and the collateral related to those services posted to the CCP.
3. Resolution authorities shall use the position allocation tool referred to in Article 29 in order to rematch the book of the CCP or bridge CCP where relevant.

Resolution authorities shall use the loss allocation tools referred to in Articles 30 and 31 for any of the following purposes:

- (a) to cover the losses of the CCP assessed in accordance with Article 27(10);
- (b) to restore the ability of the CCP to meet payment obligations as they fall due;
- (c) to recapitalise the CCP and replenish its pre-funded financial resources to an extent sufficient to restore its ability to comply with the conditions for authorisation and to continue to carry out its critical functions;
- (d) to achieve the outcome referred to in points (a), (b) and (c) in relation to a bridge CCP;
- (e) to support the transfer of the CCP's business by way of the sale of business tool to a solvent third party.

#### *Article 29*

#### *Termination of contracts – partial or full*

1. The resolution authority may terminate certain or all of the following contracts :
  - (a) the contracts of the clearing member in default;
  - (b) the contracts of the affected clearing service or asset class;

- (c) the contracts of the CCP in resolution.
2. The resolution authority may only terminate the contracts referred to in point (a) of paragraph 1 where the transfer of the assets and positions resulting from those contracts has not taken place within the meaning of Article 48(5) and (6) of Regulation (EU) No 648/2012.
  3. The resolution authority shall give notice to all relevant clearing members of the date on which any contract referred to in paragraph 1 is terminated.
  4. Prior to the termination of any of the contracts referred to in paragraph 1, the resolution authority shall take the following steps:
    - (a) require the CCP under resolution to value each contract and update the account balances of each clearing member;
    - (b) determine the net amount payable by or to each clearing member, taking account of any due but unpaid variation margin, including variation margin due as a result of the contract valuations referred to in point (a);
    - (c) notify each clearing member of the determined net amounts and collect them accordingly.
  5. Where a non-defaulting clearing member is unable to pay the net amount determined in accordance with paragraph 4, the resolution authority may require the CCP to place the non-defaulting clearing member in default and use its initial margin and default fund contribution in accordance with Article 45 of Regulation (EU) No 648/2012.
  6. Where the resolution authority has terminated one or more contracts of the types referred to in points (a), (b) and (c) of paragraph 1, it shall prevent the CCP from clearing any new contract of the same type as the one terminated.

The resolution authority may allow the CCP to resume the clearing of those types of contracts only where the following conditions are met:

- (a) the CCP complies with the requirements of Regulation (EU) No 648/2012;
- (b) the resolution authority issues and publishes a notice to that effect using the means referred to in Article 70(3).

#### *Article 30*

#### *Reduction of the value of any gains payable by the CCP to non-defaulting clearing members*

1. The resolution authority may reduce the value of the CCP's payment obligations to non-defaulting clearing members where those obligations arise from gains due in accordance with the CCP's processes for paying variation margin or an economically identical payment.
2. The resolution authority shall calculate any reduction in payment obligations referred to in paragraph 1 using an equitable allocation mechanism determined in the valuation conducted in accordance with Article 24(3) and communicated to the clearing members as soon as the resolution tool is used. The total net gains to be reduced for each clearing member shall be proportional to the amounts due from the CCP.

3. The reduction in the value of gains payable shall take effect and shall be immediately binding on the CCP and affected clearing members from the moment at which the resolution authority takes the resolution action.
4. A non-defaulting clearing member shall not have any claim in any subsequent proceedings against the CCP, or its successor entity, arising from the reduction in payment obligations referred to in paragraph 1.
5. Where a resolution authority reduces only in part the value of gains payable, the residual outstanding payable amount shall still be owed to the non-defaulting clearing member.

*Article 31*  
*Resolution cash call*

1. The resolution authority may require non-defaulting clearing members to make a contribution in cash to the CCP up to an amount equivalent to their contribution to the CCP's default fund.

Where the CCP operates multiple default funds, the amount of the contribution in cash referred to in the first subparagraph shall refer to the clearing member's contribution to the default fund or default funds of the affected clearing service or asset class.

The resolution authority may exercise the resolution cash call regardless of whether all contractual obligations requiring cash contributions from non-defaulting clearing members have been exhausted.

The resolution authority shall determine the amount of each non-defaulting clearing member's cash contribution in proportion to the clearing member's contribution to the default fund.

2. If a non-defaulting clearing member does not pay the required amount, the resolution authority may require the CCP to place that clearing member in default and use the clearing member's initial margin and default fund contribution in accordance with Article 45 of Regulation (EU) No 648/2012.

**SECTION 3**

**WRITE DOWN AND CONVERSION OF INSTRUMENTS OF OWNERSHIP AND DEBT  
INSTRUMENTS OR OTHER UNSECURED LIABILITIES**

*Article 32*

*Requirement to write down and convert instruments of ownership and debt instruments or  
other unsecured liabilities*

1. The resolution authority shall use the write-down and conversion tool in accordance with Article 33 in respect of instruments of ownership and debt instruments issued by the CCP in resolution or other unsecured liabilities in order to absorb losses, recapitalise that CCP or a bridge CCP, or to support the use of the sale of business tool.

The resolution authority shall also use the write-down and conversion tool in accordance with Article 33 in respect of instruments of ownership and debt

instruments issued by the parent of the CCP in resolution where the instruments of ownership issued by the parent undertaking are used to fulfil the CCP's capital requirements in accordance with Article 16 of Regulation (EU) No 648/2012 or those instruments of ownership or debt instruments are issued for the purpose of funding the CCP and they fully absorb losses or constitute subordinate claims in normal insolvency proceedings.

2. Based on the valuation carried out in accordance with Article 24(3), the resolution authority shall determine the following:
  - (a) the amount by which the instruments of ownership and debt instruments or other unsecured liabilities must be written down taking into account any losses that are to be absorbed by the enforcement of any outstanding obligations of the clearing members or other third parties owed to the CCP;
  - (b) the amount by which debt instruments or other unsecured liabilities must be converted into instruments of ownership in order to restore the prudential requirements of the CCP or the bridge CCP.

### *Article 33*

#### *Provisions governing the write-down or conversion of instruments of ownership and debt instruments or other unsecured liabilities*

1. The resolution authority shall use the write-down and conversion tool in accordance with the priority of claims applicable under normal insolvency proceedings.
2. Prior to reducing or converting the principal amount of debt instruments or other unsecured liabilities, the resolution authority shall reduce the notional amount of instruments of ownership in proportion to the losses and up to their full value, where necessary.

Where, in accordance with the valuation carried out pursuant to Article 24(3), the CCP maintains a positive net value after the reduction of instruments of ownership, the resolution authority shall cancel or dilute, as the case may be, those instruments of ownership.

3. The resolution authority shall reduce, convert, or both, the principal amount of debt instruments or other unsecured liabilities to the extent required to achieve the resolution objectives, and up to the full value of those instruments or liabilities, where necessary.
4. The resolution authority shall not use the write-down and conversion tools in respect of the following liabilities:
  - (a) liabilities to employees, in relation to accrued salary, pension benefits or other fixed remuneration, except for the variable component of remuneration that is not regulated by a collective bargaining agreement;
  - (b) liabilities to commercial or trade creditors arising from the provision to the CCP of goods or services that are critical to the daily functioning of its operations, including IT services, utilities and the rental, servicing and upkeep of premises;
  - (c) liabilities to tax and social security authorities, provided that those liabilities are preferred liabilities under the applicable insolvency law;

- (d) liabilities owed to systems or operators of systems designated according to Directive 98/26/EC.
5. Where the notional amount of an instrument of ownership or the principal amount of a debt instrument or other unsecured liabilities is reduced, the following conditions shall apply:
- (a) that reduction shall be permanent;
  - (b) the holder of the instrument shall have no claim in connection with that reduction, except for any liability already accrued, any liability for damages that may arise as a result of an appeal challenging the legality of that reduction and any claim based on instruments of ownership issued or transferred pursuant to paragraph 6;
  - (c) where that reduction is only partial, the agreement that created the original liability shall continue to apply in respect of the residual amount subject to any necessary amendments of the terms of that agreement due to the reduction.

Point (a) shall not prevent resolution authorities from applying a write-up mechanism to reimburse holders of debt instruments or other unsecured liabilities and then holders of instruments of ownership, where the level of write-down based on the provisional valuation is found to exceed required amounts when assessed against the definitive valuation referred to in Article 26(2).

6. Where converting debt instruments or other unsecured liabilities pursuant to paragraph 3, the resolution authority may require CCPs or their parent undertakings to issue or to transfer instruments of ownership to the holders of the debt instruments or other unsecured liabilities.
7. The resolution authority shall only convert debt instruments or other unsecured liabilities pursuant to paragraph 3 where the following conditions are met:
- (a) the resolution authority has obtained the agreement of the competent authority of the parent undertaking where the parent undertaking is required to issue the instruments of ownership;
  - (b) the instruments of ownership are issued prior to any issuance of instruments of ownership by the CCP for the purposes of provision of own funds by the State or a government entity;
  - (c) the conversion rate represents appropriate compensation to the affected debt holders, in line with their treatment under normal insolvency proceedings.

Following any conversion of debt instruments or other unsecured liabilities to instruments of ownership, the latter shall be subscribed or transferred without delay after the conversion.

8. For the purposes of paragraph 7, the resolution authority shall ensure, in the context of the development and maintenance of the CCP's resolution plan and as part of the powers to remove impediments to the resolvability of the CCP, that the CCP may issue at all times the necessary number of instruments of ownership.

