

## I

(Legislative acts)

## REGULATIONS

## REGULATION (EU) 2021/23 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 December 2020

**on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the European Central Bank <sup>(2)</sup>,

Acting in accordance with the ordinary legislative procedure <sup>(3)</sup>,

Whereas:

- (1) Financial markets are pivotal for the functioning of modern economies. The more integrated they are, the greater the potential for efficient allocation of economic resources will be, potentially 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 deal with effects of market turmoil and 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 global 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 transactions and positions of counterparties, honour the obligations created by the transactions, and require adequate collateral from their members as margin and as contributions to default funds.

<sup>(1)</sup> OJ C 209, 30.6.2017, p. 28.

<sup>(2)</sup> OJ C 372, 1.11.2017, p. 6.

<sup>(3)</sup> Position of the European Parliament of 27 March 2019 (not yet published in the Official Journal) and Position of the Council at first reading of 17 November 2020 (not yet published in the Official Journal). Position of the European Parliament of 14 December 2020 (not yet published in the Official Journal).

- (3) The integration of Union financial markets has resulted in CCPs evolving 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, including listed and over-the-counter (OTC) financial and commodity derivatives, cash equities, bonds and other products such as repos. They provide services across national borders to a broad range of financial and other institutions across the Union. While some CCPs remain focused on domestic markets, they are all systemically important at least in 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 are essential. Regulation (EU) No 648/2012 of the European Parliament and of the Council <sup>(4)</sup> requires CCPs authorised in the Union to observe high prudential, organisational and conduct of business standards. Competent authorities, working together within supervisory colleges which group together relevant authorities for the specific tasks allocated to them, are tasked with the full oversight of the activities of CCPs. In accordance with commitments entered into by G20 leaders since the 2008 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 could, in turn, provide additional challenges for risk management strategies of CCPs.
- (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 a CCP, including one or more defaults by clearing members. Faced with a scenario of severe financial distress or impending failure, financial institutions should in principle remain subject to normal insolvency proceedings. However, as the 2008 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 continuity of the critical functions of financial institutions for the sake of preserving financial stability. In order to prevent such negative consequences of normal insolvency proceedings, it is necessary to create a special resolution framework for CCPs.
- (6) The 2008 financial crisis highlighted the lack of adequate tools to preserve the critical functions provided by failing financial institutions. It further demonstrated the absence of frameworks to enable cooperation and coordination amongst authorities, in particular those located in different Member States or jurisdictions, to ensure the taking of swift and decisive action. Without such tools and in the absence of cooperation and coordination frameworks, Member States were compelled to rescue financial institutions using taxpayer money in order to stem contagion and reduce panic. While CCPs were not direct recipients of extraordinary public financial support in the 2008 financial crisis, they were protected from the effects that banks failing to perform their obligations would otherwise have had on them. A recovery and resolution framework for CCPs complements the bank resolution framework adopted under Directive 2014/59/EU of the European Parliament and of the Council <sup>(5)</sup>, and is therefore necessary to prevent reliance on taxpayer money in the event of their disorderly failure. Such a framework should also address the possibility of CCPs entering into resolution for reasons other than the default of one or several of their clearing members.
- (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 up the remaining activities through normal insolvency proceedings, and to preserve financial stability and to avoid a significant adverse effect on the financial system and its ability to serve the real economy while minimising the cost to taxpayers of a CCP failure. A recovery and resolution framework further bolsters the preparedness of CCPs and authorities to mitigate financial distress 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.

<sup>(4)</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).

<sup>(5)</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, 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).

- (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 the recovery and resolution of CCPs is likely to constitute a barrier to the smooth functioning 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 clearing 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 might affect CCPs, clearing members and the clients of clearing members differently across Member States, potentially creating competitive distortions across the internal market. The absence of common rules and tools for how financial distress or failure in a CCP should be handled can affect clearing members' and their clients' choice to clear and CCPs' choice of their place of establishment, thereby preventing CCPs from fully benefiting from their fundamental freedoms within the internal market. In turn, this could discourage clearing members and their clients from accessing CCPs across borders in the internal market and hinder further integration in the Union'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 to other financial institutions which has taken place in the wake of the 2008 financial 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 Member States pursuant to Directive 2014/59/EU.
- (10) Building on the approach for bank recovery and resolution, competent authorities and resolution authorities should be prepared and have adequate 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 by the failure of the CCP's clearing members or as a result of non-default events.
- (11) A regulation is the proper legal act to choose 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 rules in respect of an area otherwise governed by directly applicable Union law and increasingly characterised by the cross-border provision of CCPs' services. Therefore uniform and directly applicable rules on recovery and resolution of CCPs should also be adopted.
- (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 laid down in this Regulation should apply to CCPs that are subject to the prudential requirements laid down in Regulation (EU) No 648/2012, regardless of whether they have a banking licence. While there might be differences in the risk profile associated with alternative corporate structures, CCPs are stand-alone entities that are required to fulfil all requirements under this Regulation and under Regulation (EU) No 648/2012 independently from their parent undertaking or other group entities. The group of which a CCP forms part does not therefore need to be subject to this Regulation. The group dimension, including, inter alia, the operational, personal and financial relations of a CCP with group entities, should, however, be taken into account in the CCP's recovery and resolution planning insofar it could affect the recovery or resolution of the CCP or insofar recovery and resolution actions could have an impact on other entities of the group.
- (13) In order to ensure that resolution actions are taken efficiently and effectively, and in line with resolution objectives, Member States should appoint, as resolution authorities for the purpose of this Regulation, national central banks, competent ministries, public administrative authorities or authorities entrusted with public administrative powers to perform functions and tasks in relation to resolution, including any existing resolution authorities. Member States should also ensure that appropriate resources are allocated to those resolution authorities. In Member States

where a CCP is established, adequate structural arrangements should be put in place to separate the CCP resolution functions from other functions, in particular where the authority responsible for the prudential supervision of the CCP, or prudential supervision of credit institutions or investment firms that are clearing members of the CCP, is designated as the resolution authority, to avoid any conflicts of interest and risk of regulatory forbearance. In such cases, the independence of the resolution authority's decision-making process should be ensured, while not preventing decision-making from converging at the highest level.

- (14) In light of the consequences that the failure of a CCP and the subsequent actions might 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 Member States should be able to decide, in line with national democratic procedures, on the use of public funds as a last resort and should consequently be closely involved, at an early stage, in the process of recovery and resolution. Therefore, with regard to the use of public funds as a last resort, this Regulation should be without prejudice to the distribution of competences between the relevant ministries or the government and the resolution authority as provided for in the legal systems of Member States.
- (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 assessing the recovery plan developed by the CCP, contributing to and reaching a joint decision on resolution plans drawn up by the resolution authority of the CCP, and addressing any impediments to resolvability of the CCP.
- (16) The 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 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 those objectives. This should include in particular sharing information on the preparation of clearing members and, where relevant, clients with regard to potential default management, recovery and resolution measures and the supervisory treatment of the related exposures towards the CCP. The authorities of Member States whose financial stability could be impacted by the failure of the CCP should be able to participate in the resolution college based on their assessment of the impact that the CCP's resolution could have on financial stability in their respective Member State. Member States should have the possibility to be represented in the resolution college by the competent authorities and resolution authorities of clearing members. Member States which are not represented by clearing members' authorities should be able to participate by choosing between participation in the college of the competent authority of clearing members' clients and of the resolution authority of clearing members' clients. The authorities should provide appropriate justification for their participation, based on their analysis of the negative impact that the CCP's resolution could have on their Member States, to the resolution authority of the CCP. Similarly, in order to ensure a regular exchange of views and coordination with relevant third-country authorities, these should be invited to participate in resolution colleges as observers where necessary.
- (17) 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, ownership structure, legal and organisational structure, risk profile, size, legal status, substitutability 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.
- (18) In order to deal in an efficient manner with failing CCPs, competent 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 recovery plans should they face financial distress. Such recovery plan should contemplate an appropriate range of scenarios, envisaging both systemic and specific stresses to the CCP, that would endanger its viability, also taking into account the potential impact of contagion in a crisis, both domestic and cross-border. The scenarios should be more severe than those used for the purposes of regular stress testing pursuant to Article 49 of Regulation (EU) No 648/2012, while remaining plausible. The recovery plan should cover a broad range of scenarios including scenarios resulting from default events, non-default events and a combination of both; and should include comprehensive arrangements for the re-establishment of a matched book, for the full allocation of losses arising from clearing member default, and adequate absorbency for all other types of losses. Recovery plans should distinguish between different types of non-default events. 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 recovery plan in all scenarios. Recovery plans should not assume access to extraordinary public financial support or expose taxpayers to the risk of loss.

- (19) CCPs should be required to draw up and regularly review and update their recovery plans. The recovery phase in that context should start when there is a significant deterioration in the CCP's financial situation or risk of breach of its capital and prudential requirements under Regulation (EU) No 648/2012 that could lead to the infringement of its authorisation requirements that would justify the withdrawal of its authorisation pursuant to Regulation (EU) No 648/2012. This should be indicated with reference to a framework of qualitative or quantitative indicators included in the recovery plan.
- (20) In order to create sound incentives *ex-ante* and to ensure a fair allocation of losses, recovery plans should ensure that the application of recovery tools appropriately balances the allocation of losses between CCPs, clearing members and, where applicable, their clients. As a general principle, losses in recovery should be distributed between CCPs, clearing members, and, where applicable, their clients as a function of their responsibility for the risk transferred to the CCP and their ability to control and manage such risks. Recovery plans should ensure that the CCP's capital is exposed to losses caused by both default and non-default events, before losses are allocated to clearing members. As an incentive for proper risk management and to further reduce the risks of losses for the taxpayer, the CCP should use a portion of its pre-funded dedicated own resources as referred to in Article 43 of Regulation (EU) No 648/2012, which can include any capital it holds in addition to its minimum capital requirements, to comply with the notification threshold referred to in the delegated act adopted on the basis of Article 16(3) of Regulation (EU) No 648/2012, as a recovery measure before resorting to other recovery measures requiring financial contributions from clearing members.

That additional amount of pre-funded dedicated own resources, which is distinct from the pre-funded own resources referred to in Article 45(4) of Regulation (EU) No 648/2012, should not be lower than 10 % nor higher than 25 % of the risk based capital requirements calculated in accordance with Article 16(2) of Regulation (EU) No 648/2012 irrespective of whether those requirements are lower or higher than the initial capital referred to in Article 16(1) of that Regulation.

- (21) The CCP should submit its recovery plan to the competent authority which should without undue delay transmit the plan to the supervisory college, established under Regulation (EU) No 648/2012, for a complete assessment, to be carried out 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 distress.
- (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. Neither the power of the resolution authority to apply a resolution cash call nor the requirement to have a minimum contractual commitment for the recovery cash call should affect the right of the CCP to introduce recovery cash calls in its rules above the minimum obligatory contractual commitment specified in this Regulation or the risk management of the CCP.
- (23) Recovery plans should also consider cyber-attacks which could lead to a significant deterioration of the financial situation of the CCP or to a risk of breaching prudential requirements under Regulation (EU) No 648/2012.
- (24) CCPs should ensure that their recovery plan is non-discriminatory and balanced in terms of its impact and the incentives it creates. The effects of the recovery measures on clearing members and, where the relevant information is available, their clients and on the financial system of the Union or of one or more of its Member States more broadly should be proportionate. In particular, in accordance with Regulation (EU) No 648/2012 CCPs have to ensure that their clearing members have limited exposures toward the CCP. CCPs should ensure that all relevant stakeholders are involved in the drawing-up of the recovery plan through their involvement in the CCP's risk committee, as the case might be, and by being appropriately consulted. Since opinions can be expected to differ among stakeholders, CCPs should establish clear processes to manage the diversity of stakeholders' views as well as any conflict of interest between those stakeholders and the CCP.
- (25) In view of the global nature of the markets served by CCPs, the CCP's operating rules should include contractual provisions to ensure its ability 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.

- (26) Where a CCP does not present an adequate recovery plan, competent authorities should be able to require the CCP to take the measures necessary to redress the material deficiencies of the plan in order to strengthen the business of the CCP and ensure that the CCP could allocate losses, restore its capital and, where relevant, re-match its book in the event 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.
- (27) In the exceptional cases of variation margin gains haircutting following a non-default event and if recovery is successful, the competent authority should be able to require the CCP to recompense its clearing members proportionately to their loss in excess of their contractual commitments, through cash payments or, where appropriate, to require the CCP to issue instruments recognising a claim on the future profits of the CCP.
- (28) 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 in the resolution college. The plans should cover a broad range of scenarios, distinguishing scenarios resulting from default events, non-default events and a combination of both, as well as different types of non-default events. Authorities should have all the information necessary to identify and ensure the continuity of critical functions. The content of a resolution plan should, however, be appropriate to the activities of the CCP and the types of products it clears and it should be based, inter alia, on the information provided by it. In order to facilitate the enforcement of resolution cash calls and of the reduction of the amount of any gains payable to a non-defaulting clearing member of a CCP under resolution, a reference to the power of the resolution authority to require such resolution cash calls and such reduction should be included in the operating rules of the CCP. Where needed, the operating rules of the CCP that are agreed contractually with clearing members should contain provisions to ensure the enforceability of other resolution measures by resolution authorities.
- (29) Resolution authorities, on the basis of the assessment of resolvability, should have the power to require changes to the legal or operational 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 application of resolution tools and ensure their resolvability. Taking into account the diverse structure of the groups that CCPs belong to, the differences in structures compared to banking groups, and the different regulatory frameworks that apply to individual entities within such groups, the resolution authority of the CCP, in consultation with the competent authority of the CCP, should be able to assess whether enforcing changes to the legal or operational structures of the CCP, or any group entity directly or indirectly under its control, involves changes in the structures of the group that the CCP belongs to that could lead to issues of legal challenge or issues of enforceability, depending on the specific legal circumstances that apply. The resolution authority, when assessing how to remove such impediments to resolution, should be able to suggest a different set of resolvability measures than requiring changes to the legal or operational structures of the group, if the use of such alternative measures would remove the impediments to resolvability in an equivalent way.
- (30) As regards resolution plans and resolvability assessments day-to-day supervisory considerations are outweighed 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, the European Supervisory Authority (European Securities and Markets Authority) (ESMA) should play a mediation role in accordance with Article 19 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council <sup>(6)</sup>. Such binding mediation by ESMA should nonetheless be prepared for 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 Regulation (EU) No 1093/2010 of the European Parliament and of the Council <sup>(7)</sup> 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. In accordance with Article 38 of Regulation (EU) No 1095/2010, such binding mediation may not impinge on the fiscal responsibilities of Member States.

<sup>(6)</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

<sup>(7)</sup> Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

- (31) It could be necessary for the recovery plan of the CCP to set out the conditions under which the provision of possible contractually binding financial support agreements, 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 regarding such arrangements would mitigate risks to the liquidity and solvency of the group entity providing support to a CCP facing financial distress. Therefore, any change to such arrangements affecting the quality and nature of such group support should be considered a material change for the purpose of reviewing the recovery plan.
- (32) Given the sensitivity of the information contained in the recovery and resolution plans, those plans should be subject to appropriate confidentiality provisions.
- (33) 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.
- (34) 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 its recovery measures where they could be detrimental for overall financial stability. Competent authorities should therefore be granted early intervention powers to avoid or minimise adverse effects on financial stability or on the interests of clients that could result from the CCP's implementation of certain measures. 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. Early intervention powers should include the power to restrict or prohibit any remuneration of equity and instruments treated as equity, including dividend payments and buybacks by the CCP, to the fullest extent possible without triggering an event of default, and also the power to restrict, prohibit or freeze any payments of variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of Regulation (EU) No 648/2012, discretionary pension benefits or severance packages to senior management.
- (35) In the framework of early intervention powers, and in accordance with the relevant provisions under national law, the competent authority should be able to appoint a temporary administrator, either to replace or to temporarily work with the board and senior management of the CCP. The task of the temporary administrator should be to exercise any powers conferred on it, subject to any condition imposed on it upon its appointment, with a view to promoting solutions to redress the financial situation of the CCP. The appointment of the temporary administrator should not unduly interfere with the rights of the shareholders or owners or with procedural obligations established under Union or national company law and should respect international obligations of the Union and Member States, relating to investment protection.
- (36) During the recovery and early intervention phases, shareholders should retain their rights in full. They should lose such rights once the CCP has been put under resolution. Any remuneration of equity and instruments treated as equity, including dividend payments and buybacks by the CCP, should be restricted or prohibited in recovery, to the fullest extent possible without triggering an event of default. Equity holders of a CCP should absorb losses first in resolution in a way that minimises the risk of legal challenge by them where such losses are greater than the losses that they would have incurred under normal insolvency proceedings also known as the 'no creditor worse off' principle. A resolution authority should be able to deviate from the 'no creditor worse off' principle. However, a shareholder or a creditor incurring greater loss than it would have incurred under normal insolvency proceedings would be entitled to the payment of the difference.
- (37) 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 or is likely to fail to restore its viability, when the CCP is unable or is likely to be unable to provide a critical function, 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 or other liabilities 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.

- (38) The provision of 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 entry into resolution, provided that a number of conditions are met.
- (39) Members of the European System of Central Banks (ESCB), other Member States' bodies performing similar functions, other Union public bodies charged with or intervening in the management of the public debt, and the Bank for International Settlements as well as other entities listed in Article 1(4) and (5) of Regulation (EU) No 648/2012 can act in the capacity of a clearing member in connection with their operations. Loss allocation tools envisaged in the recovery plan of CCPs should not apply to those entities. Similarly, resolution authorities should not apply loss allocation tools with regard to those entities, in order to avoid the exposure of public money.
- (40) 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. They should enable the resolution authority to address scenarios caused both by default and non-default events, or a combination of both. Their exercise should be subject to common conditions, objectives, and general principles. In particular, the application of such tools or powers should not impinge on the effective resolution of cross-border groups.
- (41) 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.
- (42) The critical functions of a failing CCP should be maintained, although re-structured with changes to the management where appropriate, through the application of resolution tools and, to the largest extent possible, with the use of private funds and without reliance on extraordinary public financial support. That objective could be achieved by allocating outstanding losses and restoring the CCP to a matched book through application of the position and loss allocation tools in the case of default losses, or, in the case of non-default losses, through the write-down of equity instruments and the write-down and conversion to equity of unsecured liabilities to absorb losses and recapitalise the CCP. To prevent the need for the application of government stabilisation tools, the resolution authority should also be able to use the resolution cash call following a non-default event. A CCP or specific clearing service should also be able to be sold to or merged with a solvent third-party CCP that is able to conduct and manage the transferred clearing activities. In line with the objective of maintaining the critical functions of the CCP and prior to taking the actions described above, the resolution authority should generally enforce any existing and outstanding contractual obligations towards the CCP in line with how they would be called in its operating rules, including in particular any contractual obligations by clearing members to meet recovery cash calls or to take on positions of defaulting clearing members, whether through an auction or other agreed means in the CCP's operating rules, as well as any existing and outstanding contractual obligations committing parties other than clearing members to any forms of financial support.
- (43) 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 in circumstances that require an immediate reaction by the relevant resolution authority. That authority should therefore be allowed to take resolution actions notwithstanding the exercise of recovery measures by the CCP or without imposing an obligation to first use the early intervention powers.
- (44) When taking resolution actions, the resolution authority of the CCP should take into account and follow the measures provided for in the resolution plans drawn up within the resolution college, unless the resolution authority considers, taking into account the circumstances of the case, that the resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans. The resolution authority should take into account the general principles of decision-making, including the need to balance the interests of different stakeholders of the CCP and to ensure transparency towards and involvement of the relevant authorities of Member States where the proposed decision or action could have implications on the financial stability or fiscal resources. In particular, the resolution authority should inform the resolution college of the planned resolution actions, including where such actions deviate from the resolution plan.