*Article 34*  
*Effect of write-down and conversion*

The resolution authority shall complete or require the completion of all the administrative and procedural tasks necessary to give effect to the use of the write-down and conversion tool, including:

- (a) the amendment of all relevant registers;
- (b) the delisting or removal from trading of instruments of ownership or debt instruments;
- (c) the listing or admission to trading of new instruments of ownership;
- (d) the relisting or readmission of any debt instruments which have been written down, without the requirement for the issuing of a prospectus in accordance with Directive 2003/71/EC of the European Parliament and of the Council<sup>31</sup>.

*Article 35*  
*Removal of procedural obstacles for write-down and conversion*

Where the second subparagraph of Article 32(1) is applied, the competent authority shall require CCPs, or their parent undertakings, to maintain at all times a sufficient amount of instruments of ownership to ensure that those CCPs or their parent undertakings may issue sufficient new instruments of ownership and that the issuance of or conversion into instruments of ownership could be carried out effectively.

The resolution authority shall use the write down and conversion tool regardless of any provisions in the CCP's instruments of incorporation or statutes, including with respect to pre-emption rights for shareholders or requirements for the consent of shareholders to an increase of capital.

*Article 36*  
*Submission of a business reorganisation plan*

1. CCPs shall, within one month after the use of the tools referred to in Article 32, draw up and submit to the resolution authority a business reorganisation plan in accordance with Article 37. Where the Union State aid framework is applicable, that plan shall be compatible with the restructuring plan that the CCP is required to submit to the Commission in accordance with that framework.

Where necessary for achieving the resolution objectives, the resolution authority may extend the period referred to in the first subparagraph up to a maximum of two months.

2. Where a restructuring plan is required to be notified within the Union State aid framework, the submission of the business reorganisation plan shall be without prejudice to the deadline laid down by the Union State aid framework for the submission of that restructuring plan.

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<sup>31</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

3. The resolution authority shall submit the business reorganisation plan, and any revision thereof in accordance with Article 38, to the competent authority and to the resolution college.

#### *Article 37*

##### *Content of the business reorganisation plan*

1. The business reorganisation plan referred to in Article 36 shall set out measures aiming to restore the long-term viability of the CCP or parts of its business within a reasonable timeframe. Those measures shall be based on realistic assumptions as to the economic and financial market conditions under which the CCP will operate.

The business reorganisation plan shall take account of the current and potential states of the financial markets and reflect best-case and worst-case assumptions, including a combination of events to identify the CCP's main vulnerabilities. Assumptions shall be compared with appropriate sector-wide benchmarks.

2. The business reorganisation plan shall include at least the following elements:
  - (a) a detailed analysis of the factors and circumstances that caused the CCP to fail or to be likely to fail;
  - (b) a description of the measures to be adopted to restore the CCP's long-term viability;
  - (c) a timetable for the implementation of those measures.
3. Measures aiming to restore the long-term viability of a CCP may include:
  - (a) the reorganisation and restructuring of the activities of the CCP;
  - (b) changes to the CCP's operational systems and infrastructure;
  - (c) the sale of assets or of business lines.

#### *Article 38*

##### *Assessment and adoption of the business reorganisation plan*

1. Within one month of the submission of the business reorganisation plan by the CCP pursuant to Article 36(1), the resolution authority and the competent authority shall assess whether the measures provided for in that plan would reliably restore the long-term viability of the CCP.

Where the resolution authority and the competent authority are satisfied that the plan would restore the CCP's long-term viability, the resolution authority shall approve the plan.

2. Where the resolution authority and the competent authority are not satisfied that the measures provided for in the plan would restore the CCP's long-term viability, the resolution authority shall notify the CCP of their concerns and require it to resubmit an amended plan addressing those concerns within two weeks of the notification.
3. The resolution authority and the competent authority shall assess the resubmitted plan and shall notify the CCP within one week of the reception of that plan whether the concerns are appropriately addressed or whether further amendments are required.

### *Article 39*

#### *Implementation and monitoring of the business reorganisation plan*

1. The CCP shall implement the business reorganisation plan and shall submit a report to the resolution authority and the competent authority as requested and, at least, every six months on its progress in implementing the plan.
2. The resolution authority, in agreement with the competent authority, may require the CCP to revise the plan where necessary to achieve the aim referred to in 37(1).

The CCP shall submit the revision referred to in the first subparagraph to the resolution authority for assessment in accordance with Article 38(3).

## **SECTION 4**

### **THE SALE OF BUSINESS TOOL**

### *Article 40*

#### *The sale of business tool*

1. The resolution authority may transfer the following to a purchaser that is not a bridge CCP:
  - (a) instruments of ownership issued by a CCP under resolution;
  - (b) any assets, rights, obligations or liabilities of a CCP under resolution.

The transfer referred to in the first subparagraph shall take place without obtaining the consent of the shareholders of the CCP or any third party other than the purchaser and without complying with any procedural requirements under company or securities law other than those provided for in Article 41.

2. A transfer made pursuant to paragraph 1 shall be made on commercial terms, having regard to the circumstances, and in accordance with the Union State aid framework.

For the purposes of the first subparagraph, the resolution authority shall take all reasonable steps to obtain commercial terms that conform to the valuation conducted under Article 24(3).

3. Unless otherwise provided for in this Regulation, any consideration paid by the purchaser shall benefit:
  - (a) the owners of the instruments of ownership where the sale of business has been effected by transferring instruments of ownership issued by the CCP from the holders of those instruments to the purchaser;
  - (b) the CCP, where the sale of business has been effected by transferring some or all of the assets or liabilities of the CCP to the purchaser;
  - (c) any non-defaulting clearing members that have suffered losses prior to resolution.

The allocation of any consideration paid by the purchaser shall be carried out in accordance with the CCP's default waterfall as set out in Articles 43 and 45 of Regulation (EU) No 648/2012 and the priority of claims under normal insolvency proceedings.

4. The resolution authority may exercise the transfer power referred to in paragraph 1 more than once in order to make supplemental transfers of instruments of ownership issued by the CCP or, as the case may be, the CCP's assets, rights, obligations, or liabilities.

5. The resolution authority may, with the consent of the purchaser, transfer the assets, rights, obligations or liabilities that had been transferred to the purchaser back to the CCP, or the instruments of ownership back to their original owners.

Where the resolution authority uses the transfer power referred to in the first subparagraph, the CCP or original owners shall take back any such assets, rights, obligations or liabilities, or instruments of ownership.

6. Any transfer made pursuant to in paragraph 1 shall take place irrespective of whether the purchaser is authorised to provide the services and carry out the activities resulting from the acquisition.

Where the purchaser is not authorised to provide the services and carry out the activities resulting from the acquisition, the resolution authority, in consultation with the competent authority, shall conduct an appropriate due diligence of the purchaser and ensure that the purchaser applies for authorisation as soon as practicable and, at the latest, within one month of the use of the sale of business tool. The competent authority shall ensure that any such application for authorisation is considered in an expedited manner.

7. Where the transfer of instruments of ownership referred to in paragraph 1 results in the acquisition of or increase in a qualifying holding referred to in Article 31(2) of Regulation (EU) No 648/2012, the competent authority shall carry out the assessment referred to in that Article within a period of time that neither delays the application of the sale of business tool nor prevents the resolution action from achieving the relevant resolution objectives.

8. Where the competent authority has not completed the assessment referred to in paragraph 7 by the date on which the transfer of instruments of ownership takes effect, the following shall apply:

- (a) the transfer of instruments of ownership shall have immediate legal effect from the date on which they are transferred;
- (b) during the assessment period and during any divestment period provided for in point (f), the purchaser's voting rights attached to those instruments of ownership shall be suspended and vested solely in the resolution authority, which shall have no obligation to exercise them and shall not be liable for exercising or refraining from exercising them;
- (c) during the assessment period and during any divestment period provided for in point (f), any penalties or measures for infringing the requirements for acquisitions or disposals of qualifying holdings envisaged in Article 12 of Regulation (EU) No 648/2012 shall not apply to that transfer;
- (d) the competent authority shall notify the resolution authority and the purchaser in writing of the result of its assessment in accordance with Article 32 of Regulation (EU) No 648/2012 promptly after completing its assessment;

- (e) where the competent authority does not oppose the transfer, the voting rights attached to those instruments of ownership shall be deemed to be fully vested in the purchaser as from the notification referred to in point (d);
  - (f) where the competent authority opposes the transfer of instruments of ownership, point (b) shall continue to apply and the resolution authority may, having taken into account market conditions, establish a divestment period within which the purchaser shall divest such instruments of ownership.
9. For the purposes of exercising its right to provide services in accordance with Regulation (EU) No 648/2012, the purchaser shall be considered to be a continuation of the CCP under resolution, and may continue to exercise any such right that was exercised by the CCP under resolution in respect of the assets, rights, obligations or liabilities transferred.
10. The purchaser referred to in paragraph 1 shall not be prevented from exercising the CCP's rights of membership and accessing the payment and settlement systems or any other financial market infrastructure provided that the purchaser meets the criteria for membership or participation in those systems or infrastructures.
- Where the purchaser does not meet the criteria referred to in the first subparagraph, the purchaser may continue to exercise the CCP's rights of membership and accessing those systems and infrastructures for the period of time specified by the resolution authority. That period of time shall not exceed 12 months.
11. The purchaser shall not be denied access to payment and settlement systems or any other financial market infrastructure on the ground that the purchaser does not possess a rating from a credit rating agency, or that that rating is below the rating levels required to be granted access to those systems or infrastructures.
12. Unless otherwise provided for in this Regulation, shareholders, creditors, clearing members and clients of the CCP under resolution and other third parties whose assets, rights, obligations or liabilities are not transferred shall have no rights over, or in relation to, the assets, rights, obligations or liabilities transferred.