- (45) Interference with property rights should be proportionate to the financial stability risk. Resolution tools should therefore be applied only with respect 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. Resolution tools and powers could disrupt the rights of shareholders, creditors, clearing members and, where applicable, clients of clearing members. Resolution action should therefore be taken only where necessary in the public interest and any interference with those rights should be compatible with the Charter of Fundamental Rights of the European Union ('the Charter').
- (46) Affected shareholders, clearing members and other creditors of the CCP should not incur losses greater than those which they would have incurred if the resolution authority had not taken resolution action in relation to the CCP and they had instead been subject to all applicable outstanding obligations pursuant to the CCP's default rules or other contractual arrangements in its operating rules, and the CCP had been wound up in normal insolvency proceedings ('no creditor worse off principle'). 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.
- (47) For the purpose of protecting the rights of shareholders, of clearing members and of other creditors, clear rules should be laid down concerning the valuation of the assets and liabilities of the CCP and the valuation of the treatment that shareholders, clearing members and other creditors would have received if the resolution authority had not taken resolution action. This should compare the treatment that shareholders, clearing members and other creditors have actually been afforded in resolution and the treatment they would have received if the resolution authority had not taken resolution action in relation to the CCP and if they had instead been subject to possible outstanding obligations pursuant to the CCP's recovery plan or other arrangements in its operating rules and the CCP had been wound up in normal insolvency proceedings. The use of the resolution cash call, which should be included in the CCP's operating rules, is reserved for the resolution authority. It cannot be used by the CCP, or an administrator or liquidator in insolvency and it should therefore not be part of the treatment that shareholders, clearing members and other creditors would have received if the resolution authority had not taken resolution action. Any use of the power to reduce the amount of any gains payable to a non-defaulting clearing member by the resolution authority that exceeds contractually agreed limits for such a reduction should also not be part of the treatment that shareholders, clearing members and other creditors would have received if the resolution authority had not taken resolution action.

Where shareholders, clearing members and other creditors have received, in payment of, or compensation for, their claims, less than the amount that they would have received if the resolution authority had not taken resolution action in relation to the CCP and they had instead been subject to possible outstanding obligations pursuant to the CCP's default rules or other contractual arrangements in its operating rules and the CCP had been wound up in normal insolvency proceedings, they should be entitled to the payment of the difference. Clients should only be included in that comparison and should only be entitled to the payment of any difference in treatment when there is a contractual basis for a direct claim from clients against the CCP, making them creditors of the CCP. Only in such cases can the resolution authority control the direct impact of its actions. 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, clearing members and other creditors.

- (48) Recovery and resolution actions can indirectly affect clients and indirect clients that are not creditors of the CCP, to the extent that costs of recovery and resolution have been passed to those clients and indirect clients under the applicable contractual arrangements. Therefore, the impact of a CCP recovery and resolution scenario on clients and indirect clients should also be addressed through the same contractual arrangements with the clearing members and clients that provide them with clearing services. This can be achieved by ensuring that, if contractual arrangements allow clearing members to pass on to their clients the negative consequences of the resolution tools, those contractual arrangements also include, on an equivalent and proportionate basis, the right of clients to any compensation clearing members receive from the CCP or any cash equivalent of such compensation or any proceeds they receive following a 'no creditor worse off' claim, to the extent that these relate to client positions. Such provisions should also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.
- (49) To ensure the effective resolution of a CCP, 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 a failing CCP should be based on fair, prudent and realistic assumptions at the moment when the resolution tools are applied. 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, for resolution authorities to 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.

- (50) Upon entry into resolution of the CCP, the resolution authority should enforce any outstanding contractual obligations set out in the operating rules of the CCP, including outstanding recovery measures, except where the exercise of another resolution power or tool is more appropriate to mitigate adverse effects for financial stability or to secure the critical functions of the CCP in a timely manner. The resolution authority should have the right, but not the obligation, to enforce those contractual obligations still after resolution if the reasons for refraining from their enforcement no longer exist. In order to allow for the clearing members and other relevant parties to prepare for the enforcement of the remaining obligations, the resolution authority should notify the relevant clearing members and other parties in advance. That pre-notification period should be from three to six months.

The resolution authority should determine, in consultation with the competent authorities and resolution authorities of the affected clearing members and any other parties committed by existing and outstanding obligations, whether the reasons for refraining from enforcing the contractual obligations have ceased to exist and whether to enforce the remaining obligations. If the reasons continue to exist, the resolution authority should refrain from enforcing those obligations. The proceeds from the delayed enforcement of the outstanding contractual obligations should be used to recover any public funds used for the payment of 'no creditor worse off' claims resulting from the resolution authority's decision to refrain from enforcing those obligations or the application of any government stabilisation tool. The resolution authority should use this power of delayed enforcement only to the extent that the 'no creditor worse off' safeguard is not breached with respect to the stakeholder that will be subject to the delayed enforcement. In the case of default losses, the resolution authority should restore the CCP to a matched book and allocate outstanding losses through application of position and loss allocation tools. In the case of non-default losses, losses should 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 unsecured debt and liabilities, in accordance with their ranking under applicable national insolvency law, and apply loss allocation tools, to the extent necessary without jeopardising broader financial stability.

- (51) If, after losses have been absorbed and, where applicable, the CCP has been restored to a matched book and the pre-funded resources of the CCP remain depleted, the resolution authority should ensure that those resources are restored to the levels necessary to meet regulatory requirements, either through the continued exercise of the tools in the CCP's operating rules or through other actions. In particular, resolution authorities should have the possibility to compensate non-defaulting clearing members that would have been entitled to a 'no creditor worse off' compensation payment for the application of loss allocation tools that would result in losses in excess of those that the clearing members would have borne under their obligations under the CCP's operating rules with instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits. When assessing the amount and the form of compensation, the resolution authority can consider, for example, the financial soundness of the CCP, and the quality of instruments available for compensation and for meeting the 'no creditor worse off' safeguard. To maintain an adequate incentive structure, such compensation should reflect the extent to which a clearing member has supported the recovery of the CCP and therefore also take into account the remaining outstanding contractual obligations of the clearing members towards that CCP. Such compensation should be deducted from any entitlement to a 'no creditor worse off' payment.
- (52) 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. The resolution authority should be able to take a resolution action which deviates from the principle of equal treatment of creditors if it is justified in the public interest to achieve the resolution objectives and is proportionate to the risk addressed. If the resolution authority uses such measure it should not discriminate anybody on the basis of nationality.
- (53) The resolution of a CCP should not entail calling on extraordinary public financial support. The outstanding recovery tools and resolution tools, in particular the write-down tool, should be applied to the fullest extent possible before or together with any public sector injection of capital or equivalent extraordinary public financial support is given to a CCP. The use of extraordinary public financial support to assist in the resolution of failing institutions is to be a last resort, be limited in time and comply with the relevant State aid provisions.

- (54) 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 write-down tool and the loss and position allocation tools should 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 write-down and 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 (FSB) provided for in its document 'Key Attributes of Effective Resolution Regimes for Financial Institutions'.
- (55) 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 should be able to apply the position and loss allocation tools both where the objective is to maintain critical clearing services within the CCP under resolution and in conjunction with the transfer of critical services to a bridge CCP or a third party after which the residual part of the CCP ceases to operate and is wound up.
- (56) Where the position and loss 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.
- (57) The position and loss 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 pre-funded 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 or to forcibly allocate them to the extent that voluntary arrangements established as part of recovery plan are not exhausted upon entry into resolution, to partially or fully terminate the contracts of defaulted clearing members, of an affected clearing service or asset class and other contracts of the CCP, to further haircut outgoing variation margin payments to such members and, where applicable, their clients, to exercise any outstanding recovery cash calls set out in recovery plans, and to exercise additional resolution cash calls 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. This includes the possibility to apply the loss allocation tools to contribute to the restoration of a matched book by providing the CCP with funds to accept an auction bid, enabling the CCP to allocate the defaulter's positions or to make payments on the terminated contracts.
- (58) When applying the loss allocation tool that allows the reduction of the value of any gains payable by the CCP to non-defaulting clearing members, the resolution authority should rely on processing of variation margin in accordance with the CCP's account structure, the operation of the reduction of the value of any gains payable by the CCP to non-defaulting clearing members in recovery, if applicable, and the 'no creditor worse off' principle.
- (59) With due respect for the impact on financial stability and as a last resort, resolution authorities should be able to exclude or partially exclude some contracts from position and loss allocation in a number of circumstances. Where such exclusions are applied, it should be possible to increase the level of exposure or loss applied to other contracts to take account of such exclusions subject to the 'no creditor worse off' principle being respected.
- (60) Where the resolution tools have been applied 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.
- (61) 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.

- (62) 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. Any consideration paid by the purchaser should also benefit any non-defaulting clearing members that have suffered losses. Any such net proceeds or benefit should be subject to the full recoupment of any public fund provided in resolution. Proceeds should be calculated net of the costs that have arisen from the failure of the CCP and from the resolution process.
- (63) 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. The CCP, the purchaser or both, depending on the effects of the sale of business tool and the form of acquisition, should be able to exercise or maintain existing rights of membership and accessing payment and settlement systems and other linked financial market infrastructures and trading venues. Such rights should not be denied on the basis either of non-compliance with the relevant criteria for membership or participation, or of insufficient credit rating. A purchaser who does not meet those criteria can only exercise such rights for a period to be specified by the resolution authority.
- (64) 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 it is possible for the disclosure to the public of such information required under Regulation (EU) No 596/2014 of the European Parliament and of the Council <sup>(8)</sup> to 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.
- (65) 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 it is no longer viable.
- (66) Where all other options are unavailable or 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. In order to avoid moral hazard, such extraordinary public financial support should be provided only as a last resort, be temporary in nature and always be recovered over an appropriate period. Therefore, while not constituting an obstacle to applying government stabilisation tools, comprehensive and credible arrangements for the recoupment of funds should be established by Member States. The application of government stabilisation tools is without prejudice to the role of any central bank in potentially providing liquidity to the financial system, at the central bank's exclusive discretion, even in times of stress.
- (67) To ensure the ability of a resolution 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.
- (68) Resolution authorities should have all the necessary legal powers that, in different combinations, could be exercised when applying the resolution tools. They should include 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 recovery cash calls, as set out in the CCP's operating rules, and position allocations, the power to exercise resolution cash calls, the power to terminate 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 national civil or criminal law, for the failure of the CCP.

<sup>(8)</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).

- (69) 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 could 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 application 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. 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.
- (70) Resolution authorities should have ancillary powers to ensure the effectiveness of the transfer of instruments of ownership or debt instruments and assets, liabilities, rights and obligations, including positions and related margins. Subject to the safeguards specified in this Regulation, those powers should include the power to remove the rights of third parties 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.
- (71) Given that crisis management measures could 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 expeditious. Given the requirement for a crisis management measure to be taken urgently, the court should give its decision within 24 hours and Member States should ensure that the relevant authority can take its decision immediately after the court's decision. This should be without prejudice to the right of interested parties to request the court to set aside the decision for a limited period after the resolution authority has taken the crisis management measure.
- (72) In accordance with Article 47 of the Charter, the parties concerned have the right to due process and to an effective remedy against the measures affecting them. The decisions taken by the resolution authorities should therefore be subject to the right of appeal.
- (73) Resolution action taken by national resolution authorities might 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. However, the complex nature of those assessments should not prevent national courts from examining whether the evidence relied on by the resolution authority is factually accurate, reliable and consistent, whether that evidence contains all relevant information which should be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn therefrom.
- (74) 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.
- (75) 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 resolution 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.

- (76) In the interest of efficient resolution, and in order to avoid conflicts of jurisdiction, no normal insolvency proceedings for the failing CCP should be opened or continued whilst the resolution authority is exercising its resolution powers or applying the resolution tools, except at the initiative 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. However, this should not apply to obligations of a failing CCP towards systems designated under Directive 98/26/EC of the European Parliament and of the Council<sup>(9)</sup>, including other CCPs 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. In order to ensure that those protections apply appropriately in crisis situations, whilst maintaining appropriate certainty for operators of payment and securities settlement systems and other market participants, crisis prevention measures or resolution actions 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.
- (77) 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 on the rights of counterparties 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 be limited to the shortest period possible and 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 the rights to terminate arising from any other default, including failure to pay or deliver margins, should remain.
- (78) 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, as appropriate, the splitting of linked liabilities, rights and contracts. 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 arrangements, 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 arrangement for the purposes of Directive 2013/36/EU of the European Parliament and of the Council<sup>(10)</sup> is affected to a minimum degree.
- (79) Union CCPs provide services to clearing members and their clients located in third countries and third-country CCPs provide services to clearing members and their clients located in the Union. 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 their clients.
- (80) In order to ensure the consistent application of administrative penalties across Member States for breaches of this Regulation, this Regulation should provide for a list of key administrative penalties and other administrative measures that need to be available to the resolution authorities and the competent authorities, for the power to impose those administrative penalties and other administrative measures on all persons, whether legal or natural, responsible for an infringement, and for a list of key criteria when determining the level and type of those administrative penalties and other administrative measures and for levels of administrative pecuniary penalties. Administrative penalties and other administrative measures should take into account factors such as any identified financial benefit resulting from the infringement, the gravity and duration of the infringement, any aggravating or

<sup>(9)</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).

<sup>(10)</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

mitigating factors, the need for administrative fines to have a deterrent effect and, where appropriate, include a discount for cooperation with the resolution authority or the competent authority. The adoption and publication of administrative penalties should respect fundamental rights as laid down in the Charter.

- (81) In order to ensure consistent harmonisation and adequate protection for market participants across the Union, the Commission should be empowered to adopt draft regulatory technical standards developed by ESMA by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU), in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 to specify the following elements: (a) the content of the written arrangements and procedures for the functioning of the resolution colleges; (b) the methodology for calculation and maintenance of the amount of the additional pre-funded dedicated own resources to be used by the CCP in recovery and the procedures, where such own resources are not available, for the CCP to resort to recovery measures that require contributions of non-defaulting clearing members and to subsequently reimburse such clearing members; (c) the assessment methodology for recovery plans; (d) the contents of resolution plans; (e) the order of allocation, maximum period and maximum share of the CCP's annual profits under the recompense mechanism in recovery; (f) elements relevant to the conduct of valuations; (g) methodology for calculating the buffer for additional losses to be included in provisional valuations; (h) the minimum elements that should be included in a business reorganisation plan; (i) criteria that a business reorganisation plan is to fulfil; (j) the methodology for final valuation under the 'no credit worse off' principle; (k) the conditions for clearing members to pass on compensation to their clients in line with the contractual symmetry principle and the conditions under which it is to be considered proportionate.
- (82) 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 under resolution or its competent authority, on their own initiative or at the request of the competent authority responsible for the supervision of a clearing member of the CCP under resolution, and following a non-binding opinion by ESMA, for a specific type of counterparty or for specific classes of OTC derivatives which are cleared by a CCP under resolution. The decision to suspend the clearing obligation 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, 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 and whether it is necessary to suspend the clearing obligation in order to preserve financial stability and the orderly functioning of financial markets in the Union. ESMA should be able to request the Commission to suspend the trading obligation laid down in Regulation (EU) No 600/2014 of the European Parliament and of the Council <sup>(1)</sup> where it considers the suspension of the clearing obligation to be a material change in the criteria for the trading obligation. The suspension should be of a temporary nature with a possibility of extension. Likewise, the role of the CCP's risk committee, as set out in 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 and without prejudice to the limitations to the exchange of such information laid out in competition law. Finally, resolution authorities of CCPs should also have access to all necessary information in trade repositories. Regulation (EU) No 648/2012 and Regulation (EU) 2015/2365 of the European Parliament and of the Council <sup>(2)</sup> should therefore be amended accordingly.

- (83) In order to ensure the proper implementation of the interest rate benchmark reform of the FSB it is necessary to provide clarity to market participants that transactions entered into or novated before the entry into application of the clearing or margin requirements to OTC derivative transactions referencing an interest rate benchmark (legacy trades) will not be subject to the requirements as provided for in Regulation (EU) No 648/2012 when they are novated for the sole purpose of implementing or preparing for the implementation of the interest rate benchmark reform. Doing so should also prevent any risk that Union counterparties to those legacy trades find themselves unprepared when a specific benchmark is materially changed or discontinued, therefore alleviating related financial stability concerns. Such approach is in line with the international guidance from the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO).

<sup>(1)</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

<sup>(2)</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).

- (84) In order to implement resolution of CCPs effectively, the safeguards provided for in Directive 2002/47/EC of the European Parliament and of the Council<sup>(13)</sup> should not apply to any restriction on the enforcement of a financial collateral arrangement or on the effect of a security financial collateral arrangement, any close-out netting or set-off provision provided for in this Regulation.
- (85) Directives (EU) 2017/1132<sup>(14)</sup>, 2004/25/EC<sup>(15)</sup> and 2007/36/EC<sup>(16)</sup> of the European Parliament and of the Council contain rules on the protection of shareholders and creditors of CCPs that fall within the scope of those Directives. In a situation where resolution authorities need to act rapidly under this Regulation, those rules might hinder effective resolution action and application of resolution tools and powers by resolution authorities. Derogations under Directive 2014/59/EU should therefore be extended to actions taken pursuant to this Regulation. In order to guarantee the maximum degree of legal certainty for stakeholders, the derogations should be clearly and narrowly defined, and should only be used in the public interest and when resolution triggers are met.
- (86) In order to avoid duplication of requirements, Directive 2014/59/EU and Regulation (EU) No 806/2014 of the European Parliament and of the Council<sup>(17)</sup> should be amended to exclude from their scope those entities that are also authorised in accordance with Regulation (EU) No 648/2012.
- (87) Article 54(2) of Regulation (EU) No 600/2014 provides for a transitional period during which Article 35 or 36 of that Regulation would not apply to those CCPs or trading venues which applied to their competent authority to benefit from the transitional arrangements, in respect of exchange-traded derivatives. The transitional period during which a trading venue or a CCP can be exempted by its national competent authority, in respect of exchange-traded derivatives from the application of Articles 35 and 36 of that Regulation expired on 3 July 2020. The current market environment, with a high degree of uncertainty and volatility driven by the COVID-19 pandemic, negatively impacts CCPs and trading venues' operations by increasing their operational risks. Those increased risks, combined with limited capacity for assessing access requests and for managing the migration of transactions flows, might impact the orderly functioning of markets or financial stability. In addition, that Regulation provides for a novel exchange-traded derivatives regime on access to critical market infrastructures which aims to balance more competition amongst those infrastructures with the need to preserve their operational integrity.

Therefore, while that Regulation seeks to create a competitive market for financial infrastructures, economic operators should not expect that existing rules and priorities are maintained when economic circumstances change as a consequence, in particular, of a major economic crisis. This is particularly the case in an area where the interaction between critical market infrastructures, such as trading and clearing infrastructures, requires an exceptional level of operational resilience, as any failures in such critical infrastructures would pose a high risk to financial stability. As a consequence of the COVID-19 pandemic, the application date of the new open access regime for trading venues and CCPs offering trading and clearing services in relation to exchange-traded derivatives is postponed by one year, until 3 July 2021.

- (88) In order to ensure that resolution authorities of CCPs are represented in all relevant fora, and to ensure that 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.
- (89) 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 resolution plans, and of guidelines on the conditions for resolution, and on binding mediation, and to ensure the comprehensive

<sup>(13)</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>(14)</sup> Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.6.2017, p. 46).

<sup>(15)</sup> Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142, 30.4.2004, p. 12).

<sup>(16)</sup> Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (OJ L 184, 14.7.2007, p. 17).

<sup>(17)</sup> Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

involvement of the European Supervisory Authority (European Banking Authority) (EBA) and its members in the preparation of those decisions, ESMA should create an internal committee (the 'ESMA Resolution Committee') with resolution authorities as members. Where relevant, competent authorities defined in Regulation (EU) No 575/2013 of the European Parliament and of the Council <sup>(18)</sup>, including the European Central Bank, and resolution authorities as defined in Directive 2014/59/EU, including the Single Resolution Board established by Regulation (EU) No 806/2014, should be invited to participate as observers.