#### *Article 41*

##### *Sale of business tool: procedural requirements*

1. Where using the sale of business tool in relation to a CCP, the resolution authority shall advertise the availability, or make arrangements for the marketing, of the assets, rights, obligations, liabilities, or the instruments of ownership intended to be transferred. Pools of rights, assets, obligations and liabilities may be marketed separately.
2. Without prejudice to the Union State aid framework, where applicable, the marketing referred to in paragraph 1 shall be carried out in accordance with the following criteria:
- (a) it shall be as transparent as possible and shall not materially misrepresent the assets, rights, obligations, liabilities, or instruments of ownership of the CCP, having regard to the circumstances and in particular the need to maintain financial stability;
  - (b) it shall not unduly favour or discriminate between potential purchasers;
  - (c) it shall be free from any conflict of interest;

- (d) it shall take account of the need to effect a rapid resolution action;
- (e) it shall aim at maximising, as far as possible, the sale price for the instruments of ownership, assets, rights, obligations or liabilities involved.

The criteria referred to in the first subparagraph shall not prevent the resolution authority from soliciting particular potential purchasers.

- 3. By way of derogation from paragraph 1, the resolution authority may market the assets, rights, obligations, liabilities or the instruments of ownership without complying with the criteria referred to in paragraph 2 where compliance with those criteria would be likely to undermine one or more of the resolution objectives.

## **SECTION 5**

### **THE BRIDGE CCP TOOL**

#### *Article 42*

#### *Bridge CCP tool*

- 1. The resolution authority may transfer to a bridge CCP the following:
  - (a) the instruments of ownership issued by a CCP under resolution;
  - (b) any assets, rights, obligations or liabilities of the CCP under resolution.

The transfer referred to in the first subparagraph may take place without obtaining the consent of the shareholders of the CCP under resolution or any third party other than the bridge CCP and without complying with any procedural requirements under company or securities law other than those provided for in Article 43.
- 2. The bridge CCP shall be a legal person that meets all of the following requirements:
  - (a) it is controlled by the resolution authority and it is wholly or partially owned by one or more public authorities which may include the resolution authority;
  - (b) it is created for the purpose of receiving and holding some or all of the instruments of ownership issued by a CCP under resolution or some or all of the assets, rights, obligations and liabilities of the CCP with a view to maintaining the critical functions of the CCP and subsequently selling the CCP.
- 3. When applying the bridge CCP tool, the resolution authority shall ensure that the total value of liabilities and obligations transferred to the bridge CCP does not exceed the total value of the rights and assets transferred from the CCP under resolution.
- 4. Unless otherwise provided for in this Regulation, any consideration paid by the bridge CCP shall benefit:
  - (a) the owners of the instruments of ownership, where the transfer to the bridge CCP has been effected by transferring instruments of ownership issued by the CCP under resolution from the holders of those instruments to the bridge CCP;
  - (b) the CCP under resolution, where the transfer to the bridge CCP has been effected by transferring some or all of the assets or liabilities of that CCP to the bridge CCP.

5. The resolution authority may exercise the transfer power referred to in paragraph 1 more than once in order to make supplemental transfers of instruments of ownership issued by a CCP or of its assets, rights, obligations or liabilities.
6. The resolution authority may transfer the rights, obligations, assets or liabilities that had been transferred to the bridge CCP back to the CCP under resolution, or the instruments of ownership back to their original owners where that transfer is expressly provided for in the instrument by which the transfer referred to in paragraph 1 is made.

Where the resolution authority uses the transfer power referred to in the first subparagraph, the CCP under resolution or original owners shall be obliged to take back any such assets, rights, obligations or liabilities, or instruments of ownership, provided that the conditions in the first subparagraph of this paragraph or in paragraph 7 are met.

7. Where the specific instruments of ownership, assets, rights, obligations or liabilities do not fall within the classes of, or meet the conditions for transfer of, instruments of ownership, assets, rights, obligations or liabilities specified in the instrument by which the transfer was made, the resolution authority may transfer them from the bridge CCP back to the CCP under resolution or the original owners.
8. A transfer referred to in paragraphs 6 and 7 may be made at any time, and shall comply with any other conditions stated in the instrument by which the transfer was made for the relevant purpose.
9. The resolution authority may transfer instruments of ownership or assets, rights, obligations or liabilities from the bridge CCP to a third party.
10. For the purposes of exercising its right to provide services in accordance with Regulation (EU) No 648/2012, a bridge CCP shall be considered to be a continuation of the CCP under resolution and may continue to exercise any such right that was exercised by the CCP under resolution in respect of the assets, rights, obligations or liabilities transferred.

For any other purposes, resolution authorities may require that a bridge CCP be considered to be a continuation of the CCP under resolution, and be able to continue to exercise any right that was exercised by the CCP under resolution in respect of the assets, rights, obligations or liabilities transferred.

11. The bridge CCP shall not be prevented from exercising the rights of membership and accessing payment and settlement systems and other FMIs of the CCP under resolution, provided that it meets the criteria for membership and participation in those systems and infrastructures.

Where the bridge CCP does not meet the criteria referred to in the first subparagraph, the bridge CCP may continue to exercise the CCP's rights of membership and accessing those systems and infrastructures for a period of time specified by the resolution authority. That period of time shall not exceed 12 months.

12. The bridge CCP shall not be denied access to payment and settlement systems or any other FMI on the ground that the bridge CCP does not possess a rating from a credit rating agency, or that that rating is below the rating levels required to be granted access to those systems or infrastructures.

13. Shareholders or creditors of the CCP under resolution and other third parties whose assets, rights, obligations or liabilities are not transferred to the bridge CCP, shall have no claims over or in relation to the assets, rights, obligations or liabilities transferred to the bridge CCP, or against its board or senior management.
14. The bridge CCP shall have no duty or responsibility to shareholders or creditors of the CCP under resolution, and the board or senior management of the bridge CCP shall have no liability to those shareholders or creditors for acts and omissions in the discharge of their duties, unless the act or omission is due to gross negligence or serious misconduct in accordance with applicable national law.

*Article 43*

*Bridge CCP: procedural requirements*

1. The bridge CCP shall comply with all of the following requirements:
  - (a) the bridge CCP shall seek the approval of the resolution authority for all of the following:
    - (i) the rules of incorporation of the bridge CCP;
    - (ii) the members of the bridge CCP's board, where those members are not directly appointed by the resolution authority;
    - (iii) the responsibilities and remuneration of the members of the bridge CCP's board, where the remuneration and the responsibilities are not determined by the resolution authority;
    - (iv) the strategy and risk profile of the bridge CCP;
  - (b) the bridge CCP shall be authorised to provide the services or carry out the activities resulting from the transfer referred to in Article 42(1) in accordance with Regulation (EU) No 648/2012.

Where the bridge CCP is not authorised as required pursuant to point (b) of paragraph 1, the resolution authority shall seek the approval of the competent authority for carrying out the transfer referred to in Article 42(1). Where the competent authority approves that transfer, it shall indicate the period for which the bridge CCP's obligation to comply with the requirements of Regulation (EU) No 648/2012 is waived. That period shall be no longer than 12 months.

2. Subject to any restrictions imposed in accordance with Union or national competition rules, the management of the bridge CCP shall operate the bridge CCP with the objective of maintaining access by stakeholders to the bridge CCP's critical functions and selling the bridge CCP or any of its assets, rights, obligations and liabilities to one or more private sector purchasers. That sale shall take place when market conditions are appropriate, and within the period specified in paragraphs 5 and, where applicable, 6 of this Article.
3. The resolution authority shall terminate the bridge CCP in any of the following cases:
  - (a) the resolution objectives are fulfilled;
  - (b) the bridge CCP merges with another entity;
  - (c) the bridge CCP ceases to meet the requirements laid down in Article 42(2);

- (d) the bridge CCP or substantially all of its assets, rights, obligations or liabilities have been sold in accordance with paragraph 4;
  - (e) the period specified in paragraph 5 expires;
  - (f) the contracts cleared by the bridge CCP have been settled, have expired or have been closed out and the CCP's rights and obligations relating to those contracts are thereby completely discharged.
4. Before selling the bridge CCP or its assets, rights, obligations or liabilities, the resolution authority shall advertise the availability of the elements intended to be sold, and shall ensure that they are marketed openly and transparently, and that they are not materially misrepresented.

The resolution authority shall carry out the sale referred to in the first subparagraph on commercial terms and shall not unduly favour or discriminate between potential purchasers.

5. The resolution authority shall terminate the operation of a bridge CCP two years after the date on which the last transfer from the CCP under resolution is made.

Where the resolution authority terminates the operation of a bridge CCP, it shall request the competent authority to withdraw the bridge CCP's authorisation.

6. The resolution authority may extend the period referred to in paragraph 5 for one or more additional one-year periods where the extension is necessary to terminate the bridge CCP as referred to in points (a) to (d) of paragraph 3.

The decision to extend the period referred to in paragraph 5 shall be reasoned and shall contain a detailed assessment of the bridge CCP's situation in relation to relevant market conditions and market outlook.

7. Where a bridge CCP is terminated in the circumstances referred to in point (d) or (e) of paragraph 3, the bridge CCP shall be wound up under normal insolvency proceedings.

Unless otherwise provided for in this Regulation, any proceeds generated as a result of the termination of the bridge CCP shall benefit its shareholders.

Where a bridge CCP is used for the purpose of transferring assets and liabilities of more than one CCP under resolution, the proceeds referred to in the second subparagraph shall be attributed by reference to the assets and liabilities transferred from each of the CCPs under resolution.

## **SECTION 6**

### **ADDITIONAL FINANCING ARRANGEMENTS**

#### *Article 44*

#### *Alternative funding means*

The resolution authority may enter into contracts to borrow or obtain other forms of financial support, including from pre-funded resources available in any non-depleted default funds in the CCP under resolution, where necessary to ensure the effective use of the resolution tools.

## SECTION 7

### GOVERNMENT STABILISATION TOOLS

#### *Article 45*

##### *Government financial stabilisation tools*

1. The resolution authority may use the government stabilisation tools in accordance with Articles 46 and 47 for the purpose of resolving a CCP where the following conditions are met:
  - (a) the financial support is necessary to meet the resolution objectives;
  - (b) the financial support is used as a last resort after having assessed and exploited the other resolution tools to the maximum extent practicable whilst maintaining financial stability, as determined by the competent ministry or the government after consulting the resolution authority;
  - (c) the financial support complies with the Union State aid framework;
  - (d) the competent authority requires the resolution authority to provide that financial support.
2. To give effect to the government financial stabilisation tools, competent ministries or governments shall have the relevant resolution powers specified in Articles 48 to 59, and shall ensure that Articles 52, 54 and 70 are complied with.
3. Government financial stabilisation tools shall be deemed to be used as a last resort for the purposes of point (b) of paragraph 1, where, at least, any of the following conditions are met:
  - (a) the competent ministry or government and the resolution authority, after consulting the central bank and the competent authority, determine that the use of the resolution tools would not suffice to avoid a significant adverse effect on the financial system;
  - (b) the competent ministry or government and the resolution authority determine that the use of the resolution tools would not suffice to protect the public interest, where extraordinary liquidity assistance from the central bank has previously been given to the CCP;
  - (c) in respect of the temporary public ownership tool, the competent ministry or government, after consulting the competent authority and the resolution authority, determines that the use of the resolution tools would not suffice to protect the public interest, where public equity support through the equity support tool has previously been given to the CCP.

#### *Article 46*

##### *Public equity support tool*

1. Public financial support may be provided for the recapitalisation of a CCP in exchange for instruments of ownership.
2. CCPs subject to the public equity support tool shall be managed on a commercial and professional basis.
3. The instruments of ownership referred to in paragraph 1 shall be sold to a private purchaser as soon as commercial and financial circumstances allow.

*Article 47*  
*Temporary public ownership tool*

1. A CCP may be taken into temporary public ownership by means of one or more transfer orders of instruments of ownership executed by a Member State to a transferee which is either of the following:
  - (a) a nominee of the Member State;
  - (b) a company wholly owned by the Member State.
2. CCPs subject to the temporary public ownership tool shall be managed on a commercial and professional basis and shall be sold to a private purchaser as soon as commercial and financial circumstances allow.

**CHAPTER IV**  
**Resolution powers**

*Article 48*  
*General powers*

1. The resolution authority shall have all the powers necessary to use the resolution tools effectively, including all the following powers:
  - (a) the power to require any person to provide the resolution authority with any information it requires to decide upon and prepare a resolution action, including updates and additional information to that provided in the resolution plan or required through on-site inspections;
  - (b) the power to take control of a CCP under resolution and exercise all the rights and powers conferred upon holders of instruments of ownership and the CCP's board;
  - (c) the power to transfer instruments of ownership issued by a CCP under resolution;
  - (d) the power to transfer to another entity, with its consent, the CCP's rights, assets, obligations or liabilities;
  - (e) the power to reduce, including to reduce to zero, the principal amount of or outstanding amount due in respect of debt instruments or other unsecured liabilities of a CCP under resolution;
  - (f) the power to convert debt instruments or other unsecured liabilities of a CCP under resolution into instruments of ownership of that CCP or of a bridge CCP to which assets, rights, obligations or liabilities of the CCP under resolution have been transferred;
  - (g) the power to cancel debt instruments issued by a CCP under resolution;
  - (h) the power to reduce, including to reduce to zero, the nominal amount of instruments of ownership of a CCP under resolution and to cancel such instruments of ownership;
  - (i) the power to require a CCP under resolution or its parent undertaking to issue new instruments of ownership, including preference shares and contingent convertible instruments;

- (j) with regards to debt instruments and other liabilities of the CCP, the power to amend or alter their maturity, amend the amount of interest payable, or amend the date on which interest becomes payable, including by suspending payment for a temporary period;
- (k) the power to close out and terminate financial contracts;
- (l) the power to remove or replace the board and senior management of a CCP under resolution;
- (m) the power to require the competent authority to assess the buyer of a qualifying holding in a timely manner by way of derogation from the time-limits laid down in Article 31 of Regulation (EU) No 648/2012;
- (n) the power to reduce, including to reduce to zero, the amount of variation margin due to a clearing participant of a CCP under resolution;
- (o) the power to transfer open positions and any related assets, including relevant title transfer and security financial collateral arrangements, set-off arrangements, and netting arrangements, from the account of a defaulting clearing member to a non-defaulting clearing member in a manner consistent with Article 48 of Regulation (EU) No 648/2012;
- (p) the power to enforce any existing and outstanding contractual obligations of the participants of the CCP under resolution;
- (q) the power to enforce any existing and outstanding obligations of the parent undertaking of the CCP under resolution including to provide the CCP with financial support by way of guarantees or credit lines;
- (r) the power to require clearing members to provide further contributions in cash.

Resolution authorities may exercise the powers referred to in the first subparagraph individually or in any combination.

2. Unless otherwise provided for in this Regulation and the Union State aid framework, the resolution authority shall not be subject to any of the following requirements where it exercises the powers referred to in paragraph 1:

- (a) requirement to obtain approval or consent from any public or private person;
- (b) requirements relating to the transfer of financial instruments, rights, obligations, assets or liabilities of a CCP under resolution or a bridge CCP;
- (c) requirement to notify any public or private person;
- (d) requirement to publish any notice or prospectus;
- (e) requirement to file or register any document with any other authority.

*Article 49*  
*Ancillary powers*

1. Where a power referred to in Article 48(1) is exercised, the resolution authority may also exercise any of the following ancillary powers:

- (a) subject to Article 65, provide for a transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, obligations, assets or liabilities transferred;

- (b) remove rights to acquire further instruments of ownership;
- (c) require the relevant authority to discontinue or suspend the admission to trading on a regulated market, or the official listing, of any financial instruments issued by the CCP pursuant to Directive 2001/34/EC of the European Parliament and of the Council<sup>32</sup>;
- (d) provide for the purchaser or bridge CCP, pursuant to Articles 40 and 42 respectively, to be treated as if it were the CCP under resolution, for the purposes of any rights or obligations of, or actions taken by, the CCP under resolution, including any rights or obligations relating to participation in a market infrastructure;
- (e) require the CCP under resolution or the purchaser or bridge CCP, where relevant, to provide the other with information and assistance;
- (f) provide for the clearing member which is a recipient of any positions allocated to it by way of the powers in points (o) and (p) of Article 48(1) to assume any rights or obligations relating to participation in the CCP in relation to those positions;
- (g) cancel or modify the terms of a contract to which the CCP under resolution is a party or substitute the purchaser or bridge CCP, in place of the CCP under resolution, as a party;
- (h) modify or amend the operating rules of the CCP under resolution, including as regards its terms of participation subject to Article 37;
- (i) transfer the membership of a clearing member from the CCP under resolution to a purchaser of the CCP or a bridge CCP.

Any right of compensation provided for in this Regulation shall not be considered to be a liability or an encumbrance for the purposes of point (a) of the first subparagraph.

2. The resolution authority may provide for continuity arrangements necessary to ensure that the resolution action is effective and that the business transferred may be operated by the purchaser or bridge CCP. Those continuity arrangements may include:
  - (a) the continuity of contracts entered into by the CCP under resolution, in order for the purchaser or bridge CCP to assume the rights and liabilities of the CCP under resolution relating to any financial instrument, right, obligation, asset or liability that has been transferred and to replace the CCP under resolution, expressly or implicitly, in all relevant contractual documents;
  - (b) the replacement of the CCP under resolution by the purchaser or bridge CCP in any legal proceedings relating to any financial instrument, right, obligation, asset or liability that has been transferred.
3. The powers provided for in point (d) of paragraph 1 and point (b) of paragraph 2 shall not affect:
  - (a) the right of an employee of the CCP to terminate a contract of employment;

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<sup>32</sup> Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L 184, 6.7.2001, p. 1).

- (b) subject to Articles 55, 56 and 57, the exercise of contractual rights of a party to a contract, including the right to terminate, where provided for in the terms of the contract, due to an act or omission by the CCP prior to the transfer, or by the purchaser or bridge CCP after the transfer.

*Article 50*  
*Special management*

1. The resolution authority may appoint a special manager to replace the board of a CCP under resolution. The special manager shall be of sufficiently good repute and shall have adequate expertise in financial services, risk management and clearing services in accordance with the second subparagraph of Article 27(2) of Regulation (EU) No 648/2012.
2. The special manager shall have all the powers of the shareholders and the board of the CCP. The special manager may only exercise those powers under the control of the resolution authority. The resolution authority may limit the actions of the special manager or require prior consent for certain acts.  

The resolution authority shall make public the appointment referred to in paragraph 1 and the terms and conditions attached to that appointment.
3. The special manager shall be appointed for no more than one year. The resolution authority may renew that period where necessary to achieve the resolution objectives.
4. The special manager shall take all the measures necessary to promote the resolution objectives and implement resolution actions taken by the resolution authority. In case of inconsistency or conflict, that statutory duty shall override any other duty of management in accordance with the statutes of the CCP or national law.
5. The special manager shall draw up reports for the appointing resolution authority at regular intervals set by the resolution authority and at the beginning and the end of the mandate. Those reports shall describe in detail the financial situation of the CCP and state the reasons for the measures taken.
6. The resolution authority may remove the special manager at any time. It shall in any case remove the special manager in the following cases:
  - (a) where the special manager is failing to perform its duties in accordance with the terms and conditions set out by the resolution authority;
  - (b) where the objectives of resolution would be better achieved by removing or replacing that special manager;
  - (c) where the conditions for the appointment are no longer fulfilled.
7. Where national insolvency law provides for the appointment of an insolvency management, the special manager appointed pursuant to paragraph 1 may also be appointed as insolvency manager.