- (90) The ESMA Resolution Committee should be consulted in the preparation of the conceptual framework for the assessments of the resilience of CCPs to adverse market developments, when this assessment includes the aggregate effect of CCP recovery and resolution arrangements on Union financial stability. In such cases, the ESMA Resolution Committee should also be consulted when the findings of such stress tests are being assessed.
- (91) This Regulation respects the fundamental rights and observes the rights, freedoms and principles recognised by the Charter.
- (92) 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 where the CCP's operations are critical or important for local financial markets, including where clearing members and, where relevant information is available, their clients are located and where linked trading venues and financial market infrastructures, including interoperable CCPs, are established.
- (93) Since the objective of this Regulation, namely the harmonisation of the rules and processes for the recovery and 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 Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (94) The application of this Regulation should be deferred until 12 August 2022 to establish all essential implementing measures and to allow CCPs and other market participants to take the necessary steps for compliance purposes. However, the requirement for the CCP to use dedicated own resources in recovery and the provisions to recompense clearing members in the extraordinary case of applying variation margin gains haircutting in recovery, rely on the appropriate regulatory technical standards to be in place. It is therefore appropriate to extend the deferral of the date of application for such provision until 12 February 2023. Additionally, certain provisions that apply to CCP recovery plans and the adoption and review of recovery plans, including the obligation to submit a recovery plan, should be applied from an earlier date, since all CCPs already have recovery plans, as required by the Principles for Financial Market Infrastructures published by the Committee on Payments and Market Infrastructures and the IOSCO. CCPs already authorised under Regulation (EU) No 648/2012 should take the appropriate steps to ensure that they will be able to submit their recovery plans to their competent authorities at the latest on 12 February 2022. Those provisions related to recovery plans should be applied from 12 February 2022. If the resolution authority had not been consulted on the recovery plan of the CCP, once the other provisions of this Regulation become applicable, the competent authority of the CCP should consult the resolution authority on the CCP's recovery plan without delay. In order to ensure legal certainty for counterparties, the amendments to Regulation (EU) No 648/2012 intended to ensure the proper implementation of the FSB's interest rate benchmark reform should apply from the date of entry into force of this Regulation.
- (95) In order to ensure that increased operational risks stemming from the application of the open access regime for exchange-traded derivatives do not endanger the orderly functioning of markets or financial stability and to avoid any discontinuity, it is necessary to retroactively apply the extension of such transitional periods from 4 July 2020 until 3 July 2021.

<sup>(18)</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

- (96) This Regulation should ensure that CCPs have sufficient loss-absorbing and recapitalisation capacity to ensure smooth and fast absorption of losses and recapitalisation with a minimum impact on financial stability while aiming to avoid an impact on taxpayers. Consistently with the internationally agreed principles for effective resolution regimes for financial institutions developed by the FSB, this Regulation should ensure that equity holders of a CCP absorb losses first in resolution in a way that minimises the risk of legal challenge by equity holders, on the basis that their losses in resolution are greater than the losses that they would have incurred under normal insolvency proceedings according to the 'no creditor worse off' principle. On 15 November 2018, the FSB published a consultation paper entitled 'Financial resources to support CCP resolution and the treatment of CCP equity in resolution'.

Based on the feedback received to that paper and further assessments, the FSB plans to issue guidance at the end of 2020 on how equity should be used in the event of resolution of CCPs in a manner that minimises the risk of legal challenge by equity holders resulting from the application of the 'no creditor worse off' principle. Following the publication of that guidance, the Commission should review the application of the rules laid down in this Regulation with regard to the write-down of equity in resolution by taking into account those internationally agreed standards. In addition to this specific review, the Commission should review the application of this Regulation after five years from the date of its entry into force, inter alia, by taking into account any further international developments. That general review should cover at least certain core matters related to the recovery and resolution of CCPs, such as financial resources available to resolution authorities to cover non-default losses and the CCPs' own resources to be used in recovery and resolution,

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 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 as set out in Article 27(1);
- (5) 'resolution power' means any of the powers laid down in Articles 48 to 58;
- (6) 'resolution objectives' mean 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) 'default event' means a scenario in which the CCP has declared in default:
  - (a) one or more clearing members in accordance with the procedure set out in Article 48 of Regulation (EU) No 648/2012; or
  - (b) one or more interoperable CCPs in accordance with the relevant contractual arrangements or with the procedure set out in Article 52 of Regulation (EU) No 648/2012;
- (9) 'non-default event' means a scenario in which losses are incurred by a CCP for any reason other than a default event, including but not limited to, business, custody, investment, legal or operational failures or fraud, including failures resulting from cyber-attacks;
- (10) 'resolution plan' means a resolution plan for a CCP drawn up in accordance with Article 12;
- (11) 'resolution action' means a 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;
- (12) 'clearing member' means a clearing member as defined in point 14 of Article 2 of Regulation (EU) No 648/2012;
- (13) 'parent undertaking' means a parent undertaking as defined in point (15)(a) of Article 4(1) of Regulation (EU) No 575/2013;
- (14) 'third-country CCP' means a CCP the head office of which is established in a third country;
- (15) '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;
- (16) 'financial market infrastructure' or 'FMI' means a CCP, a central securities depository, a trade repository, a payment system or another system defined and designated by a Member State under point (a) of Article 2 of Directive 98/26/EC;
- (17) 'trading venue' means a trading venue as defined in point 4 of Article 2 of Regulation (EU) No 648/2012;
- (18) 'client' means a client as defined in point 15 of Article 2 of Regulation (EU) No 648/2012;
- (19) 'O-SIIs' means other systemically important institutions as referred to in Article 131(3) of Directive 2013/36/EU;
- (20) 'indirect client' means an undertaking which has established indirect clearing arrangements with a clearing member within the meaning of the second subparagraph of Article 4(3) of Regulation (EU) No 648/2012;
- (21) 'interoperable CCP' means a CCP with which an interoperability arrangement has been established;
- (22) 'recovery plan' means a recovery plan drawn up and maintained by a CCP in accordance with Article 9;
- (23) 'board' means the administrative or supervisory board, or both, set up pursuant to national company law and in accordance with Article 27(2) of Regulation (EU) No 648/2012;
- (24) 'supervisory college' means the college referred to in Article 18(1) of Regulation (EU) No 648/2012;
- (25) 'capital' means capital as defined in point 25 of Article 2 of Regulation (EU) No 648/2012;
- (26) 'default waterfall' means default waterfall in accordance with Article 45 of Regulation (EU) No 648/2012;
- (27) '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, with particular regard to the substitutability of those activities, services or operations;

- (28) 'group' means a group as defined in point 16 of Article 2 of Regulation (EU) No 648/2012;
- (29) 'linked FMI' means an FMI with which the CCP has entered into contractual arrangements, including interoperability arrangements;
- (30) 'extraordinary public financial support' means State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (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;
- (31) 'financial contracts' means contracts and agreements as defined in point 100 of Article 2(1) of Directive 2014/59/EU;
- (32) '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;
- (33) 'instruments of ownership' means shares, other instruments that confer ownership, instruments that are convertible into or give the right to acquire shares or other instruments of ownership, and instruments representing interests in shares or other instruments of ownership;
- (34) '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);
- (35) 'default fund' means a default fund maintained by a CCP in accordance with Article 42 of Regulation (EU) No 648/2012;
- (36) 'pre-funded resources' means resources which are held by and freely available to the relevant legal person;
- (37) 'senior management' means the person or persons who effectively direct the business of the CCP, and the executive member or members of the board;
- (38) '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>(19)</sup>;
- (39) 'Union State aid framework' means the framework established by Articles 107, 108 and 109 TFEU and regulations and all Union acts, including guidelines, communications and notices, made or adopted pursuant to Article 108(4) or Article 109 TFEU;
- (40) '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;
- (41) 'initial margin' means margins collected by the CCP to cover potential future exposure to clearing members providing the margin and, where relevant, interoperable CCPs in the interval between the last margin collection and the liquidation of positions following a default of a clearing member or of an interoperable CCP;
- (42) 'variation margin' means margins collected or paid out to reflect current exposures resulting from actual changes in market prices;
- (43) 'resolution cash call' means a request for cash resources to be provided by clearing members to the CCP, additional to pre-funded resources, based on statutory powers available to a resolution authority in accordance with Article 31;
- (44) 'recovery cash call' means a request for cash resources, other than a resolution cash call, to be provided by clearing members to the CCP, additional to pre-funded resources, based on contractual arrangements laid out in the operating rules of the CCP;

<sup>(19)</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).

- (45) 'transfer powers' means the powers specified in point (c) and (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;
- (46) 'derivative' means a derivative as defined in point 5 of Article 2 of Regulation (EU) No 648/2012;
- (47) 'netting arrangement' means an arrangement under which a number of claims or obligations can be converted into a single net claim, including a close-out netting arrangement 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 a close-out netting provision as defined in point (n)(i) of Article 2(1) of Directive 2002/47/EC of the European Parliament and of the Council <sup>(20)</sup> and netting as defined in point (k) of Article 2 of Directive 98/26/EC;
- (48) '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 16, or the application of an early intervention measure under Article 18;
- (49) '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;
- (50) '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;
- (51) 'covered bond' means a covered bond as defined in point (1) of Article 3 of Directive (EU) 2019/2162 of the European Parliament and of the Council <sup>(21)</sup>;
- (52) '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;
- (53) '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;
- (54) '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.

## TITLE II

### AUTHORITIES, RESOLUTION COLLEGE AND PROCEDURES

#### Section 1

#### **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 apply the resolution tools and exercise the resolution powers as set out in this Regulation.

<sup>(20)</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>(21)</sup> Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU (OJ L 328, 18.12.2019, p. 29).

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 of this Article is entrusted with other functions, adequate structural arrangements shall be in place 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. In particular, arrangements shall be put in place to ensure effective operational independence, including separate staff, reporting lines and decision making process of that resolution authority, from any tasks that the resolution authority may perform pursuant to Article 22 of Regulation (EU) No 648/2012 as a competent authority of the CCP and from the tasks that the resolution authority may perform as the competent authority of the clearing members referred to in point (c) of Article 18(2) of Regulation (EU) No 648/2012.

4. The requirements expressed in paragraph 3 shall not preclude that reporting lines converge at the highest level of an organisation that subsumes different functions or authorities, or that, staff may, under predefined conditions, be shared between the other functions entrusted to the resolution authority to meet temporarily high workloads, or for the resolution authority to be able to avail itself of the expertise of shared staff.

5. Authorities exercising supervision and resolution functions under Regulation (EU) No 648/2012 and this Regulation, and persons exercising those functions on their behalf, shall cooperate closely in the preparation, planning and application of resolution decisions, both where the resolution authority and the competent authority are separate entities and where the functions are carried out by the same entity.

6. Resolution authorities shall adopt and make public the internal rules they have in place to ensure compliance with the requirements set out in paragraph 3, including rules regarding professional secrecy and information exchanges between the different functional areas.

7. Member States where no CCP has been established may derogate from the requirements set out in paragraph 3, except with regards to arrangements to avoid conflicts of interest.

8. Each Member State shall designate a single ministry which shall be responsible for exercising the functions entrusted to the competent ministry pursuant to this Regulation.

9. Where the resolution authority in a Member State is not the competent ministry, the resolution authority shall inform the competent ministry without undue delay of the decisions taken pursuant to this Regulation and, unless otherwise laid down in national law, obtain its approval before implementing decisions that will have a direct fiscal impact or systemic implications that are likely to lead to a direct fiscal impact.

10. Member States shall notify the Commission and the European Supervisory Authority (European Securities and Markets Authority) (ESMA), established by Regulation (EU) No 1095/2010, of the resolution authorities designated pursuant to paragraph 1.

11. Where a Member State designates more than one resolution authority pursuant to paragraph 1, the notification referred to in paragraph 10 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; and
- (d) the resolution authority designated as the contact authority for the purposes of cooperation and coordination with the relevant authorities of other Member States.

12. ESMA shall publish a list of the resolution authorities and the contact authorities notified pursuant to paragraph 10.

*Article 4***Resolution colleges**

1. The resolution authority of the CCP shall establish, manage and chair a resolution college to carry out the tasks referred to in Articles 12, 15 and 16, and ensure cooperation and coordination with the authorities that are members of the resolution college and, where appropriate, cooperation with third-country competent authorities and 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 drawing up resolution plans, including for taking into consideration the systemic impact of the implementation of the resolution plan, for the application of preparatory and preventative measures and for resolution;
- (b) draw up resolution plans pursuant to Article 12;
- (c) assess the resolvability of CCPs pursuant to Article 15;
- (d) identify, address and remove impediments to the resolvability of CCPs pursuant to Article 16; and
- (e) coordinate public communication about resolution plans and strategies.

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, including, where relevant, the European Central Bank (ECB) in the framework of the tasks concerning the prudential supervision of credit institutions within the single supervisory mechanism conferred upon it in accordance with Council Regulation (EU) No 1024/2013<sup>(22)</sup> and the Single Resolution Board (SRB) in its role as a resolution authority of credit institutions within the single resolution mechanism conferred upon it in accordance with Regulation (EU) No 806/2014;
- (d) the competent authorities and the resolution authorities of clearing members, other than those referred to in point (c). Those competent authorities and resolution authorities shall inform the resolution authority of the CCP and justify their participation in the college based on their assessment of the impact that the CCP's resolution could have on the financial stability of their respective Member State;
- (e) the competent authorities or the resolution authorities of clearing members' clients, provided that the college does not already have a member from their own Member State in accordance with points (c), (d), (f), (g) or (h). Those authorities shall inform the resolution authority of the CCP and justify their participation in the college based on their assessment of the impact that the CCP's resolution could have on the financial stability of their respective Member State;
- (f) the competent authorities referred to in point (d) of Article 18(2) of Regulation (EU) No 648/2012;
- (g) 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;
- (h) the competent authorities referred to in point (f) of Article 18(2) of Regulation (EU) No 648/2012;
- (i) the members of the European System of Central Banks (ESCB) referred to in point (g) of Article 18(2) of Regulation (EU) No 648/2012;

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<sup>(22)</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring special tasks on the European Central Bank concerning policies to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

- (j) the central banks of issue referred to in point (h) of Article 18(2) of Regulation (EU) No 648/2012;
- (k) the central banks of issue of the Union currencies of the financial instruments cleared by the CCP, other than those referred to in point (j). Those central banks of issue shall inform the resolution authority of the CCP and justify their participation in the college based on their assessment of the impact that the CCP's resolution could have on their respective currency of issue;
- (l) the competent authority of the parent undertaking, where applicable;
- (m) the competent ministry, where the resolution authority referred to in point (a) is not the competent ministry;
- (n) ESMA; and
- (o) the European Supervisory Authority (European Banking Authority) (EBA), established by Regulation (EU) No 1093/2010.

3. ESMA, EBA and the authorities referred to in points (d), (e), (k) and (l) of paragraph 2 shall not have voting rights in resolution colleges.

Where the ECB is a member of the college pursuant to points (c) and (j) of paragraph 2, it shall have two votes in the college.

4. The competent authorities and resolution authorities of clearing members established in third countries and the competent authorities 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 resolution authority of the CCP as the chair of the resolution college, to those laid down in Article 73.

The participation of third-country authorities in the resolution college may be limited to the discussion of select cross-border enforcement issues, which may include the following:

- (a) effective and coordinated enforcement of resolution actions, in particular in accordance with Articles 53 and 77;
- (b) identification and removal of 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) identification and coordination of any need for new licensing, recognition or authorisation requirements, considering the need for resolution actions to be carried out in a timely fashion;
- (d) 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) possible influence of different time-zones on the applicable close of business hours regarding the end of trading.

5. The resolution authority of the CCP as 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) enabling, promoting and coordinating the timely exchange of all relevant information between members of the resolution college; and
- (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 facilitate the performance of the tasks assigned to the college, members of the college referred to in paragraph 2 shall be entitled to contribute to the setting of the agenda of the college meetings, in particular by adding points to the agenda of the meeting.

7. 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 those regulatory standards, ESMA shall take into account the relevant provisions of the delegated acts adopted on the basis of Article 88(7) of Directive 2014/59/EU.

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### *Article 5*

#### **ESMA Resolution Committee**

1. ESMA shall create a resolution committee (the 'ESMA 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 11 of this Regulation.

The ESMA Resolution Committee shall also promote the drawing up and coordination of resolution plans and develop methods for the resolution of failing CCPs.

2. The ESMA Resolution Committee shall be composed of the authorities designated pursuant to Article 3(1).

Authorities referred to in points (i) and (v) of Article 4(2) of Regulation (EU) No 1093/2010 shall be invited to participate in the ESMA Resolution Committee as observers.

3. For the purposes of this Regulation, ESMA shall cooperate with the European Supervisory Authority (European Insurance and Occupational Pensions Authority) (EIOPA) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council <sup>(23)</sup> and EBA within the framework of the Joint Committee of the European Supervisory Authorities established under 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.

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<sup>(23)</sup> Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

4. For the purposes of this Regulation, ESMA shall ensure structural separation between the ESMA Resolution Committee and other functions referred to in Regulation (EU) No 1095/2010.

#### Article 6

### Cooperation between authorities

1. Competent authorities, resolution authorities and ESMA shall cooperate closely for the purposes of this Regulation. In particular, during the recovery phase, the competent authority and the members of the supervisory college should cooperate and communicate effectively with the resolution authority, to enable the resolution authority to act in a timely manner.
2. The resolution authority of a CCP and the resolution authorities of its clearing members shall cooperate closely with the aim of ensuring that there are no impediments to resolution.
3. 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 2

### 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 and aspects when making decisions and taking action pursuant to this Regulation:

- (a) the effectiveness and proportionality of any decision or action in relation to an individual CCP are ensured, taking into account at least the following factors:
  - (i) the CCP's legal form, ownership and organisational structure, including, where applicable, any interdependencies within the group to which the CCP belongs;
  - (ii) the nature, size and complexity of the CCP's business, in particular the size, structure and liquidity in stressed conditions of the markets it serves;
  - (iii) the structure, nature and diversity of the CCP's clearing membership, as well as, to the extent the information is available, of its clearing members' network of clients and indirect clients;
  - (iv) the substitutability of the CCP's critical functions in the markets it serves;
  - (v) the CCP's interconnectedness with other FMIs, trading venues, financial institutions and with the financial system in general;
  - (vi) whether the CCP clears any OTC derivative contract pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation in accordance with Article 5(2) of Regulation (EU) No 648/2012; and
  - (vii) the actual or potential consequences of the infringements referred to in Articles 18(1) and 22(2).

- (b) the imperatives of efficacy, of timeliness, of due urgency of decision-making, when required, and of keeping costs as low as possible are observed when decisions are made and action is taken, while at the same time ensuring that market disruption is mitigated to the greatest extent possible;
- (c) the use of extraordinary public financial support is avoided to the greatest extent possible, such support is available and used only as a last resort and in accordance with the conditions laid out in Article 45, and no expectation of public financial support is created;
- (d) 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) the roles and responsibilities of relevant authorities within each Member State are defined clearly;
- (f) the interests of the Member States where the CCP provides services and where its clearing members, and to the extent the information is available, their clients and indirect clients, including where those clients or indirect clients are designated by Member States as O-SIIs, and any linked FMIs, including interoperable 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) resolution authorities and resolution colleges cannot require Member States to provide extraordinary public financial support, nor impinge on the budgetary sovereignty and fiscal responsibilities of Member States;
- (h) the interests of affected clearing members, and to the extent the information is available, their clients and indirect clients, creditors and other stakeholders of the CCP in the Member States involved need to be balanced by avoiding unfairly prejudicing or unfairly protecting the interests of particular actors and avoiding unfair burden allocation within and across Member States;
- (i) 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 an effect on the clearing members, clients, linked FMIs or trading venues or an impact on the financial stability of the Member State where the clearing members, clients, linked FMIs or trading venues are established or located;
- (j) where an authority raises an issue concerning the financial stability of its Member State, the resolution authority and the resolution college of the CCP consider it thoroughly and if they do not take the concerns expressed into account, explain in writing the reasons for not doing so;
- (k) resolution plans referred to in Article 12 are complied with unless, taking into account the circumstances of the case, deviation from those plans is necessary in order to better achieve the resolution objectives;
- (l) transparency is ensured towards the relevant authorities wherever possible, and in any case where a proposed decision or action is likely to have implications on the financial stability or fiscal resources of any relevant Member State;
- (m) they coordinate and cooperate as closely as possible, also with the goal to lower the overall cost of resolution; and
- (n) the following are kept to a minimum, to the extent possible: negative economic and social effects, including negative impacts on financial stability, of any decision on all the Member States where the CCP provides services and where its clearing members, and to the extent the information is available, their clients and indirect clients, including where those clients or indirect clients are designated by Member States as O-SIIs, and any linked FMIs, including interoperable CCPs, are established.