*Article 51*  
*Power to require the provision of services and facilities*

1. The resolution authority may require a CCP under resolution, or any of its group entities or clearing members, to provide any services or facilities that are necessary to enable a purchaser or bridge CCP to operate effectively the business transferred to it.

The first subparagraph shall apply regardless of whether an entity in the same group as the CCP or one of the CCP's clearing members has entered into normal insolvency proceedings or is itself under resolution.

2. The resolution authority may enforce obligations imposed, pursuant to paragraph 1, by resolution authorities in other Member States where those powers are exercised in relation to entities belonging to the same group as the CCP under resolution, or of the clearing members of that CCP.
3. The services and facilities referred to in paragraph 1 shall not include any form of financial support.
4. The services and facilities provided pursuant to paragraph 1 shall be provided:
  - (a) on the same commercial terms on which they were provided to the CCP immediately before the resolution action was taken, where an agreement for those purposes exists;
  - (b) on reasonable commercial terms, where there is no agreement for those purposes or where that agreement has expired.

*Article 52*  
*Power to enforce resolution actions*  
*or crisis prevention measures by other Member States*

1. Where instruments of ownership, assets, rights, obligations or liabilities of a CCP under resolution are located in, or governed by the law of a Member State other than the Member State of the resolution authority, any transfer of those instruments, assets, rights, obligations or liabilities shall have effect in accordance with the law of that other Member State.
2. The resolution authority of a Member State shall be provided with all necessary assistance by the authorities of other relevant Member States to ensure that any instruments of ownership, assets, rights, obligations or liabilities are transferred to the purchaser or bridge CCP in accordance with the applicable national law.
3. Shareholders, creditors and third parties that are affected by the transfer of instruments of ownership, assets, rights, obligations or liabilities referred to in paragraph 1 shall not be entitled to prevent, challenge, or set aside that transfer under the law of the Member State that governs that transfer.
4. Where the resolution authority of a Member State uses the resolution tools referred to in Articles 28 or 32, and the contracts, liabilities, instruments of ownership or debt instruments of the CCP under resolution include instruments, contracts or liabilities that are governed by the law of another Member State, or liabilities owed to creditors and contracts in respect of clearing participants located in that other Member State, the relevant authorities in that other Member State shall ensure that any action resulting from those resolution tools takes effect.

For the purposes of the first subparagraph, shareholders, creditors and clearing participants affected by those resolution tools shall not be entitled to challenge the reduction of the principal or payable amount of the instrument or liability or its conversion or restructuring.
5. The following rights and safeguards shall be determined in accordance with the law of the Member State of the resolution authority:

- (a) the right for shareholders, creditors and third parties to appeal pursuant to Article 72 against the transfer of instruments of ownership, assets, rights, obligations or liabilities referred to in paragraph 1 of this Article;
- (b) the right for affected creditors to appeal pursuant to Article 72 against the reduction of the principal or payable amount or the conversion or restructuring of an instrument, liability or contract covered by paragraph 4 of this Article;
- (c) the safeguards for partial transfers, as referred to in Chapter V, in relation to assets, rights, obligations or liabilities referred to in paragraph 1 of this Article.

#### *Article 53*

#### *Power in respect of assets, contracts, rights, liabilities, obligations and instruments of ownership of persons located in or governed by the law of third countries*

1. Where a resolution action concerns assets or contracts of persons located in a third country or instruments of ownership, rights, obligations or liabilities governed by the law of a third country, the resolution authority may require that:
  - (a) the CCP under resolution and the recipient of those assets, contracts, instruments of ownership, rights, obligations or liabilities take all necessary steps to ensure that the action becomes effective;
  - (b) the CCP under resolution holds the instruments of ownership, assets or rights or discharges the liabilities or obligations on behalf of the recipient until the action becomes effective;
  - (c) the reasonable expenses of the recipient properly incurred in carrying out any action required under points (a) and (b) of this paragraph are reimbursed in any of the ways referred to in Article 27(9).
2. For the purposes of paragraph 1, the resolution authority may require the CCP to ensure the inclusion of a provision in its contracts and other agreements with clearing members and holders of instruments of ownership and debt instruments or other liabilities located in third countries by which they agree to be bound by any action in respect of their assets, contracts, rights, obligations and liabilities taken by the resolution authority, including the application of Articles 55, 56 and 57.
3. Where the resolution action referred to in paragraph 1 does not become effective, that action shall be void in relation to the instruments of ownership, assets, rights, obligations or liabilities concerned.

#### *Article 54*

#### *Exclusion of certain contractual terms in early intervention and resolution*

1. A crisis prevention measure or a resolution action taken in accordance with this Regulation, or any event directly linked to the application of that action, shall not be deemed an enforcement or insolvency event within the meaning of Directive 2002/47/EC and Directive 98/26/EC provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed.

For the purposes of the first subparagraph, third-country resolution proceedings recognised pursuant to Article 75, or otherwise where the resolution authority so decides, shall be considered a resolution action taken in accordance with this Regulation.

2. A crisis prevention measure or a resolution action referred to in paragraph 1 shall not be used to:
  - (a) exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by any entity of the group to which the CCP belongs which includes cross-default provisions or obligations which are guaranteed or otherwise supported by any group entity;
  - (b) obtain possession, exercise control or enforce any security over any property of the CCP concerned or any group entity in relation to a contract which includes cross-default provisions;
  - (c) affect any contractual rights of the CCP concerned or any group entity in relation to a contract which includes cross-default provisions.

*Article 55*

*Power to suspend certain obligations*

1. The resolution authority may suspend any payment or delivery obligations of both counterparties to any contract entered into by a CCP under resolution from the publication of the notice of suspension in accordance with Article 70 until the end of the working day which follows that publication.

For the purposes of the first subparagraph, the end of the working day shall mean midnight in the Member State of the resolution authority.

2. Where a payment or delivery obligation would have been due during the suspension period, the payment or delivery obligation shall be due immediately upon expiry of the suspension period.
3. The resolution authority shall not exercise the power referred to in paragraph 1 to payment and delivery obligations owed to systems or operators of systems designated for the purposes of Directive 98/26/EC, including other central counterparties, and central banks.

*Article 56*

*Power to restrict the enforcement of security interests*

1. The resolution authority may prevent secured creditors of a CCP under resolution from enforcing security interests in relation to any assets of that CCP under resolution from the publication of the notice of the restriction in accordance with Article 70 until the end of the working day which follows that publication.

For the purposes of the first subparagraph, the end of the working day shall mean midnight in the Member State of the resolution authority.

2. The resolution authority shall not exercise the power referred to in paragraph 1 in relation to any security interest of systems or operators of systems designated for the purposes of Directive 98/26/EC, including other central counterparties, and central banks over assets pledged or provided by way of margin or collateral by the CCP under resolution.

*Article 57*

*Power to temporarily suspend termination rights*

1. The resolution authority may suspend the termination rights of any party to a contract with a CCP under resolution from the publication of the notice of the termination in

accordance with Article 70 until the end of the working day which follows that publication, provided that the payment and delivery obligations and the provision of collateral continue to be performed.

For the purposes of the first subparagraph, the end of the working day shall mean midnight in the Member State of the resolution.

2. The resolution authority shall not exercise the power referred to in paragraph 1 in relation to systems or operators of systems designated for the purposes of Directive 98/26/EC, including other central counterparties and central banks.
3. A party to a contract may exercise a termination right under that contract before the end of the period referred to in paragraph 1 where that party receives notice from the resolution authority that the rights and liabilities covered by the contract shall not be:
  - (a) transferred to another entity;
  - (b) subject to write-down, conversion, or the use of a resolution tool to allocate losses or positions.
4. Where the notice referred to in paragraph 3 has not been given, termination rights may be exercised on the expiry of the period of suspension, subject to Article 54, as follows:
  - (a) where the rights and liabilities covered by the contract have been transferred to another entity, a counterparty may exercise termination rights in accordance with the terms of that contract only if the recipient entity causes the enforcement event to occur or continue;
  - (b) where the rights and liabilities covered by the contract remain with the CCP and the resolution authority has used a resolution tool to allocate losses or positions to that contract, a counterparty may exercise termination rights in accordance with the terms of that contract on the expiry of a suspension under paragraph 1.

#### *Article 58*

##### *Power to exercise control over the CCP*

1. The resolution authority may exercise control over the CCP under resolution to:
  - (a) manage the activities and services of the CCP, exercising the powers of its shareholders and board and to consult the risk committee;
  - (b) manage and dispose of the assets and property of the CCP under resolution.

The control referred to in the first subparagraph may be exercised directly by the resolution authority or indirectly by a person or persons appointed by the resolution authority.

2. Where the resolution authority exercises control over the CCP, the resolution authority shall not be deemed to be a shadow director or de facto director under national law.

#### *Article 59*

##### *Exercise of powers by the resolution authorities*

Subject to Article 72, resolution authorities shall take resolution actions through executive order in accordance with national administrative competences and procedures.

## CHAPTER V

### Safeguards

#### *Article 60*

#### *No Creditor Worse Off principle*

Where the resolution authority uses one or more resolution tools, it shall ensure that shareholders, creditors and clearing participants do not incur:

- (a) in the event of the default of a clearing member, greater losses than they would have incurred had the resolution authority not taken resolution action in relation to the CCP at the time the resolution authority considered that the conditions for resolution pursuant to Article 22(1) were met and had instead been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other contractual arrangements in its operating rules;
- (b) in an event other than the default of a clearing member, greater losses than they would have incurred had the CCP been wound up under normal insolvency proceedings including by taking account of its contractual arrangements in its operating rules.