#### *Article 8*

### **Information exchange**

1. Resolution authorities, competent authorities and ESMA shall, on their own initiative or on request, provide each other in a timely manner with all the information relevant for the exercise of their tasks under this Regulation.
2. By way of derogation from paragraph 1, the resolution authorities shall only divulge confidential information provided by a third-country authority where that authority has given its prior written consent.
3. 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 the case of both default and non-default events and combinations of both, in order to restore their financial soundness, without any extraordinary public financial support, and allow them to continue to provide critical functions following a significant deterioration of their financial situation or a risk of breaching their capital and prudential requirements under Regulation (EU) No 648/2012.
2. The measures included in the recovery plan shall:
  - (a) comprehensively and effectively address all the risks identified in the different scenarios, including possible uncovered liquidity shortfalls;
  - (b) in the case of losses due to a default event, ensure the re-establishment of a matched book and the full allocation of uncovered losses to clearing members, and to their clients if those clients are direct creditors of the CCP, and to shareholders, taking into account the interests of all stakeholders;
  - (c) include loss-absorbing arrangements that are adequate to cover the losses that might arise from all types of non-default events; and
  - (d) enable the replenishment of the CCP's financial resources, including its own funds, to a level sufficient in order for the CCP to meet its obligations under Regulation (EU) No 648/2012 and to support the continued and timely operation of the critical functions of the CCP.
3. The recovery plan shall include a framework of indicators based on the risk profile of the CCP, 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 soundness and operational viability of the CCP and should enable recovery measures to be taken early enough to provide sufficient time for the plan to be implemented.
4. CCPs shall put in place appropriate arrangements for the regular monitoring of the indicators referred to in paragraph 3. CCPs shall report to their competent authorities on the outcome of that monitoring. Competent authorities shall transmit information to the supervisory college, where they deem such information significant.
5. ESMA shall, in cooperation with the ESRB, by 12 February 2022, issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to specify the minimum list of qualitative and quantitative indicators referred to in paragraph 3 of this Article.
6. CCPs shall include provisions in their operating rules, outlining the procedures to be followed by them where, in order to achieve the goals of the recovery process, they propose to:
  - (a) take measures provided for in their recovery plan despite the fact that the relevant indicators have not been met; or
  - (b) refrain from taking measures provided for in their recovery plan despite the fact that the relevant indicators have been met.

Any decision taken pursuant to this paragraph and its justification shall be notified to the competent authority without delay.

7. Where a CCP intends to activate its recovery plan, it shall notify 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 as well as the envisaged time-frame to restore its financial soundness by use of those measures.

Where the competent authority considers that a recovery measure that the CCP intends to take may cause significant adverse effects to the financial system or is unlikely to be effective, it may require the CCP to refrain from taking that measure.

Following the notification received under the second subparagraph of paragraph 6 of this Article, the competent authority shall immediately assess whether the circumstances require the use of early intervention powers in accordance with Article 18.

8. The competent authority shall promptly inform the resolution authority and the supervisory college, and the resolution authority shall promptly inform the resolution college, of any notification received in accordance with the second subparagraph of paragraph 6 and with the first subparagraph of paragraph 7, and of any subsequent instruction by the competent authority in accordance with the second subparagraph of paragraph 7.

Where the competent authority is informed in accordance with the first subparagraph of paragraph 7 of this Article, it shall restrict or prohibit any remuneration of equity and instruments treated as equity, including dividend payments and buybacks by the CCP, to the fullest extent possible without triggering an event of default, and it may restrict or prohibit any payments of variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of Regulation (EU) No 648/2012, discretionary pension benefits or severance packages to senior management as defined in point 29 of Article 2 of Regulation (EU) No 648/2012.

9. CCPs shall, at least annually and in any case after any 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, review, test and, where necessary, update their recovery plans. Competent authorities may require CCPs to update their recovery plans more frequently.

10. Recovery plans shall be drawn up in accordance with Section A of the Annex and take into account all relevant interdependencies within the group to which the CCP belongs. Competent authorities may require CCPs to include additional information in their recovery plans. Where relevant, the competent authority of the CCP shall consult the competent authority of the CCP's parent undertaking.

11. Recovery plans shall:

- (a) not assume any access to or receipt of extraordinary public financial support, central bank emergency liquidity assistance or central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms;
- (b) consider the interests of all stakeholders that are likely to be affected by the plan, including clearing members and, to the extent that the information is available, their direct and indirect clients; and
- (c) ensure that clearing members do not have unlimited exposures toward the CCP and stakeholders' potential losses and liquidity shortfalls are transparent, measurable, manageable and controllable.

12. ESMA shall, in cooperation with the ESRB, by 12 February 2022 issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 further specifying the range of scenarios to be considered for the purposes of paragraph 1 of this Article. In issuing such guidelines, ESMA shall take into account, where appropriate, supervisory stress testing exercises.

13. Where the CCP is part of a group and contractual parental or group support agreements form part of the recovery plan, the recovery plan shall contemplate scenarios in which those agreements cannot be honoured.

14. Following a default or a non-default event, a CCP shall use an additional amount of its pre-funded dedicated own resources, prior to the use of the arrangements and measures referred to in point 15 of Section A of the Annex to this Regulation. That amount shall not be lower than 10 % nor higher than 25 % of the risk-based capital requirements calculated in accordance with Article 16(2) of Regulation (EU) No 648/2012.

To comply with that requirement, the CCP may use the amount of capital it holds, in addition to its minimum capital requirements, to comply with the notification threshold referred to in the delegated act adopted on the basis of Article 16(3) of Regulation (EU) No 648/2012.

15. ESMA shall, in close cooperation with EBA and after consulting the ESCB, develop draft regulatory technical standards specifying the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources to be used in accordance with paragraph 14. When developing those technical standards, ESMA shall take into account all of the following:

- (a) the structure and the internal organisation of CCPs and the nature, scope and complexity of their activities;
- (b) the structure of incentives of the shareholders, management and clearing members of CCPs and of the clients of clearing members;
- (c) the appropriateness for CCPs, depending on the currencies in which the financial instruments they clear are denominated, the currencies accepted as collateral and the risk stemming from their activities, in particular where they do not clear OTC derivatives as defined in point (7) of Article 2 of Regulation (EU) No 648/2012, to invest that additional amount of dedicated own resources in assets other than those referred to in Article 47(1) of that Regulation; and
- (d) the rules applying to and the practices of third-country CCPs, as well as the international developments concerning the recovery and resolution of CCPs, in order to preserve the competitiveness of internationally active Union CCPs, and the competitiveness of Union CCPs compared to third-country CCPs providing clearing services in the Union.

Where ESMA concludes, on the basis of the criteria referred to in point (c) of the first subparagraph, that it is appropriate for certain CCPs to invest that additional amount of pre-funded dedicated own resources in assets other than those referred to in Article 47(1) of Regulation (EU) No 648/2012, it shall also specify:

- (a) the procedure through which, in the event that those resources are not immediately available, CCPs may resort to recovery measures that require the financial contribution of non-defaulting clearing members;
- (b) the procedure that CCPs shall follow to subsequently reimburse the non-defaulting clearing members referred to in point (a) up to the amount to be used in accordance with paragraph 14 of this Article.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

16. The CCP shall develop adequate mechanisms to involve linked FMIs and stakeholders which would bear losses, incur costs or contribute to cover liquidity shortfalls in the event that the recovery plan was implemented in the process of drawing-up of that plan.

17. 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.

18. Where the board of the CCP has decided not to follow the advice of the risk committee, it shall promptly inform the competent authority in accordance with Article 28(5) of Regulation (EU) No 648/2012 and explain its decision in detail to the competent authority.

19. Recovery plans shall be integrated in the corporate governance and the overall risk management framework of the CCP.
20. The measures set out in the recovery plans that create financial or contractual obligations on clearing members and, where relevant, clients and indirect clients, linked FMIs or trading venues shall form part of the operating rules of CCPs.
21. CCPs shall ensure that the measures set out in the recovery plans are enforceable at all times in all jurisdictions where the clearing members, linked FMIs or trading venues are located.
22. The obligation of CCPs to include in their recovery plans the right to make a recovery cash call and, if applicable, to reduce the value of any gains payable by the CCPs to non-defaulting clearing members shall not be applicable to the entities referred to in Articles 1(4) and 1(5) of Regulation (EU) No 648/2012.
23. Clearing members shall communicate to their clients in a clear and transparent manner if and in what way measures in the CCP's recovery plan may affect them.

#### Article 10

#### **Assessment of recovery plans**

1. CCPs shall submit their recovery plans to the competent authority.
2. The competent authority shall transmit each plan to the supervisory college and to the resolution authority without undue delay. The competent authority shall review the recovery plan and assess the extent to which it satisfies the requirements set out in Article 9 within six months of the submission of the plan and in coordination with the supervisory college in accordance with the procedure in Article 11.
3. When assessing the recovery plan, the competent authority and the supervisory college shall take into consideration the following factors:
  - (a) the CCP's capital structure, its default waterfall, the level of complexity of the organisational structure, the substitutability of its activities and the risk profile of the CCP, including in terms of financial, operational and cyber risks;
  - (b) the overall impact that the implementation of the recovery plan would have on:
    - (i) clearing members, and to the extent the information is available, their clients and indirect clients, including where they have been designated as O-SIIs;
    - (ii) any linked FMIs;
    - (iii) financial markets, including trading venues, served by the CCP; and
    - (iv) the financial system of any Member State and the Union as a whole;
  - (c) whether the recovery tools and their sequence specified by the recovery plan create appropriate incentives for the CCP's owners, clearing members, and where possible their clients, as relevant, to control the amount of risk that they bring to or incur in the system, monitor the CCP's risk-taking and risk management activities and contribute to the CCP's default management process.
4. When assessing the recovery plan, the competent authority shall take parental support agreements into consideration as valid parts of the recovery plan only where those agreements are contractually binding.

5. The resolution authority shall examine the recovery plan in order to identify any measures which may adversely impact the resolvability of the CCP. Where any such measures are identified, the resolution authority shall bring them to the attention of the competent authority and make recommendations to the competent authority on ways to address the adverse impact of those measures on the resolvability of the CCP, within two months of the transmission of each recovery plan by the competent authority.

6. Where the competent authority decides not to act on the recommendations of the resolution authority pursuant to paragraph 5, it shall fully justify that decision to the resolution authority.

7. Where the competent authority agrees with the recommendations of the resolution authority, or considers in coordination with the supervisory college in accordance with Article 11 that there are material deficiencies in the recovery plan or material impediments to its implementation, it shall notify the CCP and shall give it the opportunity to submit its views.

8. The competent authority, taking into account the CCP's views, may require the CCP 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 paragraphs 2 to 7.

9. Where the competent authority, after consulting the resolution authority and in coordination with the supervisory college in accordance with the procedure set out in Article 11, considers that the deficiencies and impediments have not been adequately addressed by the revised plan, or where the CCP has not submitted a revised plan, it shall require the CCP to make specific changes to the plan within a reasonable period, as defined by the competent authority.

10. Where it is not possible to adequately remedy the deficiencies or impediments through specific changes to the plan, the competent authority, after consulting the resolution authority and in coordination with the supervisory college in accordance with the procedure set out in Article 11, shall require the CCP 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 fails to identify such changes within the timeframe set by the competent authority, or where the competent authority, after consulting the resolution authority and in coordination with the supervisory college in accordance with the procedures set out in Article 11, 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 to take within a reasonable period, as defined by the competent authority, specified actions with regard to one or more of the following objectives, taking into account the seriousness of the deficiencies and impediments and the effect of the measures on the CCP's business and ability to remain in compliance with Regulation (EU) No 648/2012:

- (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 capital and 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.

11. The request referred to in the second subparagraph of paragraph 10 shall be reasoned and notified in writing to the CCP.

12. ESMA, in cooperation with the ESCB and the ESRB, shall develop draft regulatory technical standards further specifying the factors referred to in points (a), (b) and (c) of paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### Article 11

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

1. The supervisory college shall examine the recovery plan and, where any member of the college considers that there are material deficiencies in the recovery plan or any material impediment to its implementation, that member shall make recommendations to the competent authority of the CCP with regard to those matters within two months of the transmission of the recovery plan by the competent authority.
2. The supervisory 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 10(7), (8), (9) and (10).
3. The supervisory college shall reach a joint decision on the issues referred to in paragraph 2 within four months of the date of the transmission of the recovery plan by the competent authority.

ESMA may, at the request of a competent authority within the supervisory college, assist the supervisory college in reaching a joint decision in accordance with point (c) of Article 31(2) of Regulation (EU) No 1095/2010.

4. 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 paragraph 2, 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 and to the other members of the college.

5. Where, by the end of that four-month period, a joint decision has not been reached and a simple majority of the voting members disagree with the competent authority's proposal for a joint decision on a matter in relation to the assessment of recovery plans or implementation of the measures pursuant to points (a), (b) and (d) of Article 10(10) of this Regulation, any of the voting members concerned, based on that majority, may refer that matter to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010. 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.
6. 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 of the referral of the matter to it. The matter shall not be referred to ESMA after the end of the four-month 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 12

##### **Resolution plans**

1. The resolution authority of the CCP shall, after consultation with the competent authority and in coordination with the resolution college, in accordance with the procedure set out in Article 14, draw up a resolution plan for the 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, including in situations of broader financial instability or system wide events, due to one of the following or their combination:
    - (i) default events, and
    - (ii) non-default events;
  - (b) the impact that the implementation of the resolution plan would have on:
    - (i) the clearing members, and to the extent the information is available, their clients and indirect clients, including where they have been designated as O-SIIs and those likely to be subject to recovery measures or resolution actions in accordance with Directive 2014/59/EU;
    - (ii) any linked FMIs;
    - (iii) financial markets, including trading venues, served by the CCP; and
    - (iv) the financial system in any Member State or the Union as a whole, and, to the extent possible, in third countries where it provides services;
  - (c) the manner and the circumstances under which a CCP may apply for the use of central bank facilities provided under standard collateralisation, tenor and interest rate terms 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. The resolution plan shall make prudent assumptions regarding the financial resources available as resolution tools that may be required to achieve the resolution objectives and the resources that are expected to be available in accordance with the CCP's rules and arrangements at the time of entering into resolution. Those prudent assumptions shall take into account the relevant findings of latest stress tests carried out in accordance with Article 32(2) of Regulation (EU) No 1095/2010, specified in point (b) of Article 24a(7) of Regulation (EU) No 648/2012, as well as scenarios of extreme market conditions beyond those in the CCP's recovery plan.
6. The resolution authority of a CCP shall, after consultation with the competent authority and in coordination with the resolution college in accordance with the procedure in Article 14, 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 CCP and the competent authority shall promptly inform the resolution authority of any such change.

7. The resolution plan shall specify the circumstances and different scenarios for applying the resolution tools and exercising the resolution powers. It shall clearly distinguish, in particular through different scenarios, between failure caused by default events, non-default events, and a combination of both, as well as between different types of non-default events. The resolution plan shall include the following, quantified whenever appropriate and possible:
  - (a) a summary of the key elements of the plan, distinguishing between default events, non-default events and a combination of the two;
  - (b) a summary of the material changes to the CCP that have occurred since the resolution plan was last updated;
  - (c) a description 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 the continuity of its critical functions in the resolution of the CCP;

- (d) an estimation of the timeframe for implementing each material aspect of the plan, including for replenishing the CCP's financial resources;
- (e) a detailed description of the assessment of resolvability carried out in accordance with Article 15;
- (f) a description of any measures required pursuant to Article 16 to address or remove impediments to resolvability identified as a result of the assessment carried out in accordance with Article 15;
- (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 13 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 and between the CCP and critical service providers, interoperability arrangements and links with other FMIs, as well as ways to address all of those interdependencies;
- (l) a description of critical intra-group interdependencies as well as ways to address them;
- (m) 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 members and, where applicable, their clients and any linked FMIs;
  - (iii) access of clearing members, and, where applicable, their clients on a transparent and non-discriminatory basis 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 and between the CCP and trading venues;
  - (v) preservation of the portability of the positions and related assets of direct and indirect clients; and
  - (vi) preservation of the licenses, authorisations, recognitions and legal designations of a CCP where 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 or with trading venues;
- (n) a description of how the resolution authority will obtain the necessary information to perform the valuation referred to in Article 24;
- (o) 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;
- (p) a plan for communicating with the media and the public so as to be as transparent as possible;
- (q) a description of essential operations and systems for maintaining the continuous functioning of the CCP's operational processes;
- (r) a description of the arrangements for notifying the resolution college in accordance with Article 72(1);
- (s) a description of the measures to facilitate the portability of positions and related assets of the clearing members and clients of the defaulting CCP from the defaulting CCP to another CCP or a bridge CCP while not affecting the contractual relationships between the clearing members and their clients.

8. The information referred to in point (a) of paragraph 7 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.

9. ESMA, after consulting the ESRB and taking into account the relevant provisions of the delegated acts adopted on the basis of Article 10(9) of Directive 2014/59/EU and respecting the principle of proportionality shall develop draft regulatory technical standards further specifying the contents of the resolution plan in accordance with paragraph 7 of this Article.

When developing the draft regulatory technical standards, ESMA shall enable sufficient flexibility for resolution authorities to take into consideration the specificities of their national legal framework in the area of insolvency law, as well as the nature and complexity of the clearing business performed by the CCPs.

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### Article 13

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

1. CCPs shall cooperate as necessary in the drawing up of resolution plans and provide their resolution authority, either directly or through their 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.

2. 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 they are a party. Resolution authorities may specify a time limit to provide those records and may specify different time limits for different types of contracts.

3. A CCP shall exchange information in a timely manner with its competent authorities in order to facilitate the assessment of the risk profiles of the CCP and the interconnectedness with other FMIs, other financial institutions and with the financial system in general as referred to in Articles 9 and 10. Competent authorities shall transmit information to the supervisory college, where they deem such information significant.

#### Article 14

##### **Coordination procedure for resolution plans**

1. The resolution authority shall transmit to the resolution college a draft resolution plan, the information provided in accordance with Article 13 and any additional information relevant to the resolution college.

2. The resolution college shall reach a joint decision regarding the resolution plan and any changes thereto within a four-month period from the date of the transmission of that plan by the resolution authority referred to in paragraph 1.

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, in accordance with Article 4(4), decide to involve third-country authorities when drawing up and reviewing the resolution plan, provided that they meet the confidentiality requirements laid down in Article 73 and are from jurisdictions in which any of the following entities are established:

(a) the CCP's parent undertaking, where applicable;

- (b) the clearing members of the CCP where their contribution to the default fund of the CCP is, on an aggregate basis over a one-year period, higher than those of the third Member State with the largest contributions as referred to in point (c) of Article 18(2) of Regulation (EU) No 648/2012;
- (c) the CCP's subsidiaries, where applicable;
- (d) other providers of critical services to the CCP;
- (e) interoperable CCPs.

4. ESMA may, at the request of a resolution authority, assist the resolution college in reaching a joint decision in accordance with point (c) of Article 31(2) of Regulation (EU) No 1095/2010.

5. Where, after four months from the date of transmission of the resolution plan, the resolution 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 resolution college members expressed during the four-month period. The resolution authority shall notify in writing the decision to the CCP and to the other members of the resolution college.

6. Where, by the end of the four-month period referred to in paragraph 5 of this Article, a joint decision has not been reached and a simple majority of the voting members disagree with the resolution authority's proposal for a joint decision on a matter in relation to the resolution plan, any of the voting members concerned, based on that majority, may refer that matter to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010. The resolution 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.

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 of the referral of the matter to it. The matter shall not be referred to ESMA after the end of the four-month 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 or competent ministry 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 15

#### **Assessment of resolvability**

1. The resolution authority, in coordination with the resolution college in accordance with the procedure set out in Article 17, and after consultation with the competent authority, 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 applying the resolution tools and exercising the resolution powers while ensuring the continuity of the CCP's critical functions and avoiding any use of extraordinary public financial support and, to the maximum extent possible, any significant adverse effect on the financial system and the potential for undue disadvantage to affected stakeholders.

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 that a CCP is not 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; and
  - (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. By 12 August 2022, ESMA, in close cooperation with the ESRB, shall issue guidelines to promote the convergence of resolution practices regarding the application of Section C of the Annex to this Regulation in accordance with Article 16 of Regulation (EU) No 1095/2010.
6. The resolution authority in coordination with the resolution college shall make the resolvability assessment at the same time as drawing up and updating the resolution plan in accordance with Article 12.

#### *Article 16*

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

1. Where, following the assessment in Article 15, the resolution authority, in coordination with the resolution college in accordance with the procedure set out in Article 17, concludes that there are material 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 material impediments to the effective application 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 laid down in Article 14 for resolution colleges to reach a joint decision on resolution plans shall be suspended following the submission of the report referred to in paragraph 1 of this Article until the measures to remove the material 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 of this Article, the CCP shall propose to the resolution authority possible measures to address or remove the material 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 17(1), whether those measures effectively address or remove those impediments.

4. Where the resolution authority in coordination with the resolution college in accordance with the procedure set out in Article 17 concludes that the measures proposed by a CCP in accordance with paragraph 3 of this Article 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 point (c) of Article 17(1).

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

- (a) the threat to financial stability of those material impediments to the resolvability of a CCP;
- (b) the likely effect of the alternative measures on:
  - (i) the CCP, including its business model and operational efficiency;
  - (ii) its clearing members, and to the extent the information is available, their clients and indirect clients, including where they have been designated as O-SIIs;
  - (iii) any linked FMIs;
  - (iv) financial markets, including trading venues, served by the CCP;
  - (v) the financial system in any Member State or the Union as a whole; and
  - (vi) the internal market; and
- (c) the effects on the provision of integrated clearing services for different products and portfolio margining across asset classes.

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

5. The resolution authority shall 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 material 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, with a reasonable timeframe for the implementation of the plan. If deemed necessary by the resolution authority, the resolution authority may shorten or extend the proposed timeframe.

7. For the purposes of paragraph 4, the resolution authority may, after consulting the competent authority and while allowing for a reasonable timeframe for implementation:

- (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 margins 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, operating rules and other contractual arrangements;
- (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 operationally and financially segregate its different clearing services so as to isolate some specific asset classes from other asset classes and where deemed appropriate, to restrict netting sets covering different asset classes;
- (l) require the CCP to set up a parent undertaking in the Union;
- (m) require the CCP to issue liabilities that can be written down and converted or to set aside other financial resources to increase the capacity for loss absorption, recapitalisation and the replenishment of pre-funded resources;
- (n) require 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. Actions considered may include in particular attempting to renegotiate any liability the CCP 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;
- (o) where the CCP is a subsidiary, coordinate with relevant authorities with a view to requiring the parent undertaking to set up a separate 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 application of the resolution tools and the exercise of the resolution powers could have on other entities of the group;
- (p) restrict or prohibit interoperability links of the CCP where such a restriction or prohibition is necessary in order to avoid adverse effects on the achievement of resolution objectives.

#### Article 17

#### **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 15(1);
  - (b) the assessment of the measures proposed by the CCP pursuant to Article 16(3), as necessary;
  - (c) the alternative measures required pursuant to Article 16(4).
2. The joint decision on the identification of material impediments to resolvability referred to in point (a) of paragraph 1 of this Article shall be adopted within four months of the submission of the report referred to in Article 16(1) to the resolution college.
3. The joint decision referred to in point (b) of paragraph 1 of this Article shall be adopted within four months of submission of the CCP's proposed measures to remove impediments to resolvability as referred to in Article 16(3).
4. The joint decision referred to in point (c) of paragraph 1 of this Article shall be adopted within four months of the communication of the alternative measures to the resolution college as referred to in Article 16(4).
5. The joint decisions referred to in paragraph 1 shall be reasoned and notified in writing by the resolution authority to the CCP and, where the resolution authority deems it relevant, its parent undertaking.

6. ESMA may, at the request of the resolution authority of the CCP, assist the resolution college in reaching a joint decision in accordance with point (c) of Article 31(2) of Regulation (EU) No 1095/2010.

7. Where, after four months from the date of transmission of the report provided for in Article 16(1), the resolution 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 16(5). The resolution authority shall take its decision having taken into account the views of the other resolution 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 resolution college in writing.

8. Where, by the end of the four-month period referred to in paragraph 7 of this Article, a joint decision has not been reached and a simple majority of the voting members disagree with the resolution authority's proposal for a joint decision on a matter referred to in point (j), (l) or (o) of Article 16(7) of this Regulation, any of the voting members concerned, based on that majority, may refer that matter to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010. The resolution 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.

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 of the referral of the matter to it. The matter shall not be referred to ESMA after the end of the four-month 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 18*

#### **Early intervention measures**

1. Where a CCP infringes, or is likely to infringe in the near future, the capital and prudential requirements of Regulation (EU) No 648/2012, or poses a risk to financial stability in the Union or in one or more of its Member States, 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, in particular, its ability to provide clearing services, the competent authority may:

- (a) require the CCP to update the recovery plan in accordance with Article 9(6) of this Regulation, 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 of this Regulation, including any information acquired 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 in the Union or in one or more of its Member States;
- (k) require the CCP to replenish its financial resources in a timely manner in order to comply or maintain compliance with its capital and prudential requirements;
- (l) require the CCP to instruct clearing members to invite their clients to participate directly in auctions organised by the CCP when the nature of the auction justifies this exceptional participation. Clearing members shall inform their clients comprehensively about the auction following the instructions received from the CCP. In particular, the CCP shall specify the deadline after which it will not be possible to participate in the auction. Clients shall directly inform the CCP before this deadline of their willingness to participate in the auction. The CCP shall then facilitate the bidding process for those clients. A client shall only be authorised to participate in the auction if it is able to demonstrate to the CCP that it has set up the appropriate contractual relationship with a clearing member to execute and clear the transactions that may result from the auction;
- (m) restrict or prohibit any remuneration of equity and instruments treated as equity to the fullest extent possible without triggering an event of default, including dividend payments and buybacks by the CCP, and it may restrict, prohibit or freeze any payments of variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of Regulation (EU) No 648/2012, discretionary pension benefits or severance packages to senior management as defined in point 29 of Article 2 of Regulation (EU) No 648/2012.

2. For each of the measures referred to in paragraph 1, the competent authority shall set an appropriate deadline and evaluate the effectiveness of those measures once they have been taken.

3. The competent authority shall only apply the measures in points (a) to (m) of paragraph 1 after taking account of the impact of those measures in other Member States where the CCP operates or provides services and after informing the relevant competent authorities, 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 shall apply the measure in point (i) of paragraph 1 only where that measure is in the public interest and is necessary to achieve any of the following objectives:

- (a) to maintain the financial stability in the Union or in one or more of its Member States;
- (b) to maintain the continuity of the critical functions of the CCP and access to critical functions on a transparent and non-discriminatory basis;
- (c) to maintain or restore 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 uses contributions to the default fund of the non-defaulting clearing members in accordance with Article 45(3) of Regulation (EU) No 648/2012, it shall inform the competent authority and the resolution 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 supervisory college on the envisaged measures provided for in paragraph 1.

Following those notifications and the consultation of the supervisory 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 supervisory college, the resolution authority and ESMA.

7. The resolution authority, following the notification of the first subparagraph of paragraph 6 of this Article, 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 73.

8. ESMA shall, by 12 February 2022, issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to promote the consistent application of the triggers for the use of the measures referred to in paragraph 1 of this Article.

#### Article 19

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

1. 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 18 are not sufficient to reverse that situation, competent authorities may require total or partial removal of the senior management or board of the CCP.

Where the competent authority requires complete or partial removal of the senior management or board of the CCP, it shall notify ESMA, the resolution authority and the supervisory college.

2. 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. Where the competent authority considers that replacement of the senior management or board as referred to in this Article is insufficient, it may appoint one or more temporary administrators to the CCP to replace or to temporarily work with the board and senior management of the CCP. Any temporary administrator shall have the qualifications, ability and knowledge required to carry out his or her functions and be free of any conflict of interests.

#### Article 20

##### **Provision of recompense to non-defaulting clearing members**

1. Without prejudice to the responsibility of clearing members to take losses which go beyond the default waterfall, where a CCP in recovery caused by a non-default event has applied the arrangements and measures to reduce the value of any gains payable by the CCP to non-defaulting clearing members set out in its recovery plan, and as a result has not entered into resolution, the competent authority of the CCP may require the CCP to recompense the clearing members for their loss through cash payments or, where appropriate, may require the CCP to issue instruments recognising a claim on the future profits of the CCP. The possibility to provide recompense to non-defaulting clearing members shall not apply to their contractually committed losses in the default management or recovery phases.

The cash payments or the value of instruments recognising a claim on future profits of the CCP issued to each affected non-defaulting clearing member shall be proportionate to its loss in excess of its contractual commitments. The instruments recognising a claim on future profits of the CCP shall entitle the possessor to receive payments from the CCP on an annual basis until the loss has been recouped, if possible in full, subject to an appropriate maximum number of years from the date of issuance. If the non-defaulting clearing members have passed on the excess losses to their clients, the non-defaulting clearing members shall be obliged to pass the payments received by the CCP on to their clients, to the extent that the losses being recompensed are related to client positions. An appropriate maximum share of the CCP's annual profits shall be used towards payments relating to those instruments.

2. ESMA shall develop draft regulatory technical standards to specify the order in which recompense must be paid, the appropriate maximum number of years and the appropriate maximum share of the CCP's annual profits referred to in the second subparagraph of paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

## TITLE V

### RESOLUTION

#### CHAPTER I

#### ***Objectives, conditions and general principles***

##### *Article 21*

#### **Resolution objectives**

1. When applying the resolution tools and exercising the resolution powers, the resolution authority shall have regard to all the following resolution objectives, which are of equal significance 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, in particular:
  - (i) the timely settlement of the CCP's obligations to its clearing members and, where applicable, their clients;
  - (ii) continuous access of clearing members and, where applicable, their clients to securities or cash accounts provided by the CCP and collateral in the form of financial assets held by the CCP;
- (b) to ensure the continuity of the links with other FMIs which, if disrupted, would have a material negative impact on financial stability in the Union or in one or more of its Member States as well as the timely completion of payment, clearing, settlement and record-keeping functions;
- (c) to avoid a significant adverse effect on the financial system in the Union or in one or more of its Member States, in particular by preventing or mitigating contagion of financial distress to the CCP's clearing members, their clients or to the wider financial system, including other FMIs, and by maintaining market discipline and public confidence; and
- (d) to protect public funds by minimising reliance on extraordinary public financial support and the potential risk of losses for taxpayers.

2. When pursuing the objectives set out in paragraph 1, the resolution authority shall seek to minimise the cost of resolution on all affected stakeholders and avoid destruction of the CCP's value, unless such destruction is necessary to achieve 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, including the CCP's recovery plan or other contractual arrangements, 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, while being proportionate to, one or more of the resolution objectives, and winding up the CCP under normal insolvency procedures would not meet those resolution objectives to the same extent.

2. For the purposes of point (a)(ii) of paragraph 1, the competent authority shall provide the resolution authority on its own initiative and without delay with any information that may give an indication that the CCP is failing or likely to fail. The competent authority shall also provide the resolution authority upon request with any other information needed in order to perform its assessment.

3. 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.

4. For the purposes of point (e) of paragraph 3, public financial support shall not be considered extraordinary public financial support where it meets all of the following conditions:

- (a) 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;
- (b) the State guarantees referred to in point (a) of this paragraph are required to remedy a serious disturbance in the economy of a Member State and preserve financial stability; and
- (c) the State guarantees referred to in point (a) of this paragraph are confined to solvent CCPs, conditional on final approval under the Union State aid framework, are of a precautionary and temporary nature, proportionate to remedy the consequences of the serious disturbance referred to in point (b) of this paragraph and are not used to offset losses that the CCP has incurred or is likely to incur in the future.

5. The resolution authority may also take a resolution action where it considers that the CCP has applied or intends to apply recovery measures which could prevent the CCP's failure but cause significant adverse effects to the financial system of the Union or of one of more of its Member States.

6. 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 12 February 2022, taking into consideration, as appropriate, the nature, and complexity of the services provided by CCPs established in the Union.

When developing 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**

1. The resolution authority shall take all appropriate measures to apply 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, to the extent that they have not been exhausted before entry into resolution, unless the resolution authority determines that in order to achieve the resolution objectives in a timely manner any of the following or both are more appropriate:
    - (i) to refrain from enforcing certain contractual obligations under the CCP's recovery plan or otherwise deviate from it;
    - (ii) to apply resolution tools or exercise the resolution powers;
  - (b) the shareholders of the CCP under resolution bear first losses following the enforcement of all obligations and arrangements referred to in point (a) and 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, unless expressly provided otherwise in this Regulation;
  - (d) the CCP's creditors of the same class are treated in an equitable manner;
  - (e) the CCP's shareholders, clearing members and other creditors should not incur greater losses than they would have incurred in the circumstances referred to in Article 60;
  - (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, collective agreements or practice;
  - (h) resolution tools are applied and resolution powers are exercised without prejudice to provisions on the representation of employees in management bodies as provided for in national laws, collective agreements or practice; and
  - (i) where a CCP is part of a group, resolution authorities take account of the impact on other group entities, in particular where such group comprises other FMIs, and on the group as a whole.
2. Resolution authorities may take a resolution action which deviates from the principles set out in points (d) or (e) of paragraph 1 of this Article where it is justified in the public interest to achieve the resolution objectives and is proportionate to the risk addressed. However, where that deviation results in a shareholder, a clearing member or any other creditor incurring greater losses than it would have incurred in the circumstances referred to in Article 60, the entitlement to payment of the difference under Article 62 shall apply.
3. 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.

*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 applied;
  - (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 applied, inform the decision on the extent of losses to be applied against affected creditors' claims, outstanding obligations or positions in relation to the CCP and on the extent and necessity of a resolution cash call;
  - (f) where the bridge CCP tool is applied, 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 applied, 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 of this Article may be subject to an appeal in accordance with Article 74 only together with the decision to apply 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; or
  - (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 of this Article 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(10).

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 pre-funded resources and outstanding financial commitments;
  - (b) the records of cleared contracts referred to in Article 29 of Regulation (EU) No 648/2012; and
  - (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(1).

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

6. ESMA, taking into account the regulatory technical standards developed in accordance with Article 36(14) and (15) of Directive 2014/59/EU and adopted pursuant to Article 36(16) thereof, 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; and
  - (c) the separation of the valuations under Articles 24 and 61 of this Regulation.

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with 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 the regulatory technical standards developed in accordance with Article 36(15) of Directive 2014/59/EU and adopted pursuant to Article 36(16) thereof, 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 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with 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 applying 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.

2. In the event of a systemic crisis, a Member State may as a last resort provide extraordinary public financial support by applying 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 and where credible arrangements for the timely and comprehensive recovery of the funds in accordance with paragraph 10 of this Article are provided for.

3. Prior to the application 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 recovery 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 application of the tools referred to in paragraph 1 is more appropriate in order to achieve the resolution objectives in a timely manner.

5. In the event that the resolution authority refrains partially or fully from enforcing existing and outstanding obligations as set out in the second subparagraph of paragraph 3 or in paragraph 4 of this Article, the resolution authority may enforce the remaining obligations within 18 months after the CCP is considered to be failing or likely to fail in accordance with Article 22, provided that the reasons for refraining from enforcing those obligations no longer exist. The resolution authority shall notify the clearing member and other party three to six months before enforcing the remaining obligation. The proceeds from the enforced remaining obligations shall be used to recover the use of public funds.

The resolution authority shall, after consultation with the competent authorities and resolution authorities of the affected clearing members and any other parties committed by existing and outstanding obligations, determine whether the reasons for refraining from enforcing the existing and outstanding obligations have ceased to exist and whether to enforce remaining obligations. Where the resolution authority deviates from the views expressed by the authorities consulted, it shall provide duly justified reasons, in writing, for doing so.

The requirement to meet the remaining obligations in the circumstances referred to in this paragraph shall be included in the CCP's rules and other contractual arrangements.

6. The resolution authority may require the CCP to compensate non-defaulting clearing members for their losses stemming from the application of loss allocation tools, where those losses are in excess of the losses that the non-defaulting clearing member would have borne under their obligations under the CCP's operating rules, provided that the non-defaulting clearing member would have been entitled to the payment of the difference referred to in Article 62.

The compensation referred to in the first subparagraph may take the form of instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profits.

The amount of instruments issued to each affected non-defaulting clearing member shall be proportionate to the excess loss referred to in the first subparagraph. It shall take account of any outstanding contractual obligations of the clearing members toward the CCP and be deducted from any entitlement to the payment of the difference referred to in Article 62.

The amount of instruments shall be based on the valuation conducted in accordance with Article 24(3).

7. Where one of the government stabilisation tools is applied, the resolution authority shall exercise the power to write down and convert any instruments of ownership and debt instruments or other unsecured liabilities before or together with the application of the government stabilisation tool.

Where the application of a resolution tool other than the write-down and conversion tool results in financial 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 application of the resolution tool, unless applying a different sequence would minimise deviations from the 'no creditor worse off' principle set out in Article 60 and better achieve the resolution objectives.

8. Where only the resolution tools referred to in points (c) and (d) of paragraph 1 of this Article are applied, 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.

9. 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 applied.

10. Member States shall recover over an appropriate period any public funds used as government financial stabilisation tools as referred to in Section 7 of this Chapter and resolution authorities shall recover any reasonable expenses incurred by them in connection with the application of the resolution tools or powers. Such recovery shall, *inter alia*, come from:

- (a) the CCP under resolution, as a preferred creditor, including any of its claims against defaulting clearing members;
- (b) any consideration paid by the purchaser to the CCP, as a preferred creditor prior to the application of Article 40(4), where the sale of business tool has been applied;
- (c) any proceeds generated as a result of the termination of the bridge CCP, as a preferred creditor prior to the application of Article 42(5);
- (d) any proceeds generated by the application of the public equity support tool referred to in Article 46 and the temporary public ownership tool referred to in Article 47, including the proceeds generated from their sale.

11. When applying the resolution tools, resolution authorities shall ensure, on the basis of a valuation that complies with Article 25, the restoration of a matched book, the full allocation of losses, the replenishment of the pre-funded resources of the CCP or the bridge CCP, and the recapitalisation of the CCP or the bridge CCP.

Resolution authorities shall ensure the replenishment of the pre-funded resources and the recapitalisation of the CCP or the bridge CCP as referred to in the first subparagraph, to an extent sufficient to restore the ability of the CCP or the bridge CCP to comply with the conditions for authorisation and to continue to carry out the critical functions of the CCP or the bridge CCP, taking into account the operating rules of the CCP or the bridge CCP.

Notwithstanding the application of other resolution tools, resolution authorities may apply the tools referred to in Articles 30 and 31 to recapitalise the 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 apply the position allocation tool in accordance with Article 29 and the loss allocation tools in accordance with Articles 30 and 31.
2. Resolution authorities shall apply the tools referred to in paragraph 1 in respect of contracts relating to clearing services and the collateral related to those services posted to the CCP.
3. Resolution authorities shall apply 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 apply 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 25;

- (b) to restore the ability of the CCP to meet payment obligations as they fall due;
- (c) to achieve the outcome referred to in points (a) and (b) in relation to a bridge CCP;
- (d) to support the transfer of the CCP's business by way of the sale of business tool to a solvent third party.

The loss allocation tool referred to in Article 30 may be applied by the resolution authorities in relation to losses arising from a default event and in relation to losses arising from a non-default event. If the loss allocation tool referred to in Article 30 is applied in relation to losses arising from a non-default event, it shall only be applied up to a cumulative amount equivalent to the non-defaulting clearing members' contribution to the CCP's default funds and distributed among clearing members proportionally to their contributions to the default funds.

4. Resolution authorities shall not apply the loss allocation tools referred to in Articles 30 and 31 of this Regulation with regard to the entities referred to in Articles 1(4) and 1(5) of Regulation (EU) No 648/2012.

#### Article 29

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

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

The resolution authority shall terminate the contracts referred to in point (a) of the first subparagraph of this paragraph only 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.

When using the power under the first subparagraph, the resolution authority shall terminate contracts referred to under each of points (a), (b) and (c) of the first subparagraph in a similar way, without discriminating between counterparties to those contracts, with the exception of those contractual obligations that cannot be enforced in a reasonable timeframe.

2. 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.
3. 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); and
  - (c) notify each clearing member of the determined net amounts and require the CCP to pay or collect them accordingly.

The clearing members shall, without undue delay, communicate the application of such tool to their clients and the way in which such application affects them.

4. The valuation referred in point (a) of paragraph 3 shall be based, as far as possible, on a fair market price determined on the basis of the CCP's own rules and arrangements, unless the resolution authority deems necessary the use of another appropriate price discovery method.

5. Where a non-defaulting clearing member is unable to pay the net amount determined in accordance with paragraph 3 of this Article, the resolution authority may, having regard to Article 21 of this Regulation, 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 paragraph 1, it may temporarily 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; and
- (b) the resolution authority issues and publishes a notice to that effect using the means referred to in Article 72(3).

7. ESMA shall by 12 February 2022 issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 further specifying the methodology to be used by the resolution authority for determining the valuation referred in point (a) of paragraph 3 of this Article.

#### 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 amount 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 a payment that has the same economic effect.

2. The resolution authority shall calculate any reduction in payment obligations referred to in paragraph 1 of this Article 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 applied. The clearing members shall, without undue delay, communicate the application of such tool to their clients and the way in which such application affects them. 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.

The first subparagraph of this paragraph shall not prevent resolution authorities from requiring the CCP to reimburse clearing members, where the level of reduction based on the provisional valuation referred to in Article 26(1) is found to exceed the level of reduction required based on the definitive valuation referred to in Article 26(2).