#### *Article 61*

#### *Valuation for the application of the No Creditor Worse Off principle*

1. For the purposes of assessing compliance with the no creditor worse off principle as laid down in Article 60, the resolution authority shall ensure that a valuation is carried out by an independent person as soon as possible after the resolution action has been effected.
2. The valuation referred to in paragraph 1 shall include:
  - (a) the treatment that shareholders, creditors and clearing participants would have received had the resolution authority not taken resolution action in relation to the CCP the resolution authority considered that the conditions for resolution pursuant to Article 22(1) were met, and they had instead been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or the CCP had been wound up under normal insolvency proceedings;
  - (b) the actual treatment that shareholders, creditors and clearing participants have received, in the resolution of the CCP;
  - (c) whether there is any difference between the treatment referred to in point (a) and the treatment referred to in point (b).
3. For the purposes of calculating the treatments referred to in paragraph 2, the valuation referred to in paragraph 1 shall disregard any provision of extraordinary public financial support to the CCP under resolution.
4. The valuation referred to in paragraph 1 shall be distinct from the valuation carried out under Article 24(3).
5. ESMA, taking into account any regulatory technical standards developed in accordance with Article 74(4) of Directive 2014/59/EU, shall develop draft

regulatory technical standards specifying the methodology for carrying out the valuation referred to in paragraph 1.

ESMA shall submit those draft regulatory standards to the Commission by [*PO please insert the date 12 months from entry into force of the Regulation*].

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

#### *Article 62*

##### *Safeguard for shareholders, creditors and clearing participants*

Where, in accordance with the valuation carried out under Article 61, any shareholder, creditor or clearing participant has incurred greater losses than it would have incurred if the resolution authority would not have taken resolution action in relation to the CCP and they would instead have been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules or the CCP had been wound up under normal insolvency proceedings, that shareholder, creditor or clearing participant shall be entitled to the payment of the difference.

#### *Article 63*

##### *Safeguard for counterparties in partial transfers*

The protections provided for in Articles 64, 65 and 66 shall apply in the following circumstances:

- (a) where the resolution authority transfers some but not all of the assets, rights, obligations or liabilities of a CCP under resolution, or a bridge CCP, to a purchaser;
- (b) where the resolution authority exercises the powers referred to in point (g) of Article 49(1).

#### *Article 64*

##### *Protection for financial collateral, set off and netting agreements*

The resolution authority shall ensure that the use of a resolution tool does not result in transferring some, but not all, of the rights and liabilities under a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement between a CCP under resolution and other parties to the arrangements, or in modifying or terminating the rights and liabilities under those arrangements through the use of ancillary powers.

The arrangements referred to in the first subparagraph shall include any arrangement to which the parties are entitled to set-off or net those rights and liabilities.

#### *Article 65*

##### *Protection for security arrangements*

The resolution authority shall ensure that the use of a resolution tool does not result in any of the following with respect to security arrangements between a CCP under resolution and other parties to those arrangements:

- (a) the transfer of assets against which the liability is secured unless that liability and benefit of the security are also transferred;

- (b) the transfer of a secured liability unless the benefit of the security is also transferred;
- (c) the transfer of the benefit of the security unless the secured liability is also transferred;
- (d) the modification or termination of a security arrangement through the use of ancillary powers, if the effect of that modification or termination is that the liability ceases to be secured.

#### *Article 66*

##### *Protection for structured finance arrangements and covered bonds*

The resolution authority shall ensure that the use of a resolution tool does not result in any of the following with respect to structured finance arrangements, including covered bonds:

- (a) the transfer of some, but not all, of the assets, rights and liabilities which constitute or form part of a structured finance arrangement to which the institution under resolution is a party;
- (b) the termination or modification through the use of ancillary powers of the assets, rights and liabilities which constitute or form part of a structured finance arrangement to which the institution under resolution is a party.

For the purposes of the first subparagraph, structured finance arrangements shall include securitisations and instruments used for hedging purposes which form an integral part of the cover pool and which according to national law are secured in a way similar to the covered bonds, which involve the granting and holding of security by a party to the arrangement or a trustee, agent or nominee.

#### *Article 67*

##### *Partial transfers: protection of trading, clearing and settlement systems*

1. The resolution authority shall ensure that the use of a resolution tool does not affect the operation of systems and rules of systems covered by Directive 98/26/EC, where the resolution authority:
  - (a) transfers some but not all of the assets, rights, obligations or liabilities of a CCP under resolution to a purchaser;
  - (b) cancels or amends the terms of a contract to which the CCP under resolution is a party or to substitute a purchaser or bridge CCP as a party.
2. For the purposes of paragraph 1, the resolution authority shall ensure that the use of a resolution tools does not result in any of the following outcomes:
  - (a) revoking a transfer order in accordance with Article 5 of Directive 98/26/EC;
  - (b) affecting the enforceability of transfer orders and netting as required by Articles 3 and 5 of Directive 98/26/EC;
  - (c) affecting the use of funds, securities or credit facilities as required by Article 4 of Directive 98/26/EC;
  - (d) affecting the protection of collateral security as required by Article 9 of Directive 98/26/EC.

## **CHAPTER VI**

### ***Procedural obligations***

#### *Article 68*

##### *Notification requirements*

1. The CCP shall notify the competent authority where it considers that it is failing or likely to fail as referred to in Article 22(2).
2. The competent authority shall inform the resolution authority of any notifications received under paragraph 1, and of any recovery or other measures in accordance with Title IV that the competent authority requires the CCP to take.

The competent authority shall inform the resolution authority of any emergency situation referred to in Article 24 of Regulation (EU) No 648/2012 relating to a CCP and of any notification received in accordance with Article 48 of that Regulation.

3. Where a competent authority or resolution authority determines that the conditions referred to in points (a) and (b) of Article 22(1) are met in relation to a CCP, it shall notify without delay the following authorities:
  - (a) the competent authority or resolution authority for that CCP;
  - (b) the competent authority for the parent undertaking of the CCP;
  - (c) the central bank;
  - (d) the competent ministry;
  - (e) the ESRB and the designated national macro-prudential authority.

#### *Article 69*

##### *Decision of the resolution authority*

1. After a notification from the competent authority pursuant to Article 68(3), the resolution authority shall determine whether any resolution action is needed.
2. The decision whether or not to take resolution action in relation to a CCP shall contain information on the following:
  - (a) the resolution authority's assessment of whether the CCP meets the conditions for resolution;
  - (b) any action that the resolution authority intends to take, including the decision to apply for winding up, the appointment of an administrator or any other measure under applicable normal insolvency proceedings or, subject to point (e) of Article 27(1), under national law.

#### *Article 70*

##### *Procedural obligations of resolution authorities*

1. As soon as practicable after taking a resolution action, the resolution authority shall notify all of the following:
  - (a) the CCP under resolution;
  - (b) the resolution college;

- (c) the designated national macroprudential authority and the ESRB;
  - (d) the Commission, the European Central Bank, and EIOPA;
  - (e) the operators of the systems covered by Directive 98/26/EC in which the CCP under resolution participates.
2. The notification referred to in paragraph 1 shall include a copy of any order or instrument by which the relevant action is taken and indicate the date from which the resolution action is effective.

The notification to the resolution college pursuant to point (b) of paragraph (1) shall also indicate whether the resolution action deviates from the resolution plan and provide reasons for any such deviation.

3. A copy of the order or instrument by which the resolution action is taken, or a notice summarising the effects of the resolution action and, if applicable, the terms and period of suspension or restriction referred to in Articles 55, 56 and 57, shall be published at all of the following:
- (a) the website of the resolution authority;
  - (b) the website of the competent authority, if different from the resolution authority, and the website of ESMA;
  - (c) the website of the CCP under resolution;
  - (d) where the instruments of ownership or debt instruments of the CCP under resolution are admitted to trading on a regulated market, the means used for the disclosure of regulated information concerning the CCP under resolution in accordance with Article 21(1) of Directive 2004/109/EC of the European Parliament and of the Council<sup>33</sup>.
4. Where the instruments of ownership or debt instruments are not admitted to trading on a regulated market, the resolution authority shall ensure that the documents providing proof of the order referred to in paragraph 3 are sent to the holders of the instruments of ownership and creditors of the CCP under resolution that are known through the registers or databases of the CCP under resolution which are available to the resolution authority.

#### *Article 71 Confidentiality*

1. The requirements of professional secrecy shall be binding in respect of the following persons:
- (a) resolution authorities;
  - (b) competent authorities, ESMA and EBA;

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<sup>33</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

- (c) competent ministries;
  - (d) special managers or temporary administrators appointed under this Regulation;
  - (e) potential acquirers that are contacted by the competent authorities or solicited by the resolution authorities, irrespective of whether that contact or solicitation was made as preparation for the use of the sale of business tool, and irrespective of whether the solicitation resulted in an acquisition;
  - (f) auditors, accountants, legal and professional advisors, valuers and other experts directly or indirectly engaged by the resolution authorities, competent authorities, competent ministries or by the potential acquirers referred to in point (e);
  - (g) central banks and other authorities involved in the resolution process;
  - (h) a bridge CCP;
  - (i) any other persons who provide or have provided services directly or indirectly, permanently or occasionally, to persons referred to in points (a) to (k);
  - (j) the senior management and members of the board of the CCP, and employees of the bodies or entities referred to in points (a) to (k) before, during and after their appointment;
  - (k) all other members of the resolution college not referred to in points (a), (b), (c) and (g).
2. With a view to ensuring that the confidentiality requirements laid down in paragraphs 1 and 3 are complied with, the persons referred to in points (a), (b), (c), (g), (h) and (k) of paragraph 1 shall ensure that there are internal rules in place, including rules to secure secrecy of information between persons directly involved in the resolution process.
3. The persons referred to in paragraph 1 shall be prohibited from disclosing confidential information received during the course of their professional activities or from a competent authority or resolution authority in connection with their functions under this Regulation, to any person or authority unless it is in the exercise of their functions under this Regulation or in summary or aggregate form such that individual CCPs cannot be identified or with the express and prior consent of the authority or the CCP which provided the information.