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.

6. The CCP shall include in its operating rules reference to the power to reduce payment obligations referred to in paragraph 1 in addition to any similar arrangements provided for in those operating rules at the recovery stage and shall ensure that contractual arrangements are concluded to allow the resolution authority to exercise its powers under this Article.

*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 twice the amount equivalent to their contribution to the CCP's default fund. This obligation to make a contribution in cash shall also be included in the CCP's rules and other contractual arrangements as a resolution cash call reserved to the resolution authority taking resolution action. Where the resolution authority calls for an amount in excess of the contribution to the default fund, it shall do so after assessing the impact of this tool on non-defaulting clearing members and the financial stability of Member States, in cooperation with the resolution authorities of non-defaulting clearing members.

Where the CCP operates multiple default funds and the tool is applied to address a default event, the amount of the contribution in cash referred to in the first subparagraph shall refer to the contribution of the clearing member to the default fund of the affected clearing service or asset class.

Where the CCP operates multiple default funds and the tool is applied to address a non-default event, the amount of the contribution in cash referred to in the first subparagraph shall refer to the sum of the contributions of the clearing member to all default funds of the CCP.

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 the cash contribution of each non-defaulting clearing member in proportion to its contribution to the default fund up to the limit referred in the first subparagraph.

The resolution authority may require the CCP to reimburse clearing members the possible excess amount of a resolution cash call where the level of the resolution cash call applied based on a provisional valuation according to Article 26(1) is found to exceed the required level based on the definitive valuation referred to in Article 26(2).

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 its initial margin and default fund contribution in accordance with Article 45 of Regulation (EU) No 648/2012 up to the required amount.

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

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; and
- (b) the amount by which debt instruments or other unsecured liabilities must be converted into instruments of ownership in order to restore the capital 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 apply 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 nominal 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 the nominal amount 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 apply the write-down and conversion tool in respect of the following liabilities:
  - (a) liabilities to employees, in relation to accrued salary, pension benefits or other fixed remuneration, except for any 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, to participants to the extent that the liabilities result from their participation in such systems, to other CCPs, and to central banks;
  - (e) initial margins.
5. Where the nominal 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, any claim based on instruments of ownership issued or transferred pursuant to paragraph 6 of this Article, or any claim for payment in accordance with Article 62; and

- (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) of the first subparagraph 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 applied based on the provisional valuation referred to in Article 26(1) is found to exceed the amounts required based on 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 the CCP 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 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; and
- (b) the conversion rate represents appropriate compensation to the affected debt holders for any loss incurred as a result of the exercise of the write-down and conversion powers, 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 drawing up and maintaining the CCP's resolution plan and as part of the powers to remove impediments to the resolvability of the CCP, that the CCP is at all times able to issue 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 application 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; and
- (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 Regulation (EU) 2017/1129 of the European Parliament and of the Council <sup>(24)</sup>.

#### Article 35

### Removal of procedural obstacles for write-down and conversion

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

<sup>(24)</sup> Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12).

2. The resolution authority shall apply 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 application of the tools referred to in Article 32, conduct a review of the causes of its failure and submit it to the resolution authority alongside a business reorganisation plan in accordance with Article 37. Where the Union State aid framework is applicable, that plan, including following any amendments in accordance with Article 38 and as implemented in accordance with Article 39, 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 under the Union State aid framework, the submission of the business reorganisation plan shall be without prejudice to the deadline laid down by that framework for the submission of that restructuring plan.

3. The resolution authority shall submit the review and the business reorganisation plan, and any revised plan 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; and
- (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;
- (d) changes to the CCP's risk management.

4. ESMA shall by 12 February 2023 develop draft regulatory technical standards to specify further the minimum elements that should be included in a business reorganisation plan pursuant to paragraph 2.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### 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 or 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 the resolution authority 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.

4. ESMA shall by 12 February 2023 develop draft regulatory technical standards to specify the criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to paragraph 1.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### 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 that 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 Article 37(1).

#### Section 4

##### **Sale of business tool**

#### Article 40

##### **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 of this paragraph, the resolution authority shall take all reasonable steps to obtain commercial terms that conform to the valuation conducted under Article 24(3).

3. Subject to Article 27(10), 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 under resolution from the holders of those instruments to the purchaser;
- (b) the CCP under resolution, 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 resulting from the application of the resolution tools in resolution, proportionate to their losses in resolution.

4. The allocation of any consideration paid by the purchaser in accordance with paragraph 3 of this Article shall be carried out as follows:

- (a) upon the occurrence of an event covered by the CCP's default waterfall as set out in Articles 43 and 45 of Regulation (EU) No 648/2012, in a reversal of the order in which the losses have been imposed by the CCP's default waterfall; or
- (b) upon the occurrence of an event not covered by the CCP's default waterfall as set out in Articles 43 and 45 of Regulation (EU) No 648/2012, in a reversal of the order in which the losses were allocated in accordance with any applicable rules of the CCP.

The allocation of any remaining consideration shall then be carried out in accordance with the priority of claims under normal insolvency proceedings.

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 the CCP or, as the case may be, the CCP's assets, rights, obligations, or liabilities.

6. 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 under resolution, 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 under resolution or original owners shall be obliged to take back any such assets, rights, obligations or liabilities, or instruments of ownership.

7. Any transfer made pursuant to 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 assessment of the purchaser and ensure that the purchaser has the professional and technical capacity to perform the functions of the purchased CCP and that it applies for authorisation as soon as practicable and, at the latest, within one month of the application of the sale of business tool. The competent authority shall ensure that any such application for authorisation is considered in an expedited manner.

8. Where the transfer of instruments of ownership referred to in paragraph 1 of this Article 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 that neither delays the application of the sale of business tool nor prevents the resolution action from achieving the relevant resolution objectives.

9. Where the competent authority has not completed the assessment referred to in paragraph 8 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) of this paragraph, 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, unless the act or omission implies gross negligence or serious misconduct, 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) of this paragraph, any penalties provided for in Article 22(3) of Regulation (EU) No 648/2012 or measures for infringing the requirements for acquisitions or disposals of qualifying holdings provided for in Article 30 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) of this paragraph;
- (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.

10. 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.

11. 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 and other linked FMIs and trading venues provided that the purchaser meets the criteria for membership or participation in those systems or infrastructures or trading venues.

Notwithstanding the first subparagraph, the purchaser shall not be denied access to payment and settlement systems, and other linked FMIs and trading venues, 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 or trading venues.

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 other infrastructures and trading venues for the period specified by the resolution authority. That period shall not exceed 12 months.

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 applying 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 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; and
  - (e) it shall aim to maximise, 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 paragraphs 1 and 2, the resolution authority may apply the sale of business tool without complying with the requirement to market, or may market the assets, rights, obligations, liabilities or the instruments of ownership where it determines that compliance with that requirement or with those criteria would be likely to undermine one or more of the resolution objectives, including by creating a material threat to financial stability.

*Section 5***Bridge CCP tool***Article 42***Bridge CCP tool**

1. The resolution authority may transfer to a bridge CCP the following:
  - (a) 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:
  - (a) is controlled by the resolution authority and is wholly or partially owned by one or more public authorities which may include the resolution authority; and

(b) is established or used 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. Subject to Article 27(10), 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;

(c) any non-defaulting clearing members that have suffered losses following the application of the resolution tools in resolution, proportionate to their losses in resolution.

5. The allocation of any consideration paid by the bridge CCP in accordance with paragraph 4 of this Article shall be carried out as follows:

(a) upon the occurrence of an event covered by the CCP's default waterfall as set out in Articles 43 and 45 of Regulation (EU) No 648/2012, in a reversal of the order in which the losses have been imposed by the CCP's default waterfall; or

(b) upon the occurrence of an event not covered by the CCP's default waterfall as set out in Articles 43 and 45 of Regulation (EU) No 648/2012, in a reversal of the order in which the losses were allocated in accordance with any applicable rules of the CCP.

The allocation of any remaining consideration shall be carried out in accordance with the priority of claims under normal insolvency proceedings.

6. 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.

7. 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 8 are met.

8. 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.

9. A transfer referred to in paragraphs 7 and 8 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.

10. The resolution authority may transfer instruments of ownership or assets, rights, obligations or liabilities from the bridge CCP to a third party.

11. 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.

12. The bridge CCP shall not be prevented from exercising the CCP's rights of membership and accessing payment and settlement systems and other linked FMIs and trading venues, provided that it meets the criteria for membership and participation in those systems or FMIs or trading venues.

Notwithstanding the first subparagraph, the bridge CCP shall not be denied access to payment and settlement systems and other FMIs and trading venues 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 or trading venues.

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 other infrastructures and trading venues for a period specified by the resolution authority. That period shall not exceed 12 months.

13. Shareholders, creditors, clearing members and clients 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 rights 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; and
    - (iv) the strategy and risk profile of the bridge CCP; and
  - (b) the bridge CCP shall take over the authorisations of the CCP under resolution to provide the services or carry out the activities resulting from the transfer referred to in Article 42(1) of this Regulation in accordance with Regulation (EU) No 648/2012.

Notwithstanding point (b) of the first subparagraph and where necessary to meet the resolution objectives, the bridge CCP may be authorised without complying with Regulation (EU) No 648/2012 for a short period at the beginning of its operation. To that end, the resolution authority shall submit a request for such authorisation to the competent authority. If the competent authority decides to grant such authorisation, 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 not exceed 12 months. During that period, the bridge CCP shall be considered as a qualifying CCP as defined in point (88) of Article 4(1) of Regulation (EU) No 575/2013 for the purposes of that Regulation.

Notwithstanding the period referred to in the second subparagraph, in the case of prudential requirements under Chapter 3 of Title IV of Regulation (EU) No 648/2012, the waiver shall only be for a period of up to three months. It may be extended for one or two further periods of up to three months if necessary to achieve the resolution objectives.

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 continuity of 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.

3. The resolution authority shall take a decision that the bridge CCP is no longer a bridge CCP within the meaning of Article 42(2) 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 paragraphs 2 and 4 of this Article;
- (e) the period specified in paragraph 5 of this Article or, where applicable, paragraph 6 of this Article 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 achieve the outcomes 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 the operations of a bridge CCP are 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 meet temporary liquidity needs in order to ensure the effective application of the resolution tools.

## Section 7

### **Government stabilisation tools**

#### *Article 45*

#### **Government financial stabilisation tools**

1. In the very extraordinary situation of a systemic crisis, Member States may apply the government stabilisation tools in accordance with Articles 46 and 47 for the purpose of resolving a CCP only where the following conditions are met:

- (a) the financial support is necessary to meet the resolution objectives referred to in Article 21;
- (b) the financial support is used only as a last resort in accordance with paragraph 3 of this Article after having assessed and exploited all resolution tools to the maximum extent practicable whilst maintaining financial stability;
- (c) the financial support is limited in time;
- (d) the financial support complies with the Union State aid framework; and

- (e) the Member State has, in advance, defined comprehensive and credible arrangements, in a manner consistent with the Union state aid framework, for recovering, over a suitable period, and in accordance with Article 27(10) the public funds deployed, to the extent not retrieved in full through the sale to private purchasers in accordance with Article 46(3) or 47(2).

The application of government stabilisation tools shall be carried out in accordance with national law either under the leadership of the competent ministry or government in close cooperation with the resolution authority or under the leadership of the resolution authority.

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 58, and shall ensure that Articles 52, 54 and 72 are complied with.
3. Government financial stabilisation tools shall be deemed to be applied as a last resort for the purposes of point (b) of paragraph 1 where at least one of the following conditions is met:
- (a) the competent ministry or government and the resolution authority, after consulting the central bank and the competent authority, determine that the application of remaining 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 application of remaining 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 application of remaining 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; or
- (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, having regard to the possibility of recovering the cost of resolution, shall be sold to a private purchaser as soon as commercial and financial circumstances allow. In determining the timing of the sale of the CCP, the financial situation and relevant market conditions shall be taken into account.

## CHAPTER IV

**Resolution powers**

## Article 48

**General powers**

1. The resolution authority shall have all the powers necessary to apply the resolution tools effectively, including all the following powers:

- (a) 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) 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 including the rights and powers under the operating rules of the CCP;
- (c) to transfer instruments of ownership issued by a CCP under resolution;
- (d) to transfer to another entity, with its consent, the CCP's rights, assets, obligations or liabilities;
- (e) 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) 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) to cancel debt instruments issued by a CCP under resolution;
- (h) 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) to require a CCP under resolution 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, 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) to close out and terminate financial contracts;
- (l) to remove or replace the board and senior management of a CCP under resolution;
- (m) 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) to reduce, including to reduce to zero, the amount of variation margin due to a clearing member of a CCP under resolution;
- (o) 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) to enforce any existing and outstanding contractual obligations of the clearing members of the CCP under resolution or, where necessary to achieve the resolution objectives, refrain from enforcing such contractual obligations or otherwise deviate from the CCP's operating rules;
- (q) 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; and

- (r) to require clearing members to provide further contributions in cash subject to the limit referred to in Article 31.

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) of this Regulation is exercised, the resolution authority may also exercise any of the following ancillary powers:

- (a) subject to Article 67, to provide for a transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, obligations, assets or liabilities transferred;
- (b) to remove rights to acquire further instruments of ownership;
- (c) to 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>(25)</sup>;
- (d) to 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) to require the CCP under resolution or the purchaser or bridge CCP, where relevant, to provide the other with information and assistance;
- (f) to 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) to 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) to modify or amend the operating rules of the CCP under resolution, including as regards its terms of access to clearing for its clearing members and other participants;
- (i) to 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.

<sup>(25)</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).

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, of this Article shall not affect:

- (a) the right of an employee of the CCP to terminate a contract of employment; nor
- (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 one or more special managers 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 shall 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 the event 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; or
- (c) where the conditions for the appointment are no longer fulfilled.

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

1. The resolution authority may require a CCP under resolution, any entity belonging to the same group as the CCP or any of the CCP's 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 in relation to 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 the purposes of providing those services and facilities exists; or
- (b) on reasonable commercial terms, where there is no agreement for the purposes of providing those services and facilities or where that agreement has expired.

*Article 52***Power to enforce crisis prevention measures or resolution actions 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 or resolution action in respect 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 or any other resolution action becomes effective 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 where the assets are located or that governs the transfer of the instruments of ownership, assets, rights, obligations or liabilities.

4. Where the resolution authority of a Member State applies the resolution tools referred to in Articles 28 to 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 members and, where applicable, their clients 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 members and, where applicable, their clients affected by those resolution tools shall be entitled to challenge the reduction of the principal or payable amount of the instrument or liability or its conversion or restructuring, as the case may be, only under the law of the Member State of the resolution authority.

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 74 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 74 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; and
- (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.

#### 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(10).

2. For the purposes of paragraph 1 of this Article, the resolution authority shall 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 located in or governed by the law of 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 28, 32, 55, 56 and 57.

The resolution authority may require the CCP to ensure the inclusion of such a provision in its contracts and other agreements with holders of other liabilities located in or governed by the law of third countries. The resolution authority may require the CCP to provide it with a reasoned legal opinion by an independent legal expert confirming the legal enforceability and effectiveness of such provisions.

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 to be insolvency proceedings, an enforcement event or an event of default within the meaning of Directive 98/26/EC, Directive 2002/47/EC and Regulation (EU) No 575/2013 respectively 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 of this paragraph, third-country resolution proceedings recognised pursuant to Article 77, 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; or
  - (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 72 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, other CCPs, 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 72 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, other CCPs, 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 72 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, other CCPs 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; or
- (b) subject to write-down, conversion, or the application of a resolution tool to allocate losses or positions.

4. Where the notice referred to in paragraph 3 of this Article 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, a counterparty may exercise termination rights in accordance with the conditions for termination as set out in the contract between the CCP and the relevant counterparty only if the enforcement event occurs or continues after the expiry of a suspension under paragraph 1 of this Article.

*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;
- (b) consult the risk committee;
- (c) manage and dispose of the assets and property of the CCP under resolution.

The control referred to in the first subparagraph of this paragraph may be exercised directly by the resolution authority or indirectly by a special manager appointed by the resolution authority in accordance with Article 50(1).

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**

Without prejudice to Article 74, resolution authorities shall take resolution actions through executive orders in accordance with national administrative competences and procedures.

*CHAPTER V***Safeguards***Article 60***'No creditor worse off' principle**

Where the resolution authority applies one or more resolution tools, it shall ensure that shareholders, clearing members and other creditors do not incur 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 the CCP instead been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other 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 or actions have been effected.
2. The valuation referred to in paragraph 1 shall include:
  - (a) the treatment that shareholders, clearing members and other creditors would have received 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 the CCP instead been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules;
  - (b) the actual treatment that shareholders, clearing members and other creditors, have received in the resolution of the CCP;
  - (c) whether there is any difference between the treatment referred to in point (a) of this paragraph and the treatment referred to in point (b) of this paragraph.
3. For the purposes of calculating the treatments referred to in point (a) of paragraph 2, the valuation referred to in paragraph 1 shall:
  - (a) disregard any provision of extraordinary public financial support to the CCP under resolution or central bank emergency liquidity assistance or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest terms;

- (b) be based on the losses that would have been realistically incurred by clearing members and other creditors, had the CCP been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules;
- (c) take into account a commercially reasonable estimate of the direct replacement costs, including any additional margin requirements, incurred by the clearing members to reopen within an appropriate period their comparable net positions in the market by considering effective market conditions, including market depth and ability of the market to transact the relevant volume of such net positions within that period; and
- (d) be based on the CCP's own pricing methodology unless such methodology for price determination does not reflect the effective market conditions.

The length of the period referred to in point (c) of the first subparagraph shall reflect the implications of the applicable insolvency law and the characteristics of the relevant net positions.

4. The valuation referred to in paragraph 1 of this Article shall be distinct from the valuation carried out under Article 24(3).

5. ESMA, taking into account the regulatory technical standards adopted pursuant to Articles 49(5) and 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 of this Article including the calculation of the losses following liquidation resulting from the costs referred to in point (c) of the first subparagraph of paragraph 3 of this Article had the CCP been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations and other arrangements in its operating rules.

ESMA shall submit those draft regulatory standards to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### *Article 62*

### **Safeguard for shareholders, clearing members and other creditors**

Where, in accordance with the valuation carried out under Article 61, any shareholder, clearing member or other creditor has incurred greater losses than it would have incurred had the resolution authority not taken resolution action in relation to the CCP and had the CCP instead been wound up under normal insolvency proceedings, following the full application of the applicable contractual obligations or other arrangements in its operating rules, that shareholder, clearing member or other creditor shall be entitled to the payment of the difference.

#### *Article 63*

### **Safeguard for clients and indirect clients**

1. Contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 to the extent that such proceeds are related to client positions. Those provisions shall also apply to the contractual arrangements by clients and indirect clients offering indirect clearing services to their clients.

2. ESMA shall develop draft regulatory technical standards in order to specify, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds referred to in the paragraph 1 is required, and the conditions under which it is to be considered proportionate.

ESMA shall submit those draft regulatory technical standards to the Commission by 12 February 2022.

The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

#### *Article 64*

### **Recoupment of payments**

The resolution authority shall recover, to the largest extent possible, any reasonable expenses incurred in connection with a payment as referred to in Article 62 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 applied;
- (c) from any proceeds generated as a result of the termination of the bridge CCP, as a preferred creditor.

#### *Article 65*

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

The protections provided for in Articles 66, 67 and 68 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 to another entity or, in the application of a resolution tool, from a bridge CCP to a purchaser; and
- (b) where the resolution authority exercises the powers referred to in point (g) of Article 49(1).

#### *Article 66*

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

The resolution authority shall ensure that the application of a resolution tool, other than the position allocation tool referred to in Article 29, 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 67***Protection for security arrangements**

The resolution authority shall ensure that the application 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 68***Protection for structured finance arrangements and covered bonds**

The resolution authority shall ensure that the application 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 CCP 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 CCP 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 69***Partial transfers: protection of trading, clearing and settlement systems**

1. The resolution authority shall ensure that the application 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 another entity;
- (b) cancels or amends the terms of a contract to which the CCP under resolution is a party or substitutes a purchaser or bridge CCP as a party.

2. For the purposes of paragraph 1 of this Article, the resolution authority shall ensure that the application of a resolution tool 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 70*

### **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) or in Article 22(3) are met in relation to a CCP, it shall notify without undue delay the following bodies:
  - (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; and
  - (f) the supervisory college and resolution college for that CCP.

#### *Article 71*

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

1. After a notification from the competent authority pursuant to Article 70(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; and
  - (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.

*Article 72***Procedural obligations of resolution authorities**

1. The resolution authority shall notify the resolution college of the resolution actions it intends to take. That notification shall also indicate whether the resolution actions deviate from the resolution plan.

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, ECB, and EIOPA; and
- (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 the second subparagraph of 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 second subparagraph of paragraph 1 shall provide the reasons for any deviation from the resolution plan.

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 of this Regulation, shall be published on 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; and
- (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>(26)</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 73***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;

<sup>(26)</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 application 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) 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;
- (j) all other members of the resolution college not referred to in points (a), (b), (c) and (g); and
- (k) any other persons who provide or have provided services directly or indirectly, permanently or occasionally, to persons referred to in points (a) to (j).

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 (j) 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 12 and the result of any assessment carried out under Articles 10 and 15.

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 the recipient is subject to requirements of confidentiality 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, authorities responsible for normal insolvency proceedings, authorities entrusted with the public duty of supervising other financial sector entities, authorities responsible for the supervision of financial markets and insurance undertakings and inspectors acting on their behalf, authorities responsible for maintaining the stability of the financial system in Member States through the use of macroprudential rules, authorities responsible for protecting the stability of the financial system, and persons responsible for 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 (j), 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 80, 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 74*

### **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 where provided in national law, where 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 lodging of an appeal shall not entail any automatic suspension of the effects of the challenged decision;
  - (b) 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; and
  - (c) the procedure relating to the appeal shall be expeditious.
5. The court shall use the economic assessments of the facts carried out by the resolution authority as a basis for its own assessment.
6. 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 75***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 72(3).
3. The authorities responsible for normal insolvency proceedings shall 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 application of the resolution tools and powers, resolution authorities may request the court to apply a stay on any judicial action or proceeding in which a CCP under resolution is or may become a party for an appropriate period in accordance with the resolution objectives.

## TITLE VI

**RELATIONS WITH THIRD COUNTRIES***Article 76***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 of this Article shall, in particular, seek to ensure the establishment of processes and arrangements for cooperation in carrying out the tasks and exercising the powers referred to in Article 79, including the exchange of information necessary for those purposes.

*Article 77***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 76(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 76(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, 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; and
  - (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; and
- (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 applicable under national law.

#### *Article 78*

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

By way of derogation from Article 77(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, clearing members and, where applicable, their clients located in their Member State would not receive the same treatment as third-country creditors, clearing members and, where applicable, their clients 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 79***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 76(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 76(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 third-country authorities where the CCP is established;
- (b) where a CCP provides services in or has one or more third-country subsidiaries, the relevant third-country authorities where those services are provided or where the subsidiaries are established.

3. The cooperation arrangements referred to in paragraph 2 of this Article 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 that paragraph or groups including such CCPs:

- (a) the drawing up of resolution plans in accordance with Article 12 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 15 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 16 and any similar powers under the law of the relevant third countries;
- (d) the application of early intervention measures pursuant to Article 18 and similar powers under the law of the relevant third countries; and
- (e) the application 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 drawing up resolution plans, including principles for the exercise of powers under Article 77 and similar powers under the law of the relevant third countries;
- (c) the exchange of information necessary for the application 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) of this paragraph, 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 this paragraph by 12 August 2022.

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

#### Article 80

### 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 73; and
- (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; and
- (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

### ADMINISTRATIVE MEASURES AND PENALTIES

#### Article 81

### Administrative penalties and other administrative measures

1. Without prejudice to the right of Member States to provide for and impose criminal penalties, Member States shall lay down rules on administrative penalties and other administrative measures applicable where this Regulation has not been complied with, and shall take all measures necessary to ensure that they are implemented.

Where Member States decide not to lay down rules on administrative penalties for infringements which are subject to national criminal law, they shall communicate to the Commission and to ESMA the relevant criminal law provisions. The administrative penalties and other administrative measures shall be effective, proportionate and dissuasive.

By 12 August 2022, Member States shall notify, in detail, the rules referred to in the first and second subparagraphs of this paragraph to the Commission and to ESMA. They shall notify the Commission and ESMA without delay of any subsequent amendments thereto.

2. Member States shall ensure that, where the obligations referred to in paragraph 1 apply to CCPs and clearing members, in the event of an infringement, the administrative penalties or other administrative measures referred to in that paragraph can be applied, subject to the conditions laid down in national law, to the board and the senior management of CCPs and of clearing members and to other natural persons who under national law are responsible for the infringement.

3. The powers to impose administrative penalties or other administrative measures provided for in this Regulation shall be attributed to resolution authorities or, where different, to competent authorities, depending on the type of infringement. Resolution authorities and competent authorities shall have all information-gathering and investigatory powers that are necessary for the exercise of their respective functions. In the exercise of their powers to impose penalties, resolution authorities and competent authorities shall cooperate closely to ensure that administrative penalties or other administrative measures produce the desired results and coordinate their action when dealing with cross-border cases.

4. Resolution authorities and competent authorities shall exercise their powers to impose administrative penalties or other administrative measures in accordance with this Regulation and national law in any of the following ways:

- (a) directly;
- (b) in collaboration with other authorities;
- (c) under their responsibility by delegation to such authorities;
- (d) by application to the competent judicial authorities.

#### Article 82

#### **Specific provisions**

1. Member States shall ensure that their laws, regulations and administrative provisions provide for penalties and other administrative measures at least in respect of the following situations:

- (a) failure to draw up, maintain and update recovery plans, in breach of Article 9;
- (b) failure to provide all the information necessary for the development of resolution plans, in breach of Article 13; and
- (c) failure of the CCP to notify the competent authority when the CCP is failing or likely to fail, in breach of Article 70(1).

2. Member States shall ensure that, in the cases referred to in paragraph 1, the administrative penalties and other administrative measures that can be applied include at least the following:

- (a) a public statement which indicates the natural person, CCP, or other legal person responsible and the nature of the infringement;
- (b) an order requiring the natural or legal person responsible to cease the conduct and to desist from a repetition of that conduct;
- (c) a temporary ban against the members of the senior management of the CCP or any other natural person, who is held responsible, to exercise functions in a CCP;
- (d) in the case of a legal person, administrative fines of up to 10 % of the total annual turnover of that legal person in the preceding business year. Where the legal person is a subsidiary of a parent undertaking, the relevant turnover shall be the turnover resulting from the consolidated accounts of the ultimate parent undertaking in the preceding business year;
- (e) in the case of a natural person, administrative fines of up to EUR 5 000 000, or in the Member States where the euro is not the official currency, the corresponding value in the national currency on 11 February 2021; and
- (f) administrative fines of up to twice the amount of the benefit derived from the infringement where that benefit can be determined.

*Article 83***Publication of administrative penalties or other administrative measures**

1. Resolution authorities or competent authorities shall publish on their official website any administrative penalties or administrative measures imposed by them for infringements of this Regulation where such penalties or measures have not been the subject of an appeal or where the right of appeal has been exhausted. Such publication shall take place without undue delay after the natural or legal person is informed of that penalty or measure and shall include information on the type and nature of the infringement and the identity of the natural or legal person on whom the penalty or measure is imposed.

Where Member States permit publication of administrative penalties or other administrative measures against which there is an appeal, resolution authorities and competent authorities shall, without undue delay, publish on their official websites information on the status of that appeal and the outcome thereof.

2. Resolution authorities and competent authorities shall publish the administrative penalties or other administrative measures imposed by them on an anonymous basis, in a manner which is in accordance with national law, in any of the following circumstances:

- (a) where the administrative penalty or other administrative measure is imposed on a natural person and publication of personal data is shown to be disproportionate by an obligatory prior assessment of the proportionality of such publication;
- (b) where publication would jeopardise the stability of financial markets or an ongoing criminal investigation or proceedings;
- (c) where publication would cause, insofar as it can be determined, disproportionate damage to the CCP or natural persons involved.

Alternatively, in such cases, the publication of the data in question may be postponed for a reasonable period, if it is foreseeable that the reasons for anonymous publication will cease to exist within that period.

3. Resolution authorities and competent authorities shall ensure that any publication in accordance with this Article shall remain on their official website for a period of at least five years. Personal data contained in the publication shall only be kept on the official website of the resolution authority or the competent authority for the period which is necessary in accordance with applicable data protection rules.

4. By 12 August 2022, ESMA shall submit a report to the Commission on the publication of administrative penalties and other administrative measures by Member States on an anonymous basis as provided for under paragraph 2 and in particular whether there have been significant divergences between Member States in that respect. That report shall also address any significant divergences in the duration of publication of administrative penalties or other administrative measures under national law of Member States for publication of administrative penalties and other administrative measures.

*Article 84***Maintenance of central database by ESMA**

1. Subject to the professional secrecy requirements referred to in Article 73, resolution authorities and competent authorities shall inform ESMA of all administrative penalties imposed by them under Article 81 and of the status of any appeal against such penalties and the outcome thereof.

2. ESMA shall maintain a central database of administrative penalties reported to it solely for the purpose of exchange of information between resolution authorities which shall be accessible to resolution authorities only and shall be updated on the basis of the information provided by resolution authorities.

3. ESMA shall maintain a central database of administrative penalties reported to it solely for the purpose of exchange of information between competent authorities which shall be accessible to competent authorities only and shall be updated on the basis of the information provided by competent authorities.

4. ESMA shall maintain a webpage on its existing website with links to each resolution authority's publication of administrative penalties and each competent authority's publication of administrative penalties under Article 83 and indicate the period for which each Member State publishes penalties.

#### Article 85

### **Exercise of powers to impose administrative penalties and other administrative measures and their effective application by competent authorities and resolution authorities**

Member States shall ensure that, when determining the type of administrative penalties or other administrative measures and the level of administrative fines, the competent authorities and resolution authorities take into account all relevant circumstances, including where appropriate:

- (a) the gravity and the duration of the infringement;
- (b) the degree of responsibility of the natural or legal person responsible;
- (c) the financial strength of the natural or legal person responsible, for example, as indicated by the total turnover of the responsible legal person or the annual income of the responsible natural person;
- (d) the amount of profits gained or losses avoided by the natural or legal person responsible, insofar as they can be determined;
- (e) the losses for third parties caused by the infringement, insofar as they can be determined;
- (f) the level of cooperation of the natural or legal person responsible with the competent authority and the resolution authority;
- (g) previous infringements by the natural or legal person responsible;
- (h) any potential systemic consequences of the infringement.

#### TITLE VIII

### **AMENDMENTS TO REGULATIONS (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 AND (EU) 2015/2365 AND DIRECTIVES 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU AND (EU) 2017/1132**

#### Article 86

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

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

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

- (iv) with regard to Regulation (EU) 2021/23 of the European Parliament and of the Council \*, a resolution authority as defined in point (3) of Article 2 of that Regulation.

\* Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 022, 22.1.2021, p. 1).;

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

'For the purpose of acting within the scope of Regulation (EU) 2021/23, 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 87

### Amendments to Regulation (EU) No 648/2012

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

(1) the following Article is inserted:

*Article 6b*

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

1. Where a CCP meets the conditions under Article 22 of Regulation (EU) 2021/23 of the European Parliament and of the Council \*, the resolution authority of the CCP designated under Article 3(1) of that Regulation or the competent authority designated in accordance with Article 22(1) of this Regulation may, on their own initiative or at the request of a competent authority responsible for the supervision of a clearing member of the CCP under resolution, request that the Commission suspend the clearing obligation referred to in Article 4(1) of this Regulation for specific classes of OTC derivatives or for a specific type of counterparty where the following conditions are met:

- (a) the CCP under resolution is authorised to clear the specific classes of OTC derivatives subject to the clearing obligation for which the suspension is requested; and
- (b) the suspension of the clearing obligation for those specific classes of OTC derivatives or for a specific type of counterparty is necessary to avoid or address a serious threat to financial stability or to the orderly functioning of financial markets in the Union in connection with the resolution of the CCP, and that suspension is proportionate to those aims.

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

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 submitted to the Commission.

2. ESMA shall, within 24 hours of notification of the request from the authority referred to in the first subparagraph of paragraph 1 of this Article, and, to the extent possible, after consulting the ESRB, issue an opinion on the intended suspension taking into account the necessity to avoid or address a serious threat to financial stability or to the orderly functioning of financial markets in the Union, the resolution objectives laid down in Article 21 of Regulation (EU) 2021/23 and the criteria set out in Article 5(4) and (5) of this Regulation.

3. Where the suspension of the clearing obligation is considered by ESMA to be a material change in the criteria for the trading obligation to take effect referred to in Article 32(5) of Regulation (EU) No 600/2014, ESMA may request the Commission to suspend the trading obligation laid down in Article 28(1) and (2) of that Regulation for the same specific classes of OTC derivatives that are subject to the request to suspend the clearing obligation.

ESMA shall submit its reasoned request to the authority referred to in the first subparagraph of paragraph 1 and the ESRB at the same time the request is submitted to the Commission.

4. The requests referred to in paragraphs 1 and 3 and the opinion referred to in paragraph 2 shall not be made public.

5. The Commission shall, without undue delay after receipt of the request referred to in paragraph 1, on the basis of the reasons and evidence provided by the authority referred to in paragraph 1, either suspend the clearing obligation for the specific classes of OTC derivatives by way of an implementing act, or reject the requested suspension.

In adopting the implementing act referred to in the first subparagraph, the Commission shall take into account the opinion issued by ESMA referred to in paragraph 2 of this Article, the resolution objectives referred to in Article 21 of Regulation (EU) 2021/23, the criteria set out in Article 5(4) and (5) of this Regulation regarding those OTC derivative classes and the necessity of the suspension to avoid or address a serious threat to financial stability or the orderly functioning of financial markets in the Union.

Where the Commission rejects the requested suspension, it shall provide reasons therefor in writing to the requesting authority referred to in the first subparagraph of paragraph 1 and to ESMA. The Commission shall immediately inform the European Parliament and the Council thereof and forward them the reasons provided to the requesting authority referred to in the first subparagraph of paragraph 1 and to ESMA. Such information shall not be made public.

The implementing act referred to in the first subparagraph of this paragraph shall be adopted in accordance with the procedure referred to in Article 86(3).

6. Where requested by ESMA in accordance with paragraph 3 of this Article, the implementing act suspending the clearing obligation may also suspend the trading obligation laid down in Article 28(1) and (2) of Regulation (EU) No 600/2014 for the same specific classes of OTC derivatives that are subject to the suspension of the clearing obligation.

7. The suspension of the clearing obligation and, where applicable, of the trading obligation shall be communicated to the requesting authority referred to in the first subparagraph of paragraph 1 of this Article and to ESMA and shall be published in the *Official Journal of the European Union*, on the Commission's website and in the public register referred to in Article 6.

8. The suspension of the clearing obligation pursuant to paragraph 5 shall be valid for an initial period of no more than three months from the date of application of that suspension.

The suspension of the trading obligation referred to in paragraph 6 shall be valid for the same initial period.

9. Where the grounds for the suspension continue to apply, the Commission may, by way of an implementing act, extend the suspension referred to in paragraph 5 for additional periods of no more than three months, with the total period of the suspension of no more than 12 months. Any extensions of the suspension shall be published in accordance with paragraph 7.

The implementing act referred to in the first subparagraph of this paragraph shall be adopted in accordance with the procedure referred to in Article 86(3).

10. Any of the authorities referred to in the first subparagraph of paragraph 1 may, in sufficient time before the end of the initial suspension period referred to in paragraph 5, or the extension period referred to in paragraph 9, issue a request to the Commission to extend the suspension of the clearing obligation.

The request shall be accompanied by evidence that the conditions laid down in points (a) and (b) of the first subparagraph of paragraph 1 continue to be met.

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.

The request referred to in the first subparagraph shall not be made public.

ESMA shall without undue delay after the receipt of the notification of the request and, if it deems necessary, after consulting the ESRB, issue an opinion to the Commission on whether the grounds for the suspension continue to apply taking into account the necessity to avoid or address a serious threat to financial stability or the orderly functioning of financial markets in the Union, the resolution objectives laid down in Article 21 of Regulation (EU) 2021/23 and the criteria set out in Article 5(4) and (5) of this Regulation. ESMA shall send a copy of that opinion to the European Parliament and to the Council. That opinion shall not be made public.

The implementing act extending the suspension of the clearing obligation may also extend the period of the suspension of the trading obligation referred to in paragraph 6.

The extension of the suspension of the trading obligation shall be valid for the same period as the extension of the suspension of the clearing obligation.

\* Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 022, 22.1.2021, p. 1).;

(2) the following Article is inserted:

*'Article 13a*

### **Replacement of interest rate benchmarks in legacy trades**

1. Counterparties referred to in Article 11(3) may continue to apply the risk-management procedures that they have in place at the date of application of this Regulation in respect of non-centrally cleared OTC derivative contracts entered into or novated before the date on which the obligation to have risk-management procedures pursuant to Article 11(3) takes effect where, after 11 February 2021, those contracts are novated for the sole purpose of replacing the interest rate benchmark they are referring to or of introducing fallback provisions in relation to that benchmark.

2. Transactions entered into or novated before the date on which the clearing obligation takes effect pursuant to Article 4 and which, after 11 February 2021, are subsequently novated for the sole purpose of replacing the interest rate benchmark they are referring to or of introducing fallback provisions in relation to that benchmark, shall not, for that reason, become subject to the clearing obligation referred to in Article 4.;

(3) in Article 24a(7), point (b) is replaced by the following:

*'(b) at least annually, initiate and coordinate Union-wide assessments of the resilience of CCPs to adverse market developments in accordance with Article 32(2) of Regulation (EU) No 1095/2010, taking into account, where possible, the aggregate effect of CCP recovery and resolution arrangements on Union financial stability;'*

(4) 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.'*

(5) 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.'*

(6) in Article 37(2), the following subparagraph is added:

*'The CCP shall inform the competent authority of any significant negative development regarding the risk profile of any of its clearing members determined in the context of the CCP's assessment referred to in the first subparagraph or any other assessment with similar conclusion, including any increase in the risk that any of its clearing members brings to the CCP, which the CCP considers to have the potential of triggering a default procedure.'*

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

'8. The clearing members of the CCP shall clearly inform their existing and potential clients of the potential losses or other costs that they may bear as a result of the application of default management procedures and loss and position allocation arrangements under the CCP's operating rules, including the type of compensation they may receive, taking into account Article 48(7). Clients shall be provided with sufficiently detailed information to ensure that they understand the worst-case losses or other costs they could face should the CCP undertake recovery measures.;

(8) the following Article is inserted:

*Article 45a*

#### **Temporary restrictions in the case of a significant non-default event**

1. In the case of a significant non-default event as defined in point (9) of Article 2 of Regulation (EU) 2021/23, the competent authority may require the CCP to refrain from any of the following actions for a period specified by the competent authority, that cannot exceed five years:

- (a) making a dividend distribution or give an irrevocable commitment to make a dividend distribution, except for rights to dividends specifically referred to in Regulation (EU) 2021/23 as a form of compensation;
- (b) buy-back of ordinary shares;
- (c) creating an obligation to pay variable remuneration as defined by the CCP's remuneration policy pursuant to Article 26(5) of this Regulation, discretionary pension benefits or severance packages to senior management as defined in point 29 of Article 2 of this Regulation.

The competent authority shall not restrict the CCP from undertaking any of the actions referred to in the first subparagraph, if the CCP is legally obliged to undertake that action and the obligation predates the events pursuant to the first subparagraph.

2. The competent authority may decide to waive the restrictions in paragraph 1 where it deems that waiving those restrictions would not reduce the quantity or availability of the CCP's own resources, in particular own resources available for use as a recovery measure.

3. ESMA shall by 12 February 2022 draft guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 further specifying the circumstances in which the competent authority may require the CCP to refrain from undertaking any of the actions referred to in paragraph 1 of this Article.;

(9) in Article 81(3), first subparagraph, the following point is added:

'(r) the resolution authorities designated under Article 3 of Regulation (EU) 2021/23.;

#### *Article 88*

#### **Amendment to Regulation (EU) 2015/2365**

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

'(n) the resolution authorities designated under Article 3 of Regulation (EU) 2021/23 of the European Parliament and of the Council \*.

\* Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 022, 22.1.2021, p. 1).;

## Article 89

**Amendments to Directive 2002/47/EC**

Directive 2002/47/EC is amended as follows:

(1) in Article 1, paragraph 6 is replaced by the following:

'6. Articles 4 to 7 of this Directive shall not apply to any restriction on the enforcement of financial collateral arrangements or any restriction on the effect of a security financial collateral arrangement, any close out netting or set-off provision that is imposed by virtue of Title IV, Chapter V or VI of Directive 2014/59/EU of the European Parliament and of the Council \*, or of Title V, Chapter III, Section 3, or Chapter IV of Regulation (EU) 2021/23 of the European Parliament and of the Council \*\* or to any such restriction that is imposed by virtue of similar powers in the law of a Member State to facilitate the orderly resolution of any entity referred to in point (c)(iv) or (d) of paragraph 2 of this Article which is subject to safeguards at least equivalent to those set out in Title IV, Chapter VII of Directive 2014/59/EU or in Title V, Chapter V of Regulation (EU) 2021/23.

\* 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, 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).

\*\* Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 022, 22.1.2021, p. 1).';

(2) Article 9a is replaced by the following:

*'Article 9a*

**Directive 2008/48/EC, Directive 2014/59/EU and Regulation (EU) 2021/23**

This Directive shall be without prejudice to Directive 2008/48/EC, Directive 2014/59/EU and Regulation (EU) 2021/23.'

## Article 90

**Amendment to Directive 2004/25/EC**

In Article 4(5), the third subparagraph is replaced by the following:

'Member States shall ensure that Article 5(1) of this Directive does not apply in the case of application of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council \* or in Title V of Regulation (EU) 2021/23 of the European Parliament and of the Council \*\*.

\* 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, 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).

\*\* Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 022, 22.1.2021, p. 1).'

## Article 91

**Amendments to Directive 2007/36/EC**

Directive 2007/36/EC is amended as follows:

(1) in Article 1, paragraph 4 is replaced by the following:

‘4. Member States shall ensure that this Directive does not apply in the case of the application of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council \* or in Title V of Regulation (EU) 2021/23 of the European Parliament and of the Council \*\*.

\* 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, 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).

\*\* Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 022, 22.1.2021, p. 1).;

(2) in Article 5, paragraph 5 is replaced by the following:

‘5. Member States shall ensure that for the purposes of Directive 2014/59/EU and Regulation (EU) 2021/23 the general meeting may, by a majority of two-thirds of the votes validly cast, issue a convocation to a general meeting, or modify the statutes to prescribe that a convocation to a general meeting is issued, at shorter notice than as laid down in paragraph 1 of this Article, to decide on a capital increase, provided that that meeting does not take place within ten calendar days of the convocation, that the conditions of Article 27 or 29 of Directive 2014/59/EU or of Article 18 of Regulation (EU) 2021/23 are met, and that the capital increase is necessary to avoid the conditions for resolution laid down in Articles 32 and 33 of Directive 2014/59/EU or in Article 22 of Regulation (EU) 2021/23.’.

## Article 92

**Amendment to Directive (EU) 2017/1132**

Directive (EU) 2017/1132 is amended as follows:

(1) in Article 84, paragraph 3 is replaced by the following:

‘3. Member States shall ensure that Article 49, Article 58(1), Article 68(1), (2) and (3), the first subparagraph of Article 70(2), Articles 72 to 75, 79, 80 and 81 of this Directive do not apply in the case of application of the resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council \* or in Title V of Regulation (EU) 2021/23 of the European Parliament and of the Council \*\*.

\* 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, 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).

\*\* Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 022, 22.1.2021, p. 1).;

(2) Article 86a is amended as follows:

(a) point (b) of paragraph 3 is replaced by the following:

‘(b) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU or in Title V of Regulation (EU) 2021/23.’;

(b) point (c) of paragraph 4 is replaced by the following:

‘(c) the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU or in point (48) of Article 2 of Regulation (EU) 2021/23.’;

(3) in Article 87, paragraph 4 is replaced by the following:

‘4. Member States shall ensure that this Chapter does not apply to companies which are the subject of the application of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU or in Title V of Regulation (EU) 2021/23.’;

(4) Article 120 is amended as follows:

(a) point (b) of paragraph 4 is replaced by the following:

‘(b) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU or in Title V of Regulation (EU) 2021/23.’;

(b) point (c) of paragraph 5 is replaced by the following:

‘(c) the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU or in point (48) of Article 2 of Regulation (EU) 2021/23.’;

(5) Article 160a is amended as follows:

(a) point (b) of paragraph 4 is replaced by the following:

‘(b) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU or in Title V of Regulation (EU) 2021/23.’;

(b) point (c) of paragraph 5 is replaced by the following:

‘(c) the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU or in point (48) of Article 2 of Regulation (EU) 2021/23.’;

#### *Article 93*

#### **Amendment to Directive 2014/59/EU**

In Article 1, the following paragraph is added:

‘3. This Directive shall not apply to entities that are also authorised in accordance with Article 14 of Regulation (EU) No 648/2012.’.

#### *Article 94*

#### **Amendment to Regulation (EU) No 806/2014**

Article 2 is amended as follows:

(a) the first subparagraph is numbered as paragraph 1;

(b) the following paragraph is added:

'2. This Regulation shall not apply to entities that are also authorised in accordance with Article 14 of Regulation (EU) No 648/2012.'

#### Article 95

### **Amendment to Regulation (EU) No 600/2014**

In Article 54(2), the first subparagraph is replaced by the following:

'If the Commission assesses that there is no need to exclude exchange-traded derivatives from the scope of Articles 35 and 36 in accordance with Article 52(12), a CCP or a trading venue may, before 11 February 2021, apply to its competent authority for permission to avail itself of transitional arrangements. The competent authority, taking into account the risks resulting from the application of the access rights under Article 35 or 36 as regards exchange-traded derivatives to the orderly functioning of the relevant CCP or trading venue, may decide that Article 35 or 36 would not apply to the relevant CCP or trading venue, respectively, in respect of exchange-traded derivatives, for a transitional period until 3 July 2021. Where such a transitional period is approved, the CCP or trading venue shall not benefit from the access rights under Article 35 or 36, as regards exchange-traded derivatives for the duration of that period. The competent authority shall notify ESMA and, in the case of a CCP, the college of competent authorities for that CCP, when a transitional period is approved.'

#### TITLE IX

### **FINAL PROVISIONS**

#### Article 96

#### **Review**

By 12 February 2024, ESMA shall assess the staffing and resources needs arising from the assumption of its powers and duties in accordance with this Regulation and submit a report to the European Parliament, to the Council and to the Commission.

By 12 February 2026, the Commission shall review the implementation of this Regulation and shall submit a report thereon to the European Parliament and to the Council. It shall assess at least the following:

- (a) the appropriateness and sufficiency of financial resources available to the resolution authority to cover losses arising from a non-default event;
- (b) the amount of own resources of the CCP to be used in recovery and in resolution and the means for its use; and
- (c) whether the resolution tools available to the resolution authority are adequate.

Where appropriate, that report shall be accompanied by proposals for revision of this Regulation.

By 31 December 2021, the Commission shall review the application of Article 27(7). The Commission shall assess in particular the need for any further amendments with regard to the application of the write-down and conversion tool in the event of resolution of CCPs in combination with other resolution tools that result in financial losses being borne by clearing members. The Commission shall submit a report thereon to the European Parliament and to the Council accompanied where appropriate by proposals for revision of this Regulation.

By 12 August 2027, the Commission shall review this Regulation and its implementation and shall assess the effectiveness of the governance arrangements for the recovery and resolution of CCPs in the Union and submit a report thereon to the European Parliament and to the Council, accompanied where appropriate by proposals for revision of this Regulation.

*Article 97*

**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 12 August 2022 with the exception of:

Article 95 which shall apply from 4 July 2020;

Article 87(2) which shall apply from 11 February 2021;

Articles 9(1), 9(2), 9(3), 9(4), 9(6), 9(7), 9(9), 9(10), 9(12), 9(13), 9(16), 9(17), 9(18), 9(19), 10(1), 10(2), 10(3), 10(8), 10(9), 10(10), 10(11), 10(12) and 11 which shall apply from 12 February 2022;

Articles 9(14) and 20 which shall apply from 12 February 2023.

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

Done at Brussels, 16 December 2020.

*For the European Parliament*  
*President*  
D. M. SASSOLI

*For the Council*  
*President*  
M. ROTH

## ANNEX

## SECTION A

**Requirements for recovery plans**

The recovery plan shall include the following items:

- (1) a summary of the key elements of the plan and a summary of overall recovery capacity;
- (2) a summary of the material changes to the CCP since the most recently filed recovery plan;
- (3) a communication and disclosure plan outlining how the CCP intends to keep its competent authority informed of the recovery situation and manage any potentially negative market reactions while acting in as transparent a manner as possible;
- (4) a comprehensive range of capital, loss allocation, position allocation and liquidity actions required to maintain or restore the viability and financial soundness of the CCP including to restore its matched book and capital, and replenish pre-funded resources and maintain access to sufficient sources of liquidity which are necessary for the CCP to maintain its viability as a going concern and to continue providing its critical services in accordance with the delegated acts adopted on the basis of Articles 16(3) and 44(2) of Regulation (EU) No 648/2012. Loss allocation actions may include recovery cash calls and a reduction in the value of gains payable by the CCP to non-defaulting clearing members, where defined in the operating rules of the CCP, and shall not use the initial margins posted by non-defaulting clearing members to allocate losses in accordance with Article 45(4) of Regulation (EU) No 648/2012;
- (5) an assessment of the recovery options with respect to:
  - (i) the impact of their implementation on the solvency, liquidity, funding positions, profitability and operations of the CCP;
  - (ii) the external impact and systemic consequences of their implementation on critical functions, shareholders, clearing members, creditors and other stakeholders of the CCP, and where applicable, the rest of the group, and to the extent the information is available, clients and indirect clients of the CCP;
  - (iii) the feasibility of their implementation, following a detailed analysis of risks, impediments and solutions for the impediments; and
  - (iv) the impact of their implementation on the continuity of operations, in particular human resources and IT, and access to other financial infrastructures.
- (6) appropriate conditions and procedures to ensure the timely implementation of recovery actions, including an estimation of the timeframe for implementing each material aspect of the plan;
- (7) a detailed description of any material impediment to the effective and timely implementation of the plan, including consideration of the impact on clearing members and clients including in cases where clearing members are likely to take measures in accordance with their recovery plans as referred to in Articles 5 and 7 of Directive 2014/59/EU, and where appropriate on the rest of the group;
- (8) an assessment of the appropriateness of the recovery options to address each relevant recovery plan scenario, based on how those options:
  - (i) ensure transparency and allow those who could be exposed to losses and liquidity shortfalls to measure, manage and control such potential losses and shortfalls;
  - (ii) provide incentives to shareholders, clearing members and their clients and the financial system; and
  - (iii) minimise negative impact on clearing members and their clients and the financial system;
- (9) identification of critical functions;
- (10) a detailed description of the processes for determining the value and marketability of the core business lines, operations and assets of the CCP;

- (11) a detailed description of how recovery planning is integrated into the corporate governance structure of the CCP, how it forms part of the operating rules of the CCP agreed to by clearing members, as well as the policies and procedures governing the approval of the recovery plan and identification of the persons in the organisation responsible for drawing up and implementing the plan;
- (12) arrangements and measures incentivising non-defaulting clearing members to bid competitively in auctions of a defaulted members' positions;
- (13) arrangements and measures to ensure that the CCP has adequate access to contingency funding sources, including potential liquidity sources, to enable it to continue to carry out its operations and meet its obligations as they fall due;
- (14) an assessment of available collateral and an assessment of the possibility to transfer resources or liquidity across business lines;
- (15) arrangements and measures:
  - (i) to reduce risk;
  - (ii) to restructure contracts, rights, assets and liabilities;
  - (iii) to restructure business lines;
  - (iv) necessary to maintain continuous access to FMIs and trading venues;
  - (v) necessary to maintain the continuous functioning of the CCP's operational processes, including infrastructure and IT services;
  - (vi) to partially or fully terminate contracts;
  - (vii) to reduce the value of any gains payable by the CCP to non-defaulting clearing members, if applicable, depending on the type of instruments that the CCP clears; and
  - (viii) to oblige non-defaulting clearing members to make a contribution in cash to the CCP up to at least each clearing member's contribution to the default fund. This recovery cash call obligation shall also be included and referred to in the CCP's rules and other contractual arrangements;
- (16) preparatory arrangements to facilitate the sale of assets or business lines in a timeframe appropriate for the restoration of financial soundness, including an assessment of the potential impact of such a sale on the operations of the CCP;
- (17) where other management actions or strategies to restore financial soundness are envisaged, a description of those actions or strategies and their anticipated financial effect;
- (18) preparatory measures that the CCP has taken or plans to take in order to facilitate the implementation of the recovery plan, including those necessary to enable the timely recapitalisation of the CCP, restoring its matched book and replenishment of its pre-funded resources as well as its enforceability across borders;
- (19) a framework of quantitative and qualitative indicators which identifies the points at which appropriate actions referred to in the plan may be taken;
- (20) where applicable, an analysis of how and when the CCP may apply, in the conditions addressed in the plan, for the use of central bank facilities and identify those assets that would be expected to qualify as collateral under the terms of the central bank facility;
- (21) taking into account Article 49(1) of Regulation (EU) No 648/2012, a range of scenarios that would severely affect the financial soundness or operational viability of the CCP and be relevant to the CCP's specific conditions such as its product mix, business model and liquidity and risk governance framework, including scenarios involving system-wide events or events specific to the legal entity and any group to which it belongs and specific stress to the individual clearing members of the CCP or, where appropriate, a linked FMI; and
- (22) taking into account Article 34, and Article 49(1), of Regulation (EU) No 648/2012, a range of scenarios that would severely affect the financial soundness or operational viability of the CCP and result both from the stress or default of one or more of its members, including scenarios going beyond the stress or default of at least the two clearing members to which the CCP has the largest exposures under extreme but plausible market conditions, and from other reasons including losses from the CCP's investment activities or from operational problems, including severe external threats to a CCP's operations due to an external disruption, shock or cyber-related incident.

## SECTION B

**Information that resolution authorities may request CCPs to provide for the purposes of drawing up and maintaining resolution plans**

For the purposes of drawing up and maintaining resolution plans, resolution authorities may request CCPs to provide at least the following information:

- (1) a detailed description of the CCP's organisational structure including a list of all legal persons;
- (2) identification of the direct holders and the percentage of voting and non-voting rights of each legal person;
- (3) the location, jurisdiction of incorporation, licensing and key management associated with each legal person;
- (4) a mapping of the CCP's critical functions and core business lines, including balance sheet details of such functions and business lines, by reference to legal persons;
- (5) a detailed description of the components of the CCP's and all its legal entities' business activities, separating, at a minimum by types of services and respective amounts of cleared volumes, open interest, initial margin, variation margin flows, default funds and any associated assessment rights or other recovery actions pertaining to such business lines;
- (6) details of capital and debt instruments issued by the CCP and its legal entities;
- (7) an identification of from whom the CCP has received collateral and in what form (title transfer or security interest), and to whom it has pledged collateral and in what form and the person that holds the collateral, and in both cases the jurisdiction in which the collateral is located;
- (8) a description of the off balance sheet exposures of the CCP and its legal entities, including a mapping to its critical operations and core business lines;
- (9) the material hedges of the CCP including a mapping to legal persons;
- (10) identification of the relative exposures and importance of clearing members of the CCP as well as an analysis of the impact of the failure of major clearing members on the CCP;
- (11) each system on which the CCP conducts a material number or value amount of trades, including a mapping to the CCP's legal persons, critical operations and core business lines;
- (12) each payment, clearing or settlement system of which the CCP is directly or indirectly a member, including a mapping to the CCP's legal persons, critical operations and core business lines;
- (13) a detailed inventory and description of the key management information systems, including those for risk management, accounting and financial and regulatory reporting used by the CCP including a mapping to the CCP's legal persons, critical operations and core business lines;
- (14) an identification of the owners of the systems identified in point (13), service level agreements related thereto, and any software and systems or licenses, including a mapping to their legal entities, critical operations and core business lines;
- (15) an identification and mapping of the legal persons and the interconnections and interdependencies among the different legal persons such as:
  - (i) common or shared personnel, facilities and systems;
  - (ii) capital, funding or liquidity arrangements;
  - (iii) existing or contingent credit exposures;
  - (iv) cross-guarantee agreements, cross-collateral arrangements, cross-default provisions and cross-affiliate netting arrangements;
  - (v) risks transfers and back-to-back trading arrangements;
  - (vi) service level agreements;

- (16) the competent authority and resolution authority for each legal person, if different to those designated under Article 22 of Regulation (EU) No 648/2012 and under Article 3 of this Regulation;
- (17) the member of the board responsible for providing the information necessary to draw up the resolution plan of the CCP as well as those responsible, if different, for the different legal persons, critical operations and core business lines;
- (18) a description of the arrangements that the CCP has in place to ensure that, in the event of resolution, the resolution authority will have all the necessary information, as determined by the resolution authority, for applying the resolution tools and exercising the resolution powers;
- (19) all the agreements entered into by the CCP and their legal entities with third parties the termination of which may be triggered by a decision of the authorities to apply a resolution tool and whether the consequences of termination may affect the application of the resolution tool;
- (20) a description of possible liquidity sources for supporting resolution;
- (21) information on asset encumbrance, liquid assets, off-balance sheet activities, hedging strategies and booking practices.

#### SECTION C

##### **Matters that the resolution authority is to consider when assessing the resolvability of a CCP**

When assessing the resolvability of a CCP, the resolution authority shall consider the following:

- (1) the extent to which the CCP is able to map core business lines and critical operations to legal persons;
- (2) the extent to which legal and corporate structures are aligned with core business lines and critical operations;
- (3) the extent to which the legal structure of the CCP inhibits the application of the resolution tools as a result of the number of legal persons, the complexity of the group structure or the difficulty in aligning business lines to group entities;
- (4) the extent to which there are arrangements in place to provide for essential staff, infrastructure, funding, liquidity and capital to support and maintain the core business lines and the critical operations;
- (5) the existence and robustness of service level agreements;
- (6) the extent to which the service agreements that the CCP maintains are fully enforceable in the event of resolution of the CCP;
- (7) the extent to which the governance structure of the CCP is adequate for managing and ensuring compliance with the CCP's internal policies with respect to its service level agreements;
- (8) the extent to which the CCP has a process for transitioning the services provided under service level agreements to third parties in the event of the separation of critical functions or of core business lines;
- (9) the extent to which there are contingency plans and measures in place to ensure continuity in access to payment and settlement systems;
- (10) the adequacy of the management information systems in ensuring that the resolution authorities are able to gather accurate and complete information regarding the core business lines and critical operations so as to facilitate rapid decision making;
- (11) the capacity of the management information systems to provide the information essential for the effective resolution of the CCP at all times even under rapidly changing conditions;
- (12) the extent to which the CCP has tested its management information systems under stress scenarios as defined by the resolution authority;
- (13) the extent to which the CCP can ensure the continuity of its management information systems both for the affected CCP and the new CCP in the case that the critical operations and core business lines are separated from the rest of the operations and business lines;

- (14) the extent to which any intra-group guarantees are provided at market conditions and the risk management systems concerning those guarantees are robust, where the CCP benefits from or is exposed to such guarantees;
  - (15) the extent to which any intra-group transactions are performed at market conditions and the risk management systems concerning those transactions practices are robust, where the CCP engages in such transactions;
  - (16) the extent to which the use of any intra-group guarantees or transactions increases contagion across the group;
  - (17) the extent to which the resolution of the CCP could have a negative impact on another part of its group, in particular where such group comprises other FMIs, where applicable;
  - (18) whether third-country authorities have the resolution tools necessary to support resolution actions by Union resolution authorities, and the scope for coordinated action between Union and third-country authorities;
  - (19) the feasibility of applying resolution tools in such a way which meets the resolution objectives, given the tools available and the CCP's structure;
  - (20) any specific requirements needed to issue new instruments of ownership as referred to in Article 33(1);
  - (21) the arrangements and means through which resolution could be hampered in the cases of CCP that have clearing members or collateral arrangements established in different jurisdictions;
  - (22) the credibility of applying resolution tools in such a way which meets the resolution objectives, given possible impacts on clearing members and, where applicable, their clients, other counterparties and employees and possible actions that third-country authorities may take;
  - (23) the extent to which the impact of the CCP's resolution on the financial system and on financial market's confidence can be adequately evaluated;
  - (24) the extent to which the resolution of the CCP could have a significant direct or indirect adverse effect on the financial system, market confidence or the economy;
  - (25) the extent to which contagion to other CCPs or to the financial markets could be contained through the application of the resolution tools and the exercise of the resolution powers; and
  - (26) the extent to which the resolution of the CCP could have a significant effect on the operation of payment and settlement systems.
-