Before disclosing any type of information, the persons referred to in paragraph 1 shall assess the effects that the disclosure may have on the public interest as regards financial, monetary or economic policy, on the commercial interests of natural and legal persons, on the purpose of inspections, on investigations and on audits.

The procedure for checking the effects of disclosing information shall include a specific assessment of the effects of any disclosure of the contents and details of recovery and resolution plans as referred to in Articles 9 and 13 and the result of any assessment carried out under Articles 10 and 16.

Any person or entity referred to in paragraph 1 shall be subject to civil liability in the event of an infringement of this Article, in accordance with national law.

4. By way of derogation from paragraph 3, the persons referred to in paragraph 1 may exchange confidential information with any of the following provided that confidentiality agreements are in place for the purposes of that exchange:
  - (a) any other person where necessary for the purposes of planning or carrying out a resolution action;
  - (b) parliamentary enquiry committees in their Member State, courts of auditors in their Member State and other entities in charge of enquiries in their Member State;
  - (c) national authorities responsible for overseeing payment systems, the authorities responsible for normal insolvency proceedings, the authorities entrusted with the public duty of supervising other financial sector entities, the authorities responsible for the supervision of financial markets and insurance undertakings and inspectors acting on their behalf, the authorities responsible for maintaining the stability of the financial system in Member States through the use of macroprudential rules, the authorities responsible for protecting the stability of the financial system, and persons charged carrying out statutory audits.
5. This Article shall not prevent:
  - (a) employees and experts of the bodies or entities referred to in points (a) to (g) and in point (k) of paragraph 1 from sharing information among themselves within each body or entity;
  - (b) resolution authorities and competent authorities, including their employees and experts, from sharing information with each other and with other Union resolution authorities, other Union competent authorities, competent ministries, central banks, authorities responsible for normal insolvency proceedings, authorities responsible for maintaining the stability of the financial system in Member States through the use of macroprudential rules, persons charged with carrying out statutory audits of accounts, EBA, ESMA, or, subject to Article 78, third-country authorities that carry out equivalent functions to resolution authorities, or, subject to strict confidentiality requirements, to a potential acquirer for the purposes of planning or carrying out a resolution action.
6. This Article shall be without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases.

## CHAPTER VII

### *Right of appeal and exclusion of other actions*

#### *Article 72*

##### *Ex-ante judicial approval and rights of appeal*

1. A decision to take a crisis prevention measure or resolution action may be subject to ex-ante judicial approval, provided that the procedure relating to that approval and the court's consideration are expeditious.
2. All persons affected by a decision to take a crisis prevention measure or a decision to exercise any power, other than a resolution action, shall have the right of appeal against that decision.
3. All persons affected by a decision to take a resolution action shall have the right of appeal against that decision.
4. The right of appeal referred to in paragraph 3 shall be subject to the following conditions:
  - (a) the decision of the resolution authority shall be immediately enforceable and it shall give rise to a rebuttable presumption that a suspension of its enforcement would be against the public interest;
  - (b) the procedure relating to the appeal shall be expeditious;
  - (c) the court shall use the economic assessments of the facts carried out by the resolution authority as a basis for its own assessment.
5. Where necessary to protect the interests of third parties acting in good faith who have acquired instruments of ownership, assets, rights, obligations or liabilities of a CCP under resolution by virtue of a resolution action, the annulment of a decision of a resolution authority shall not affect any subsequent administrative acts or transactions concluded by the resolution authority concerned which were based on the annulled decision.

For the purposes of the first subparagraph, the remedies available to the applicant where a decision of the resolution authority is annulled shall be limited to compensation for the loss suffered as a result of that decision.

#### *Article 73*

##### *Restrictions on other proceedings*

1. Normal insolvency proceedings shall not be commenced in relation to a CCP except at the initiative of the resolution authority or with its consent in accordance with paragraph 3.
2. Competent authorities and resolution authorities shall be notified without delay of any application for the opening of normal insolvency proceedings in relation to a CCP, irrespective of whether the CCP is under resolution or a decision has been made public in accordance with Article 70(3).
3. The authorities responsible for normal insolvency proceedings may only commence those proceedings after the resolution authority has notified them of its decision not to take any resolution action in relation to the CCP or where no notification has been received within seven days of the notification referred to in paragraph 2.

Where necessary for the effective use of the resolution tools and powers, resolution authorities may request the court to apply a stay for an appropriate period of time in accordance with the objective pursued, on any judicial action or proceeding in which a CCP under resolution is or may become a party.

## **TITLE VI**

# **RELATIONS WITH THIRD COUNTRIES**

### *Article 74*

#### *Agreements with third countries*

1. In accordance with Article 218 TFEU, the Commission may submit to the Council recommendations for the negotiation of agreements with one or more third countries regarding the means of cooperation between the resolution authorities and the relevant third country authorities in connection with recovery and resolution planning in relation to CCPs and third country CCPs, with regard to the following situations:
  - (a) where a third country CCP provides services or has subsidiaries in one or more Member States;
  - (b) where a CCP established in a Member State provides services or has one or more subsidiaries in a third country.
2. The agreements referred to in paragraph 1 shall, in particular, seek to ensure the establishment of processes and arrangements for cooperation in carrying out the tasks and exercising the powers indicated in Article 77, including the exchange of information necessary for those purposes.

### *Article 75*

#### *Recognition and enforcement of third-country resolution proceedings*

1. This Article shall apply in respect of third-country resolution proceedings unless and until an international agreement as referred to in Article 74(1) enters into force with the relevant third country. It shall also apply following the entry into force of an international agreement as referred to in Article 74(1) with the relevant third country to the extent that recognition and enforcement of third-country resolution proceedings is not governed by that agreement.
2. Relevant national authorities shall recognise third-country resolution proceedings relating to a third-country CCP in any of the following cases:
  - (a) the third-country CCP provides services in or has subsidiaries established in one or more Member States;
  - (b) the third-country CCP has assets, rights, obligations or liabilities located in one or more Member States or are governed by the law of those Member States.

Relevant national authorities shall ensure the enforcement of the recognised third-country resolution proceedings in accordance with their national law.

3. The relevant national authorities shall at least have the power to do the following:
  - (a) exercise the resolution powers in relation to the following:
    - (i) assets of a third-country CCP that are located in their Member State or governed by the law of their Member State;

- (ii) rights or liabilities of a third-country CCP that are booked in their Member State or governed by the law of their Member State, or where claims in relation to such rights and liabilities are enforceable in their Member State;
  - (b) perfect, including to require another person to take action to perfect, a transfer of instruments of ownership in a subsidiary established in the designating Member State;
  - (c) exercise the powers in Article 55, 56 and 57 in relation to the rights of any party to a contract with an entity referred to in paragraph 2 of this Article, where such powers are necessary in order to enforce third-country resolution proceedings;
  - (d) render unenforceable any right to terminate, liquidate or accelerate contracts, or affect the contractual rights, of entities referred to in paragraph 2 and other group entities, where such a right arises from resolution action taken in respect of the third-country CCP, whether by the third-country resolution authority itself or otherwise pursuant to legal or regulatory requirements as to resolution arrangements in that country, provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed.
4. The recognition and enforcement of third-country resolution proceedings shall be without prejudice to any normal insolvency proceedings under national law applicable.

#### *Article 76*

##### *Right to refuse recognition or enforcement of third-country resolution proceedings*

By way of derogation from Article 75(2), the relevant national authorities may refuse to recognise or to enforce third-country resolution proceedings in any of the following cases:

- (a) the third-country resolution proceedings would have adverse effects on financial stability in their Member State;
- (b) creditors or clearing participants located in their Member State would not receive the same treatment as third-country creditors or clearing participants with similar legal rights under the third-country home resolution proceedings;
- (c) recognition or enforcement of the third-country resolution proceedings would have material fiscal implications for their Member State;
- (d) the recognition or enforcement would be contrary to national law.

#### *Article 77*

##### *Cooperation with third-country authorities*

1. This Article shall apply in respect of cooperation with a third country unless and until an international agreement as referred to in Article 74(1) enters into force with the relevant third country. It shall also apply following the entry into force of an international agreement provided for in Article 74(1) with the relevant third country to the extent that the subject matter of this Article is not governed by that agreement.

2. Competent authorities or resolution authorities, where appropriate, shall conclude cooperation arrangements with the following relevant third-country authorities, taking into account existing cooperation arrangements established pursuant to Article 25(7) of Regulation (EU) No 648/2012:
  - (a) where a third country CCP provides services or has subsidiaries in one or more Member States, the relevant authorities of the third country where the CCP is established;
  - (b) where a CCP provides services in or has one or more third-country subsidiaries, the relevant authorities of the third countries where those services are provided or where the subsidiaries are established.
3. The cooperation arrangements referred to in paragraph 2 shall establish processes and arrangements between the participating authorities for sharing the necessary information for and cooperating in carrying out the following tasks and exercising the following powers in relation to CCPs referred to in points (a) and (b) of paragraph 2 or groups including such CCPs:
  - (a) the development of resolution plans in accordance with Article 13 and similar requirements under the law of the relevant third countries;
  - (b) the assessment of the resolvability of such institutions and groups, in accordance with Article 16 and similar requirements under the law of the relevant third countries;
  - (c) the application of powers to address or remove impediments to resolvability pursuant to Article 17 and any similar powers under the law of the relevant third countries;
  - (d) the application of early intervention measures pursuant to Article 19 and similar powers under the law of the relevant third countries;
  - (e) the use of resolution tools and exercise of resolution powers and similar powers conferred upon the relevant third-country authorities.
4. Cooperation arrangements concluded between resolution authorities and competent authorities of Member States and third countries pursuant to paragraph 2 may include provisions on the following matters:
  - (a) the exchange of information necessary for the preparation and maintenance of resolution plans;
  - (b) consultation and cooperation in the development of resolution plans, including principles for the exercise of powers under Article 75 and similar powers under the law of the relevant third countries;
  - (c) the exchange of information necessary for the use of resolution tools and exercise of resolution powers and similar powers under the law of the relevant third countries;
  - (d) early warning to or consultation of parties to the cooperation arrangement before taking any significant action under this Regulation or relevant third-country law affecting the CCP or group to which the arrangement relates;

- (e) the coordination of public communication in the case of joint resolution actions;
- (f) procedures and arrangements for the exchange of information and cooperation under points (a) to (e), including, where appropriate, through the establishment and operation of crisis management groups.

In order to ensure the common, uniform and consistent application of paragraph 3, ESMA shall issue guidelines on the types and content of the provisions referred to in paragraph 4 by [*PO please insert the date 18 months from entry into force of the Regulation*].

- 5. Resolution authorities and competent authorities shall notify ESMA of any cooperation agreements that they have concluded in accordance with this Article.

#### *Article 78*

#### *Exchange of confidential information*

- 1. Resolution authorities, competent authorities, competent ministries and, where applicable, other relevant national authorities shall exchange confidential information, including recovery plans, with relevant third-country authorities only if the following conditions are met:
  - (a) those third-country authorities are subject to requirements and standards of professional secrecy at least considered to be equivalent, in the opinion of all the authorities concerned, to those imposed by Article 71;
  - (b) the information is necessary for the performance by the relevant third-country authorities of their functions under national law that are comparable to those under this Regulation and is not used for any other purposes.
- 2. In so far as the exchange of information relates to personal data, the handling and transmission of such personal data to third-country authorities shall be governed by the applicable Union and national data protection law.
- 3. Where confidential information originates in another Member State, resolution authorities, competent authorities and competent ministries shall not disclose that information to relevant third-country authorities unless the following conditions are met:
  - (a) the relevant authority of the Member State where the information originated agrees to that disclosure;
  - (b) the information is disclosed only for the purposes permitted by the authority referred to in point (a).
- 4. For the purposes of this Article, information is deemed to be confidential if it is subject to confidentiality requirements under Union law.

# TITLE VII

## AMENDMENTS TO REGULATIONS (EU) NO 1095/2010, (EU) NO 648/2012, AND (EU) 2015/2365

### *Article 79* *Amendments to Regulation (EU) No 1095/2010*

Regulation (EU) No 1095/2010 is amended as follows:

(1) in Article 4, in paragraph 3, the following point (iv) is added:

'(iv) with regard to Regulation (EU) No [*on CCP recovery and resolution*], a resolution authority as defined in point 3 of Article 2(1) of Regulation (EU) No [*on CCP recovery and resolution*].';

(2) in Article 40, in paragraph 5, the following subparagraph is added:

'For the purpose of acting within the scope of Regulation (EU) [*on CCP recovery and resolution*], the member of the Board of Supervisors referred to in point (b) of paragraph 1 may, where appropriate, be accompanied by a representative from the resolution authority in each Member State, who shall be non-voting.'.

### *Article 80* *Amendments to Regulation (EU) No 648/2012*

Regulation (EU) No 648/2012 is amended as follows:

(1) The following Article 6a is inserted:

#### *Article 6a*

#### **Suspension of the clearing obligation in resolution**

1. Where a CCP meets the conditions under Article 22 of Regulation (EU) [*on CCP recovery and resolution*], the resolution authority of the CCP designated under Article 3(1) of that Regulation or the competent authority of a clearing member of the CCP in resolution may request the Commission to temporarily suspend the clearing obligation laid down in Article 4(1) for specific classes of OTC derivatives where the following conditions are met:
  - (a) the CCP in resolution is authorised under Article 14 to clear the specific classes of OTC derivatives subject to clearing pursuant to Article 4(1) for which the suspension is requested;
  - (b) the suspension of the clearing obligation laid down in Article 4 for those specific classes of OTC derivatives is necessary to avoid a serious threat to financial stability in the Union in connection with the resolution of the CCP, in particular where both of the following criteria are met:

- (i) there are adverse events or developments which constitute a serious threat to financial stability;
- (ii) the measure is necessary to address the threat and will not have a detrimental effect on financial stability which is disproportionate to its benefits.

The request referred to in the first subparagraph shall be accompanied by evidence that the conditions laid down in points (a) and (b) of the first subparagraph are fulfilled.

The authority referred to in the first subparagraph shall notify its reasoned request to ESMA and the ESRB at the same time that the request is notified to the Commission.

2. ESMA shall, within 24 hours of notification of the request referred to in paragraph 1, and after consultation of the ESRB, issue an opinion on the intended suspension taking into account the necessity to avoid a serious threat to financial stability in the Union, the resolution objectives laid down in Article 21 of Regulation (EU) [*on CCP recovery and resolution*] and the criteria set out in paragraphs 4 and 5 of Article 5 of this Regulation.
3. The opinion referred to in paragraph 2 shall not be made public.
4. The Commission shall, within 48 hours of the request referred to in paragraph 1 and in accordance with paragraph 6 adopt a decision suspending temporarily the clearing obligation for specific classes of OTC derivatives or rejecting the requested suspension.
5. The Commission's decision shall be communicated to the authority that requested the suspension and to ESMA and shall be published on the Commission's website. Where the Commission decides to suspend a clearing obligation, this shall be published on the public register referred to in Article 6.
6. The Commission may decide to temporarily suspend the clearing obligation referred to in paragraph 1 for the specific class of OTC derivatives provided that the conditions in point (a) and (b) of paragraph 1 are fulfilled. In adopting such a decision, the Commission shall take into account the opinion issued by ESMA referred to in paragraph 2, the resolution objectives referred to in Article 21 of Regulation (EU) [*on CCP recovery and resolution*], the criteria set out in paragraphs 4 and 5 of Article 5 regarding those OTC derivative classes and the necessity of the suspension to avoid a serious threat to financial stability.
7. The suspension of a clearing obligation pursuant to paragraph 4 shall be valid for an initial period not exceeding three months from the date of its publication in the *Official Journal of the European Union*.
8. The Commission may renew the suspension referred to in paragraph 7 for one or more periods not cumulatively exceeding three months from the end of the initial suspension period where the grounds for the suspension continue to apply.
9. Where the suspension is not renewed by the end of the initial period or by the end of any subsequent renewal period it shall automatically expire.
10. The Commission shall notify ESMA of its intention to renew the suspension of the clearing obligation.

ESMA shall, within 48 hours of notification by the Commission of its intention to renew the suspension of the clearing obligation, issue an opinion on the renewal of the suspension taking into account the necessity to avoid a serious threat to financial stability in the Union, the resolution objectives laid down in Article 21 of Regulation (EU) [*on CCP recovery and resolution*] and the criteria set out in paragraphs 4 and 5 of Article 5 of this Regulation.';

(2) In Article 28, paragraph 3 is replaced by the following:

'3. The risk committee shall advise the board on any arrangements that may impact the risk management of the CCP, such as a significant change in its risk model, the default procedures, the criteria for accepting clearing members, the clearing of new classes of instruments, or the outsourcing of functions. The risk committee shall inform the board in a timely manner of any new risk affecting the resilience of the CCP. The advice of the risk committee is not required for the daily operations of the CCP. Reasonable efforts shall be made to consult the risk committee on developments impacting the risk management of the CCP in emergency situations, including on developments relevant to clearing members' exposures to the CCP and interdependencies with other CCPs'.

(3) In Article 28, paragraph 5 is replaced by the following:

'5. A CCP shall promptly inform the competent authority and the risk committee of any decision in which the board decides not to follow the advice of the risk committee and explain such decision. The risk committee or any member of the risk committee may inform the competent authority of any areas in which it considers that the advice of the risk committee has not been followed.';

(4) in Article 38, the following paragraph 6 is added:

'The clearing members of the CCP shall inform their existing and potential clients of the potential losses or other costs that they may bear during a recovery phase of the CCP, including the type of compensation they may receive, taking into account Article 48(7) of Regulation (EU) No 648/2012. Clients shall be provided with sufficient information to ensure that they understand the worst-case losses or other costs they could face should the CCP undertake recovery measures.';

(5) in Article 81, in paragraph 3, the following point (q) is added:

'(q) the resolution authorities designated under Article 3 of Regulation (EU) No [*on CCP recovery and resolution*].'

*Article 81*  
*Amendment to Regulation (EU) 2015/2365*

In Article 12, in paragraph 2, the following point (n) is added:

'(n) the resolution authorities designated under Article 3 of Regulation (EU) [*on CCP recovery and resolution*].'

## TITLE VIII FINAL PROVISIONS

### *Article 82*

#### *Review*

By [...], the Commission shall review the implementation of this Regulation and shall submit a report thereon to the European Parliament and to the Council. Where appropriate, that report shall be accompanied by a legislative proposal.

### *Article 83*

#### *Entry into force*

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

It shall apply from [*PO: Please insert the date set out in the second subparagraph of Article 9(1) of the Directive amending Directive 2014/59/EU*].

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

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*